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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.952 OF 2008

Star Television News Limited)
P.O. Box 71, Craigmuir Chambers,)
Road Town, Tortola, British Virgin Island)
C/o.AZB & Partners, F-40, NDSE-1,)
New Delhi-110 049.)..PETITIONER

Vs.

1.Union of India, through the Secretary)
Department of Revenue, Ministry of)
Finance, North Block, New Delhi-110 001)
2.Income Tax Settlement Commission,)
Mahalakshmi Chambers, Mumbai-400 034)
3.Direector of Income Tax (International)
Taxation), Mumbai having his Office)
at 107, Scindia House, N.M.Road,)
Ballard Pier, Mumbai-400 038.)..RESPONDENTS

Mr. Iqbal Chagla, Senior Counsel with Mr. Poras F. Kaka, Mr. Lyrin . Periera and Mr. Ajay Bahl, Mr. N. Ganapathy, Dr. Sunil Agarwal, Mr. Abhinav Ashiwin and A.K. Jasani, for the Petitioners.

Mr. B.M. Chatterji with Mr. Abhay Ahuja, Mr. R. Ashokan, Mr. N.R. Prajapati, Mr. A.S. Shivsharan, Mrs. Anamica Malhotra and Mr. P.S. Sahadevan, for the Revenue.

CORAM : FERDINO I. REBELLO &

J.H. BHATIA, JJ.

DATED : 7th August, 2009.

JUDGMENT (PER FERDINO I. REBELLO, J.):

1. The petitioner herein is a non-resident company. They filed an application before the Income Tax Settlement Commission on 5th March, 2007 under Section 246-C of the Income Tax Act, 1961 (hereinafter shall be referred to as the Act) for settlement of the cases. By the present petition the petitioners seek to challenge the constitutional validity and legality of the provisions of Section 245HA(1)(iv) and Section 245HA(3) of the Income Tax Act as inserted by Finance Act, 2007 (hereinafter referred to as F.A. 2007) with effect from 1st June, 2007 as being ultra vires and violative of Article 14 of the Constitution of India.

2. Chapter XIX-A was inserted in the Act by Taxation Law Amendment Act, 1975 with effect from 1st April, 1976. Since then, there have been several amendments. Some of the relevant provisions with which we are concerned with and need to be considered are, Section 245C which provides for making an application by an assessee before the Settlement Commission at any stage of a case relating to them by making a full and true disclosure of their 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 The other provisions of the Section need not be adverted to. Section 245D sets out the procedure to be followed by the

Commission on receipt of an application under Section 245C. Before its substitution by Finance Act 2007 sub-section (1) mandated the Settlement Commission to call for a report from the Commissioner and on the basis of the material contained in such report and having regard to the nature and circumstances of the case, the complexity of the investigation involved therein, the Settlement Commission had to proceed with within a period of one year from the end of the month in which such application was made under Section 245C. The Application could not be rejected without giving a hearing to the applicant in terms of the first proviso and there was a time limit on the Commission furnishing the report. In terms of the second proviso if the Commission was of the opinion that the application be allowed to be proceeded with the Commission if of the opinion that further inquiry/investigation was necessary, could direct further information. Section 245D(4A) as it stood prior to Finance Act 2007 is relevant, which we may reproduce and it reads as under:-

> "(4A) In every application allowed to be proceeded with under sub-section (1), the Settlement Commission shall, where it is possible, pass an order under sub-section (4) within a period of four years from the end of the financial year in which such application was allowed to be proceeded with."

3. Several changes were effected in the Chapter by Finance Act, 2007. Time limits were set for completion of a particular stage of the proceedings.. Under sub-section (2A) of Section 245 if an application was made under Section 245C before the first day of June, 2007, but an order under the provisions of sub-section (1) of this Section, as they stood immediately before their amendment by the Finance Act, 2007 has not been made before the 1st day of June, 2007 such application shall be deemed to have been allowed to be proceeded with if the additional tax on the income disclosed in such application and the interest thereon is paid on or before the 31st day

of July, 2007. In view of the explanation, 31st day of July, 2007 was deemed to be the date of the order of rejection or allowing the application to be proceeded with. Section 245D(2B) as amended provided for calling a report from the Commissioner in respect of the application within the time frame as set out.

4. The next relevant provision as submitted is Section 245D(4A) which reads as under:-

> "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, within twelve months from the end of the month in which the application was made."

5. Under Section 245H there is power in the Settlement Commission to grant immunity from prosecution and penalty in the manner and circumstances set out therein.

6. Section 245HA of which some provisions are challenged to the extent necessary is reproduced and reads as under:-

> **"245HA. Abatement of proceeding before Settlement Commission.**
>
> (1) Where -
>
> (i) an application made under Section 245C on or after the 1st day of June, 2007 has been rejected under sub-section (1) of Section 245D; or
>
> (ii) an application made under section 245C has not been allowed to be proceeded with under sub-section (2A) or further proceeded with under sub-

section (2D) of Section 245D; or

(iii) an application made under section 245C has been declared as invalid under sub-section (2C) of section 245D; or

(iv) in respect of any other application made under Section 245C, an order under sub-section (4) of section 245D has not been passed within the time or period specified under sub-section (4A) of Section 245D,

the proceedings before the Settlement Commissioner shall abate on the specified date.

Explanation._ For the purposes of this sub-section, "specified date" means--

(a) in respect of an application referred to in clause (i), the day on which the application was rejected;

(b) in respect of an application referred to in clause (ii), the 31st day of July, 2007;

(c) in respect of an application referred to in clause (iii), the last day of the month in which the application was declared invalid;

(d) in respect of an application referred to in clause (iv), on the date on which the time or period specified in sub-section (4A) of Section 245D expires.

(2) Where a proceeding before the Settlement Commission abates, the Assessing Officer, or, as the case may be, any other income-tax authority before whom the proceeding at the time of making the application was pending, shall dispose of the case in accordance with the provisions of this Act as if no application under Section 245C had been made.

(3) For the purposes of sub-section (2), the Assessing Officer, or, as the case may be, other income-tax authority, shall be entitled to use all the material and other information produced by the assessee before the Settlement Commission or the results of the inquiry held or evidence recorded by the

Settlement Commission in the course of the proceedings before it, as if such material, information inquiry and evidence had been produced before the assessing Officer or other income tax authority or held or recorded by him in the course of the proceedings before him."

7. Section 273AA and 278AB which were inserted by Finance Act 2008 with effect from 1st April, 2008 are also relevant for our discussion. The relevant portions of Section 273AA(1) and (3) and 278AB(1) and (3) read as under:-

"273AA. Power of Commissioner to grant immunity from penalty.

(1) A person may make an application to the Commissioner for granting immunity from penalty, if --

(a) he has made an application for settlement under section 245C and the proceedings for settlement have abated under section 245HA; and

(b) the penalty proceedings have been initiated under this Act.

(2) the application to the Commissioner under sub-section (1) shall not be made after the imposition of penalty after abatement."

(3) The Commissioner may, subject to such conditions as he may as he may think fit to impose, grant to the person immunity from the imposition of any penalty under this Act, if he is satisfied that the person has, after the abatement, co-operated with the income-tax authority in the proceedings before him and has made a full and true disclosure of his income and the manner in which such income has been derived."

278AB. (1) A person may make an application to the Commissioner for granting immunity from prosecution, if he has made an application for settlement under Section 245C and the proceedings for settlement have abated under Section 245HA.

(2).....

(3) The Commissioner may, subject to such conditions as he may think fit to impose, grant to the person immunity from prosecution for any offence under this Act, if he is satisfied that the person has, after the abatement, co-operated with the income-tax authority in the proceedings before him and has made a full and true disclosure of his income and the manner in which such income has been derived:

Provided that where the application for settlement under Section 245C had been made before the 1st day of June, 2007, the Commissioner may grant immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force."

8. On a consideration of the above provisions, it would be clear that though earlier there was no mandatory time limit for the Settlement Commission to dispose of the application and it could as far as possible do within four years, by the Finance Act, 2007, a time limit has been set out under Section 245D(4A). Another relevant aspect of the F.A. 2007 is that if the Settlement Commission is unable to pass final settlement order on 31st March, 2008 in case of applications which were pending before 1st June, 2007 it would ipso facto abate and consequence of Section 245HA(3) would follow. The I.T. Authorities including the Assessing Officer then was entitled to use all material and other information produced by the petitioner before the respondent No.2 including that disclosed as confidential. It is also necessary to note that in so far as the applicant is concerned, once an application is made, the applicant could not withdraw that application. Similarly, when the Settlement Commission allowed the application to proceed it could only allow or reject it. If the application was allowed then that order in terms of Section 245-I would be conclusive and could not be reopened in any proceedings under the Act or any other law for the time being

in force. In the event the application was rejected the confidential material will be available to the authorities under the Income Tax Act. The effect of the F.A. 2007 is that if the application which was filed on or before 31st May, 2007 even for no fault of the applicant could not be disposed of on or before 31st March, 2008 it would abate and consequently all the information is available to the A.O. and other authorities under the Income Tax Act. In the instant petition we are not concerned with the issue of an application made to the Settlement Officer after 1st June, 2007.

9. The petitioner along with its group companies is engaged in broadcasting of satellite television channels in 53 countries across Asia including India. The petitioner along with its group companies was engaged in a large number of litigations with the Income Tax Department as to the basis and quantum of taxability of the petitioner in respect of advertisement and subscription revenue being repatriated from India. According to the petitioner the Income Tax Department had adopted conflicting basis of assessment in respect of its various group companies With a view to have a speedy resolution of the various litigations and with a view to avoid multiplicity of proceedings the petitioners approached the Settlement Commission. The application of the petitioner was placed before the Special Bench of Five Members which by order dated September 11, 2007 declared the application filed by the applicant as valid and allowed the same to be proceeded with for final settlement. It is the case of the petitioner that for no fault of theirs the Commission could not proceed to dispose of the application inspite of various dates that were given. The respondent No.2, it is pointed out, has a huge backlog of cases and was hearing very old applications of 1990-91 on first come first serve basis. The petitioner, therefore, was under reasonable apprehension that the application would not be disposed of and in the light of that approached this Court for the relief as prayed for. The petition was admitted on 12th March, 2008 as similar other petitions

had been admitted and interim order was passed not to treat the application as having abated.

10. It is the case of the petitioner that the provisions of Section 245HA(1)(iv) are ultra vires the Constitution and/or violative of Article 14 of the Constitution. According to the petitioner on a true and harmonious interpretation, the Section ought to be read as providing for abatement only in respect of such applications wherein the applicant has in any manner prevented Respondent No.2 from discharging its mandatory statutory duty/obligation in passing an order under Section 245HA(1)(iv) on or before 31st March, 2008. Any other interpretation would result in the section being struck down. The effect clearly wold be prejudicial to the interest of the petitioner, who like many other applicants were induced to part with the confidential information based on the bonafide belief and a legitimate expectation that settlement orders would be passed and confidential information disclosed by the petitioner would not be made available to the Income Tax Authorities for use against the petitioner in assessment proceedings, penalty and other proceedings, launched by I.T. Authorities. Thus the provisions which stipulates abatement of the application for no fault of the applicant would be violative of Article 14 of the Constitution of India.

10. The petitioners in this Petition and other companion petitions which have been heard today, point out their apprehensions which may be listed as under:-

Apprehensions of the Assessee:

(i) Apprehension of not getting a fair and just hearing or treatment from the Assessing Officer who, is in a sense, an adversary of the applicant before the Commission.

(ii) Personal and institutional bias against the applicant for his approaching the Commission and disclosing the material not disclosed to the Assessing Officer.

(iii) Confidential material/Information disclosed in strict confidence to the Commission being made available to the Assessing Officer to be used not only for making assessments but also for levying penalty and criminal prosecution. The power of immunity vested in the CIT is largely illusory. Being a party before the Commission, and subject to the jurisdiction of the internal audit as also the audit by the Comptroller General of India, he is not likely to exercise the power objectively and fearlessly.

(iv) Income of the applicant being determined by the Assessing Officer or CIT (A) not having wide knowledge and experience of the scale that the members of the Commission have, being equivalent in status to the members of the Central Board of Direct Taxes.

(v) Proceedings before the Assessing Officer are conducted by one person and are quasi-judicial. Those before the Commission are by a Bench of three independent persons and the proceedings are judicial in nature.

(vi) Commission's order is final and conclusive and application is decided on one-stop basis. Regular assessments after abatement would have to go through a plethora of appeals before a final decision gets arrived at.

(vii) Commission's jurisdiction was exclusive and plenary while the income tax authority, after abatement, will have no such exclusive jurisdiction or plenary power.

(viii) Settlements, unlike regular assessments, are through adjudication. The issues by the Commission are thus viewed in an entirely different way from those by the Assessing Officer.

(ix) The Assessing Officer being a litigant himself before the Commission

may not be realistic and provide fair and even-handed treatment to the applicant.

(x) The criteria for abatement, being the inability of the Commission to dispose of the applications, is not a valid and reasonable one in the eyes of law and suffers from the vice of inequality violative of Article 14 of the Constitution.

(xi) The choice of the applicants where applications abated was totally arbitrary. The applications were not taken up for disposal by the Commission chronologically and there was an element of pick and choose.

(xii) The fixing of time limit of less than one year for disposal of all pending applications was totally unrealistic and impractical.

(xiii) Alternate methods of solving the problem of pendency like the creation of additional Benches and/or having a single member Bench for disposal of small cases were neither explored not made known to the public.

(xiv) No reasons, whatsoever, were given to the Parliament explaining the object of the abatement provisions.

11. Reply has been filed on behalf of the respondents. It is set out that the amended provisions relating to the settlement of cases have become effective from 1st June, 2007 and in respect of all pending proceedings before the settlement commission. It has been provided that tax and interest on the admitted income has to be paid. The criterion adopted in this case is in respect of all pending proceedings and no exceptions have been provided. There is no unequal or discriminatory treatment for any class of assessees under the amended provisions. Therefore, it cannot be construed that the amended provisions are arbitrary and violative of Article 14 of the Constitution of India. The object of the amended provisions are essentially to ensure expeditious disposal of the case pending before the Commission and

realization of taxes thereon. The amendment in the present case was brought into effect with a view to avoid delay in determining tax liability of an assessee because of factors like duplication of proceedings, absence of statutory time frame for setting the case and also with a view to streamline the proceedings before the Settlement Commission. The classification in the present case cannot be assailed on the ground of being arbitrary or evasive, but it is based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved without violating the equal protection clause of Article 14. There is always a presumption in favour of the constitutionality of a statute and the burden in this regard is upon the person who alleges transgression of the constitutional principles. According to the respondents from experience they have found that in many cases the assessee found it convenient to move the Settlement Commission and postpone their tax liability perpetually by a deliberate act of non-cooperation with the proceedings. It is submitted that there was no fundamental right in the petitioner to approach the Settlement Commission. The right to file an application before the Settlement Commission is a statutory right and as such, can be taken away by the statute. Also no prejudice will be occasioned as the law has been amended to empower the Commissioner of Income Tax to grant impunity from penalty and prosecution in cases which abate. For all the aforesaid reasons it is set out that the petition should be dismissed.

13. Before answering the issue we may briefly set out the historical background of the Settlement Commission. The Settlement Commission was established pursuant to the introduction of Chapter XIX-A in the Act and Chapter V-A in the Wealth-tax Act (w.e.f. 1st April 1976 vide the Taxation Law Amendment Act, 1975). The said provisions were introduced on the basis of the recommendations in the Final Report (submitted in December 1971) of the

Direct Taxes Enquiry Committee. The said Committee was popularly known as the Wanchoo Committee after its Chairman Justice K.N. Wanchoo. Some of the recommendations contained in Chapter 2 (titled "*Black money and tax evasion*") of the said Report are as under:

"Settlement machinery

2.32 This, however, does not mean that the door for compromise with an errant taxpayer should for ever remain closed. In the administration of fiscal laws, whose primary objective is to raise revenue, there has to be room for compromise and settlement. A rigid attitude would not only inhibit a one-time tax-evader or an unintending defaulter from making a clean breast of his affairs, but would also unnecessarily strain the investigational resources of the Department in cases of doubtful benefit to revenue, while needlessly proliferating litigation and holding up collections. We would, therefore, suggest that there should be a provision in the law for a settlement with the taxpayer at any stage of the proceedings. In the United Kingdom, the 'confession' method has been in vogue since 1923. In the U.S. law also, there is a provision for compromise with the taxpayer as to his tax liabilities. A provision of this type facilitating settlement in individual cases will have this advantage over general disclosure schemes that misuse thereof will be difficult and the disclosure will not normally breed further tax evasion. Each individual case can be considered on its merits and full disclosures not only of the income but of the modus operandi of its build-up can be insisted on, thus sealing off chances of

continued evasion through similar practices.

2.33 To ensure that the settlement is fair, prompt and independent, we would suggest that there should be a high level machinery for administering the provisions, which would also incidentally relieve the field officer of an onerous responsibility and the risk of having to face adverse criticism which, we are told, has been responsible for the slow rate of disposal of disclosure petitions. We would, therefore, recommend that settlements may be entrusted to a separate body within the Department, to be called the Direct Taxes Settlement Tribunal. It will be a permanent body with three Members. The strength of the Tribunal can be increased later, - depending on the work-load. To ensure impartial and quick decisions, and to encourage officers with integrity and wide knowledge and experience to accept assignments on the Tribunal, we recommend that its members should be given the same status and emoluments as the members of the Central Board of Direct Taxes.

… The terms of the award will be set down in writing and it will be open to the Tribunal to determine not only the amount of tax, penalty or interest but also to fix date or dates of payment. The quantum of penalty and interest will be in the discretion of the Tribunal. Similarly, the Tribunal may also in its discretion grant immunity from criminal prosecution in suitable cases. The award will be binding both on the petitioner and on the

Department. The application of its decisions on questions of law will, however, be confined to the case under settlement and will not in any way interfere with the interpretation of law in general. No appeal will lie against the decision of the Tribunal by the petitioner or the Department, whether on questions of fact or of law.

2.34 The success of this measure will, to a very large extent, depend on the confidence which this Tribunal can inspire in the minds of the taxpayers as to its fairness and impartiality. For this reason, we consider it to be of paramount importance that only persons who are known for their integrity and high sense of justice and fairness are selected for appointment on the Tribunal." (emphasis supplied)

14. With regard to the Settlement Commission, the National Website of the Income Tax Department of India [http://www.incometaxindia.gov.in/HISTORY/1975-1985.ASP as on 17th April 2009] states as under:-

"**Settlement Commission**

Wanchoo Committee in its report had made certain very important recommendations which were to have a far-reaching effect on the growth and functioning of the Income-tax Department. One suggestion resulted in the creation of 'Settlement Commission'.

While condemning the Voluntary Disclosure Schemes, the Committee had recommended that the door for compromising with an errant taxpayer should not, for ever, be closed. "A rigid attitude would not only inhibit a one time tax evader or an unintending defaulter, from making a clean breast of his affairs but would also unnecessarily strain investigational resources of the Department in cases of doubtful benefit to revenue, while needlessly proliferating litigation and holding up collections". They recommended that settlements may be entrusted to a separate body within the department to be called the Direct Taxes Settlement Tribunal. This body should be a permanent body with three members. The members should be given the same status as the members of the Central Board of Direct Taxes. They should be persons of known integrity and high sense of justice and fairness.

The Taxation Law Amendment Act, 1975 inserted a new Chapter XIX A in the Income-tax Act and Chapter V-A in the Wealth-tax Act whereby the Government constituted a Settlement Commission w.e.f. 1.4.76 as a statutory body for the settlement of the cases. This institution has helped the Department to get over long and continued litigation in complicated cases. During the period 1976 to 1983, the Settlement Commission has settled 1213 cases of which only one case was admitted by the Supreme Court. The Direct Tax Laws Committee in its final report submitted in September, 1978 further recommended that all restrictions on the powers of the Settlement Commission to entertain cases should be removed. As a result of this recommendation w.e.f. 1.4.79, the powers of the Settlement

Commission were further widened. Earlier, if the Commissioner objected to the application of an assessee from being proceeded with, the Commission could not proceed with it. The proviso to section 245D (1A) inserted w.e.f. 1.4.79 gave the Commission power to proceed with it, inspite of the objection but only after giving the Commissioner, opportunity of being heard.

Besides the gain to revenue, the Department's manpower increased significantly, as a result of the creation of Settlement Commission. Several new posts were created. In 1976, 14 posts (2 D.Is., 1 Secy., 10DDs. & 1 A.O.) became available. There has been no increase in the strength of personnel, since then.".

15. While considering the scheme of Chapter XIX-A of the Act, the Supreme Court [in **C.I.T. v B.N. Bhattacharjee –** (1979) 4 SCC 121 observed:

"It is not inappropriate to state that the policy of the law as disclosed in Chapter XIXA is not to provide a rescue shelter for big tax-dodgers who indulge in criminal activities by approaching the Settlement Commission. The Settlement Commission will certainly take due note of the gravity of the economic offences on the wealth of the nation which the Wanchoo Committee had emphasised and will exercise its power of immunisation against criminal prosecutions by using its power only sparingly and in deserving cases; otherwise such orders may become vulnerable if properly challenged."

A Constitution Bench of the Supreme Court [in **C.I.T. v Anjum**

M.H. Ghaswala – (2002) 1 SCC 633 inter alia, held that:

"Chapter XIX-A was included for the purpose of quick settlement of the cases before it so that the tax due to the Revenue is collected at the earliest. The object of Chapter XIX-A is not to give amnesty to a tax-evader from paying the tax due." and that "The object of the legislature in introducing this section [section 245C] is to see that the protracted proceedings before the authorities or in courts are avoided by resorting to settlement of cases. In this process, an assessee cannot expect any reduction in amounts statutorily payable under the Act."

16. According to the petitioner the main benefits of the Settlement Commission to both Government and the Assessee were –

(i) Department to get over long and continued litigation in complicated cases with doubtful benefit to Revenue.

(ii) Final Settlement for settling liabilities across the board in complicated cases with doubtful benefit to Revenue, avoiding endless and prolonged litigation and subsequent strain on investigational resources of the Department.

(iii) Provided its disclosure was "full and true", the Assessee had a forum wherein complicated matters could be decided by one forum.

(iv) Time consuming litigation in the regular Appellate procedure was avoided by the Department and the Assessee.

(v) Provided its disclosure was full and true, benefits of waiver of penalties and prosecution were available to the Assessee.

(vi) Confidentiality of the Assessee's disclosure was maintained, as the same could be used only in the Settlement Commission.

17. Scheme of the Act and Relevant Changes in Chapter XIX-A of the Act by the Finance Act, 2007.

Prior Scheme

(i) An application to the Settlement Commission was submitted in accordance with Form 34B in Appendix II to the Income-tax Rules.The Annexure to Form 34B required the applicant, inter alia, to state – (a) amount of income which has not been disclosed before the assessing officer; (b) additional amount of income-tax payable on such income; and (c) the manner in which the income disclosed before the Settlement Commission has been derived. The disclosure made by the applicant to the Settlement Commission in the said Annexure was to be kept confidential unless the application was admitted by the Settlement Commission. Once admitted, the disclosure made to the Commission in the said Annexure and the accompanying material was conveyed to the income-tax authorities (hereinafter referred to as "***IT Authorities***") and could be used by IT Authorities only for the limited purpose of making submissions to the Settlement Commission, and the Settlement Commission alone was empowered to pass a final

order. Prior to the 2007 Act, if the application filed by the applicant was rejected as not admitted, the disclosure made by the applicant in the said Annexure and the accompanying material would not be available to the IT Authorities.

(ii) Once the Settlement Commission had admitted the application filed under Section 245C of the Act, the Settlement Commission alone had the power to pass the final settlement order and there was no provision for the application to revert back to the IT Authorities for any reason whatsoever.

(iii) While there was no mandatory time limit provided by the Act within which the Settlement Commission was obliged to pass a final order of settlement under section 245D(4), under the then existing section 245D(4A), the period of four years provided therein was only recommendatory.

(iv) Further, taxes on the declared income were to be paid only when the application was 'admitted' by the Settlement Commission. Even on such admission, no interest was required to be paid.

Post Amendment

(v) While the Notes on Clauses of the Finance Bill, 2007 provide no reason whatsoever for the amendments proposed by Clauses 53 to 61 of the said Bill, the Memorandum explaining the provisions of the said

Bill purports to provide the reason for the said amendments stating that:

"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 a 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.".

CBDT Circular No. 3/2008 dated 12th March 2008 titled "*Finance Act, 2007 – Explanatory Notes on provisions relating to Direct Taxes*" purports to provide the identical reason for the said amendments to Chapter XIX-A of the Act. In the Affidavit dated 10th November 2008 filed on behalf of the Director on Income-tax (International Taxation) Mumbai by one I.C.S. Kaushik in reply to Writ Petition No. 952 of 2008 filed by Star Television News Ltd. in this Hon'ble Court, it is, inter alia, alleged that "The object of the amended provisions was essentially to ensure expeditious disposal of cases pending before the commission and realization of taxes thereon." It is important to note that the selection of members to the Commission, and filling of vacancies is completely within the control of the Government of India.

(vi) (a) The 2007 Act substituted the definition of "*case*" in sub-section (b) of section 245A of the Act, providing a more restrictive definition, thereby limiting the proceedings in which

an application could be made to the Settlement Commission after the amendment of the law w.e.f. 1st June, 2007.

(b) By virtue of sub-sections 245D(2A) and 245D(2D) as substituted by the 2007 Act, in the case of an application filed before 1st June 2007 where no order of admission/rejection had been passed under the erstwhile sub-section 245D(1), or where an order of admission had been passed but no final order under the erstwhile sub-section 245D(4) had been passed, such application could not be proceeded with further unless the additional tax on the income disclosed in such application and the interest thereon was paid on or before 31st July 2007. Failure to pay such additional tax or interest thereon by the aforesaid date would result in abatement of such application, with the attendant consequences set out hereunder.

(c)By virtue of section 245D(4A) as substituted by the 2007 Act, in respect of an application filed before 1st June 2007 a mandatory statutory duty was cast on the Settlement Commission to pass a final settlement order under sub-section (4) of section 245D on or before 31st March 2008. As inserted by the 2007 Act, Section 245HA(1)(iv) of the Act provides that in the case of such an application, in the event that the Settlement Commission has not passed a final settlement order on or before 31st March 2008 as mandated by section 245D(4A), the said application would abate on the aforesaid date. An application which abates would, under section

245HA(2) as inserted by the 2007 Act, revert back to the IT Authorities as if no application had, in the first place, been made under section 245C to the Settlement Commission. As inserted by the 2007 Act, Section 245HA(3) of the Act further provides that where an application so reverts to the IT Authorities upon abatement, the IT Authorities, including the assessing officer, will be entitled to use all material and other information produced by the applicant before the Settlement Commission, including that disclosed in confidence based on the protection provided by law when the application was filed.

(D) No provision has been made permitting an applicant to withdraw the settlement application filed by him prior to the 2007 Act, to avoid the aforesaid prejudice that may be caused by the amendments made to the Act by virtue of the 2007 Act. On the contrary, the existing section 245C(3), which prohibited withdrawal of an application once filed before the Settlement Commission, remained on the statute book despite the amendments introduced by the 2007 Act.

(e) By Finance Act, 2008 Section 273AA was introduced conferring power on the Commissioner to grant immunity from penalty, if the Commissioner was satisfied that the person has, after the abatement, co-operated with the Income-tax Authority, in the proceedings before him and has made a full and true disclosure of his income and the matter in which such income has been derived. Similarly, Section 278AB has been introduced conferring power on the

Commissioner to grant immunity from prosecution for any offence under this Act, if he is satisfied that after the abatement such person has cooperated with the Income-tax Authority in the proceedings before such Authority and has made a full and true disclosure of his income and the manner in which such income has been derived. In other words the decision to grant immunity is by an authority which would normally in the ordinary course not be the authority before whom the proceedings were but another authority. The Commissioner then will have to address himself to the issue whether there was a true and full disclosure. A party may be aggrieved by the order of the Income Tax Authority in which event the party may prefer an appeal. Would the Commissioner still then consider the information disclosed as a true and full disclosure. On the other hand under Section 245H power was in the Settlement Commission to grant immunity from prosecution for any offence under this Act or under the Indian Penal Code or any other Central Act for the time being in force. Thus the very body which considers the application under Section 245C has been conferred the powers unlike Sections 273AA and 278AB.

17. Before further dealing with the issue we may consider some data and the stand of the Respondents.

Bench wise institution and disposal of settlement applications during the F.Y. 2007-08.

(i) Applications received on or before 31-5-2007 and pending on 31-3-2008:

Particulars	**Delhi**	**Mumbai**	**Kalkata**	**Chennai**	**Total**

Applications received as on 1-4-2007	1103	738	311	286	2438
Add: Applications received from 30-6-2007 to 31-3-2008	685	266	265	55	1271
Total for disposal	1788	1004	576	341	3709
Less Disposal between 30-6-2007 and 31-3-2008	563	340	446	326	1675
Balance as on 31-3-2008	1225	664	130	15	2034

(ii) Applications received on or after 1-6-2007 and till 31-3-2008:

Particulars	**Delhi**	**Mumbai**	**Kalkata**	**Chennai**	**Total**
Pendency as on 31-3-2007	-	--	--	--	--
Addition during 2007-08	15	8	3	-	26
Less: Disposal during F.Y.	2	-	-	-	2
Balance as on 31-3-2008	13	8	3	-	24

[Data furnished by the Income Tax Settlement Commission on 8-05-2008 under Right to Information Act and sourced from "All India Federation of Tax Practitioners Journal, June, 2009, Vol. 12 No.3 Page 10.]

18. In an Appeal filed in the Supreme Court bearing C.C.No.17498 of 2009, arising from an interim order in this very petition, the stand of the State in the Supreme Court was as under:-

"On age-wise classification of pendency of cases, it will be noticed that 1.175 out of 3,090 cases are pending for more than six years. Even these cases will take another four to five years to be disposed of at the rate of disposal of

about 200 cases a year. In this view of the matter, legislature can not be compelled to continue with a machinery whereby the basic purpose of having initiated it is being defeated. The statement of Age-wise pendency of cases under Section 245D(4) as on 31.12.2007 before the Income Tax Settlement Commissioner is given herein below:-

Age of Application	Principal Bench, Delhi	Kolkatta Bench	Mumbai Bench	Chennai Bench	Total
More than 6 years	62	86	365	62	1175 (575)
Between 5-6 years	148	20	59	14	241
Between 4-5 years	111	13	55	25	204
Between 3-4 years	90	43	47	35	215
Between 2-3 years	43	41	73	37	194
Between 1-2 years	49	44	56	21	170
Less than 1 year					
Filed between 01.04.2007 to 01.06.2007	543	162	147	18	870
Filed after 01.06.2007	11	4	6	0	21
Total	*1657 (1057)	413	808	212	*3090 (2490)

*(Seems to be calculation error)

19. In the reply filed in the Delhi High Court in Vatika Farms Pvt. Ltd., the learned Bench of the Delhi High Court noted that in Writ Petition No.245 of 2008 (Vardhman Properties Ltd. vs. Union of India), the Secretary to the Settlement Commission filed an affidavit dated January 29, 2008 in which it is candidly

admitted that it is not possible for the Settlement Commission to dispose of all the pending cases before March 31, 2008. It is also mentioned in the affidavit the disposal of cases for the last five years from 2003-03 to 2006-07 as 100, 88, 75, 85 and 101 respectively (See **Vatika Farms Pvt. Ltd. vs. Union of India (Delhi) (2008) 302 ITR 98 (Delhi)**."

20. Considering the provisions pursuant to the F.A. 2007 it would be clear that the Legislation has created only two classes of applicants. Those applicants whose applications were pending before 1st June, 2007 and others whose applications were filed on or after 1st June, 2007. The Legislature, therefore, identified only two classes based on the date of the application. It would be difficult to accept the contention that this classification by itself is unreasonable, considering the object of the Legislature in making the classification is based on the date of application, with the object of disposal of the applications within a time frame.

21. The real controversy, however, arises on account of fixing 31st March, 2008 as the date for disposal of those applications which were filed and pending as on 1st June, 2007. Such of these applications which could not be disposed of on or before 31st March, 2008 stand abated. Therefore, in one homogeneous class of applicants who had filed and whose applications were pending as of 31st June, 2007 on account of the cut-off date, two mini-classes have been created. One class of applicants who by a fortuitous circumstance of their application was pending before a Bench where there was less work load and/or by the fact that the Tribunal heard the applications before applications filed earlier and/or by the fact that the machinery created by the Legislature on the admitted figures earlier disclosed could not dispose of the application before 31st March, 2008 and the others similarly situated whose applications resulted in an order of settlement. This has resulted in mini-

classification of a homogeneous class. The consequences apart from abatement of the application for no fault of the applicant has also resulted in the confidential information being available to the A.O. and other authorities under the Act. It is this which has resulted in the challenge in the present petition.

22. The law on the scope and meaning of Article 14 is now well settled. We may gainfully refer to D.S. Nakara & Ors. vs. Union of India, (1983) 1 S.C.C. 305, wherein the Supreme Court observed as under:-

> "10. The scope, content and meaning of Article 14 of the Constitution has been the subject-matter of intensive examination by this Court in a catena of decisions. It would, therefore, be merely adding to the length of this judgment to recapitulate all those decisions and it is better to avoid that exercise save and except referring to the latest decision on the subject in Maneka Gandhi v. Union of India from which the following observation may be extracted:
>
> "...what is the content and reach of the great equalising principle enunciated i in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

11. The decisions clearly lay down that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, viz., (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that that differentia must have a rational relation to the objects sought to be achieved by the statute in question, (see Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors). The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be a nexus i.e., causal connection between the basis of classification and object of the statute under consideration. It is equally well settled by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

12. After an exhaustive review of almost all decisions bearing on the question of Article 14, this Court speaking through Chandrachud, C.J. in Re. Special Courts Bill. 1978 restated the settled propositions which emerged from the judgments of this Court undoubtedly insofar as they were relevant to the decision on the points arising for consideration in that matter. Four of them are apt and relevant for the present purpose and may be extracted. They are:

(3). The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not

insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4). The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is substantially the same.

(6). The law can make and set apart the classes according of the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7). The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be

achieved by the Act.

13. The other facet of Article 14 which must be remembered is that it eschews arbitrariness in any form. Article 14 has, therefore, not to be held identical with the doctrine of classification. As was noticed in Maneka Gandhi's case in the earliest stages of evolution of the Constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that Article 14 forbids discrimination and there will be no discrimination where the classification making the differentia fulfils the aforementioned two conditions. However, in EP. Royappa v. State of Tamil Nadu it was held that the basic principle which informs both Articles 14 and 16 is equality and inhibition against discrimination. this Court further observed as under:

From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

15. Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differntia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must

have a rational nexus to the object sought to be achieved by the statute in question.

16. As a corollary to this well established proposition, the next question is, on whom the burden lies to affirmatively establish the rational principle on which the classification is founded correlated to the object sought to be achieved? The thrust of Article 14 is that the citizen is entitled to equality before law and equal protection of laws. In the very nature of things the society being composed of unequals a welfare state will have to strive by both executive and legislative action to help the less fortunate in the society to ameliorate their condition so that the social and economic inequality in the society may be bridged. This would necessitate a legislation applicable to a group of citizens otherwise unequal and amelioration of whose lot is the object of state affirmative action. In the absence of doctrine of classification such legislation is likely to flounder on the bed rock of equality enshrined in Article 14. The court realistically appraising the social stratification and economic inequality and keeping in view the guidelines on which the State action must move as constitutionally laid down in part IV of the Constitution, evolved the doctrine of classification. The doctrine was evolved to sustain a legislation or State action designed to help weaker sections of the society or some such segments of the society in need of succour. Legislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved. The State, therefore, would have to affirmatively satisfy the Court that the twin tests have been satisfied. It can only be satisfied if the State establishes not only the rational principle on which classification is founded but correlate if to the objects sought to be achieved. This approach

is noticed in Ramana Dayaram Shetty v. The International Airport Authority of India and Ors., when at page 1034, the Court observed that a discriminatory action of the Government is liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

23. **Arbitrary Cut-off Date**

The National Website of the Income-tax Department, inter alia, states that "During the period 1976 to 1983, the Settlement Commission has settled 1213 cases of which only one case was admitted by the Supreme Court." This works out to an average disposal rate of around 152 cases a year during the aforesaid 8 year period. In Special Leave Petition (C) No. 17498 of 2008 filed by the Union of India, the Settlement Commission and the Director of Income Tax (International Taxation) Mumbai it is stated that the average rate of disposal of cases until 2006-07 has been about 200 cases a year. In the table which we have earlier reproduced are set out the age-wise classification of pendency of cases. The said table shows a total of 3,090 (2490) pending cases as on 31st December, 2007 out of which 1,175 (575) are pending for more than six years. It is also stated that just these cases pending for more than six years would take another four to five years at the rate of disposal of about 200 cases a year. Even if we consider the corrected figures assuming there was an error in calculation, it would take 12 years for disposal of all the cases which were pending considering the number of Benches.

24. It is inconceivable considering these figures that there could be any

realistic expectation that the Settlement Commission could dispose of within a period of ten months (June 2007 to March 2008) the 3,069 (2490) cases which were filed before the Settlement Commission prior to 1st June 2007. Even assuming a period of thirteen months (commencing at the end of February 2007 when the Finance Bill, 2007 was tabled), from what is stated above, achieving such disposal of cases was clearly impossible. The Delhi High Court in Vatika Farms Pvt. Ltd., has noted this. It is also pertinent to note that the amendments introduced did not bar fresh applications, and further ensured that in respect of pending and fresh applications Government did not lose out even on the interest on the income disclosed by making it mandatory to pay interest due thereon. Thus the Government had recovered both tax and interest on admission itself of the application.

25. In our opinion, the choice of 31st March 2008 as the cut-off date is not supported by any rationale reasons. From the statistics of the Income-tax Department itself it is indisputable that the cut-off date of 31st March 2008 for disposal of all applications filed prior to 1st June 2007 were known to be illusory, whimsical, capricious and so wide off the reasonable mark as to make it palpably arbitrary. The arbitrariness of the choice of 31st March 2008 as the cut-off date is even more apparent when it is noticed that the Settlement Commission is not being wound up, but on the contrary even after the amendments made by the 2007 Act came into effect on 1st June 2007, the Act permits the filing of fresh applications before the Settlement Commission – a clear recognition by Parliament that the assumptions made by the Wanchoo Committee and the rationale given by it for establishing the Settlement Commission are still valid and applicable. In the present circumstances, the choice of 31st March 2008 as the cut-off date cannot but

be described as a date of imaginative exercise having no basis or rationale whatsoever.

26. By fixing such an unrealistic and arbitrary cut-off date, into which of the two abovementioned classes an applicant would fall, depended entirely on the fortuitous circumstance of the Settlement Commission, entirely at its whim and fancy, deciding whether or not to dispose of its application by 31st March 2008. Thus, even two applicants who had filed their applications on the same date could be classified differently on the basis of aforesaid fortuitous circumstance.

27. A Constitution Bench of the Supreme Court in **Union of India v M.V. Valliappan –** (1999) 6 SCC 259, held that "It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances; while fixing a line, a point is necessary and there is no mathematical or logical way of fixing it; precisely, the decision of the legislature or its delegate must be accepted unless it is very wide off the reasonable mark.". In the facts of that case, the Court upheld the choice of date stating that "The learned Counsel for the Respondent was not in a position to point out any ground for holding that the said date is capricious or whimsical in the circumstances of the case."

28. In **D.S. Nakara v Union of India *(***supra) the Supreme Court held that "Therefore, the choice of the date cannot be wholly divorced from the objects sought to be achieved by the impugned action. In other words, if the choice is shown to be thoroughly arbitrary and introduces discrimination violative of

Article 14, the date can be struck down." The Court stated the principle "that when a certain date or eligibility criteria is selected with reference to legislative or executive measure which has the pernicious tendency of dividing an otherwise homogeneous class and the choice of beneficiaries of the legislative/executive action becomes selective, the division or classification made by choice of date or eligibility criteria must have some relation to the objects sought to be achieved." In the present case, the choice of the illusory, unreasonable and arbitrary date of 31st March 2008 as the cut-off date, on which pre-June 2007 applications will abate if not disposed of by the Settlement Commission, has no rational relation to the purported objective of the amendments in Chapter XIX-A of the Act introduced by the 2007 Act, viz. "to streamline the proceedings before the Settlement Commission" and "to ensure expeditious disposal of cases pending before the commission and realization of taxes thereon".

29. On this touchstone, the choice of a date is clearly capricious or whimsical as on failure by the Settlement Commission, even for no fault of the petitioner delaying the proceedings, the application stood abated by operation of law. In these circumstances will not reading the cut-off date 31st March, 2008 as mandatory be unjust, arbitrary and also discriminatory. We have referred to the various material placed by Union of India itself before the Supreme Court in the petitioner's own case as also the stand of the Union of India before the Delhi High Court in Vatika Farms' case. We have also set out the various figures of pendency of matters and the disposal by the Commission. In the affidavit filed before this Court it is the stand of the respondents that the object of the amendment was for early settlement of the cases. The cut-off date did not take into consideration whether the failure to dispose of the application is on account of any act on the part of the applicant or not . The

pendency of matters itself will show that the matters could not be disposed of as the adjudicating machinery created by the Act (Legislature) was not in a position to dispose of the applications on or before 31st March, 2008 for no fault of the applicant. The application before the Commission was dependent on various circumstances like the matter pending before a particular Bench, a particular matter being taken up by the Commission earlier to others which were pending before it and/or sheer inability to dispose of the petitions. In our opinion, considering the material on record the fixation of date was capricious and/or whimsical. The Legislature having statistics before it of the inability of the machinery created by it to dispose of the applications, nevertheless choose to fix the date which was unrealistic and incapable of being adhered to by the machinery created by it. In our opinion this would be an arbitrary exercise of power and consequently would attract the mandate of Article 14 of the Constitution of India if it is read as mandatory.

Learned Counsel for the Revenue has sought to place reliance on the judgment of the Supreme Court in **Government of Andhra Pradesh vs. N. Subbarayudu & Ors., decided on 26th March, 2008 being Civil Appeal No.3939 – 3941 of 2002**. There the issue was pertaining to the age of superannuation. The Court upheld the cut-off date keeping in view the economic conditions, financial constraints and many other administrative and other attending circumstances of the respondents therein. Reliance is also placed on the judgment of this Court in All India Federation of Tax Practitioners vs. Union of India, (1997) 228 ITR 0068. That was a case in which tax payer sought to challenge the VDIS scheme. The challenge was rejected. Large number of authorities were also cited to hold that once the right is created by statute it is open to the same Legislature to also withdraw or take away that right (see Kuldip Nayar & Ors. vs. Union of India & Ors., (2006) 7 S.C.C. 1. In our opinion there can be no quarrel with the proposition. The stand of the Respondents in justifying the cut-off date is based on no material. The petitioners

having discharged the burden that the cut-off date is whimsical or arbitrary, the respondents have failed to discharge the burden cast on them.

30. **Arbitrary Withdrawal of Earlier Assurance of Confidentiality.**

The disclosure made by the applicant to the Settlement Commission in Annexure to Form 34B was to be kept confidential unless the application was admitted by the Settlement Commission. Once admitted, the disclosure made to the Commission in the said Annexure and the accompanying material was conveyed to the IT Authorities and could be used by IT Authorities for the limited purpose of making submissions to the Settlement Commission, and the Settlement Commission alone was empowered to pass a final order. Prior to the 2007 Act, if the application filed by the applicant was rejected as not admitted, the disclosure made by the applicant in the said Annexure and the accompanying material would not be available to the IT Authorities. It may be mentioned that once an applicant applies, the applicant could not withdraw the application. The confidential information could only be used by the Settlement Commission.

31 As a consequence of the amendments introduced by the 2007 Act, an application which abates for no fault of the applicant would, under section 245HA(2) revert back to the IT Authorities as if no application had, in the first place, been made under section 245C to the Settlement Commission. As inserted by the 2007 Act, Section 245HA(3) of the Act further provides that where an application so reverts to the IT Authorities upon abatement, the IT Authorities, including the assessing officer will be entitled to use all material and other information produced by the applicant before the Settlement

Commission, including that disclosed in confidence based on the protection provided by law when the application was filed.

32. Section 245HA(3) thus has the effect of severely prejudicing the interest of applicants who in good faith that the case would be settled were induced to part with the confidential information based on the bona fide belief and a legitimate expectation, on the basis of the law in force when such applications were filed, that settlement orders would be passed and confidential information disclosed by such applicants would not be made available to the IT Authorities for use by them against such applicants in assessment proceedings, penalty and prosecution proceedings. After 1st June, 2007, the application has to be decided within twelve months. The consequences of the amendment has been that the number of new applications for settlement have dropped drastically as the applicants are aware when they make an application the consequences of an application not being disposed off within the time stipulated. As much as such an applicant cannot be visited with such great hardship, disadvantage and prejudice for no fault of its own but solely by reason of the inability of the Settlement Commission to dispose of such application by the specified date the provisions of section 245HA(1)(iv) read with Section 245HA(3) of the Act, so read would have to be held as arbitrary, unreasonable and violative of Article 14 of the Constitution,.

33 The arbitrariness becomes more palpable when even in cases where the applicant has paid the additional tax and the interest thereon as required under the amended provisions of the Act and has fully co-operated with the Settlement Commission in ensuring expeditious disposal of its application, the

availability of such confidential information to the IT Authorities is made dependent solely on a fortuitous circumstance, viz. the inability or failure on the part of the Settlement Commission to dispose of the application by the specified date, an event over which the applicant has no control. Thus, even two applicants who had filed their applications on the same date, equally fulfilled requirements of payment of tax and interest, and had equally co-operated with the Settlement Commission, could be classified differently on the aforesaid fortuitous circumstance. Thus, discrimination is inherent in the impugned provision itself and the same is violative of Article 14 of the Constitution.

34. Arbitariness can also be seen in the context of consequences which the applicant has to suffer. As pointed out earlier on the application being declared as abated the confidential information which the petitioner had filed before the F.A. of 2007 and which was not available to the I.T. Authorities if the application was disposed of under Section 245(4) as it earlier stood would now be available. The answer by the Respondents to this submission is that the Legislature has advisedly amended the provisions of the Act and introduced Section 273AA. In our opinion Section 273AA as inserted only confers a power on the Commission for granting immunity from penalty. It does not prevent the authorities under the I.T. Act from using the confidential information which was filed including for prosecution and which was treated as confidential even if the petitioners application was not allowed to be proceeded with. What would be effect of Section 278AB introduced by the Finance Act 2008, will be considered separately.

35. Similarly, consequent to the amendment, if the application abates even for the reasons of the settlement Commission’s inablity or failure to decide the same by the

specified cut-off date the confidential information becomes available to the Authorities, including the Assessing Officer. The consequences of therefore, upholding Section 245HA(3) would be to cause prejudice to the interest of the applicants, who were induced to part with the confidential information based on the bona fide belief and a legitimate expectation, on the basis of the law in force when such applications were filed, that settlement orders would be passed and confidential information disclosed by such applicants would not be made available to the I.T. Authorities for use by them against such applicants in assessment proceedings, penalty and prosecution proceedings. It is true that there can be no estoppel against law. At the same time a person who voluntarily incriminates himself with the belief that if he has made a true and full disclosure, an independent body like the Settlement Commission would consider the case and not impose penalty inspite of the stand of the Department is now subject to adjudication provisions and penal consequences.

Under Section 245H on an application being allowed the Settlement Commission was empowered on an applicant satisfying the the conditions provided in Section 245H(1) to grant immunity from prosecution. An applicant is now denied the benefit of consideration from being prosecuted on account of failure by the Commission to dispose off the application and/or for no fault on the part of the applicant. This power continues in the Commission even after the amendment if the Commission disposes of the application within twelve months on or after 1.6.2007. In other words it becomes dependent on the efficiency of the machinery over which an applicant has no control.

36. Does Section 278AB introduced by the Finance Act, 2008 w.e.f. 1.4.2008 make any difference. Is the purported remedy completely illusory

and ineffective as the grant of immunity from penalty/prosecution is conditional upon the Commissioner after the application has abated in the proceedings before the I.T. Authority being satisfied that the person "*has made a full and true disclosure of his income and the manner in which such income has been derived*". The Commissioner according to the petitioner in most cases takes a stand before the Settlement Commission that the disclosure by the applicant is not full and true. In proceedings before the Settlement Commission, the Commission takes an independent view, from the stand of the Department and often did, overrule such objection of the Commissioner. Whilst however, introducing Section 273AA and section 278AB, it is the Commissioner who will sit in judgment over an issue which most cases he has already pre-judged by taking a stand before the Commission. It is inconceivable that the same Commissioner, who may have already objected before the Settlement Commission in most pending cases that the disclosure by an applicant is not full and true, will in purporting to exercise the aforesaid powers do a *volte face* and declare such disclosure as full and true even if now what he considers is full and true disclosure before the I.T. Authorities the true and full disclosure is before proceedings before the I.T. Authorities. The Commissioner by the very nature of his post is a part of taxing machinery. The Commissioner, who may have taken a stand on the application before the Settlement Commission, has now become the judge as in the Petitioners own case by filing a Petition challenging the order to proceed with the application. This would violate the basic principles of natural justice which is inherent in the said provisions of the Act and the purported exercise of power thereunder will result in a flood of litigation impugning such purported exercise. A further anomaly is that in cases where the Settlement Commission has allowed the application to be proceeded with

on a decision that the applicant's disclosure is full and true, the Commissioner will now sit in effect as an appellate authority over such decision of the Settlement Commission, which is a superior independent authority created by the Act with far more extensive powers and authority. It is true that the language used in Section 278AB(3) is satisfaction after abatement if the person has cooperated with the Income-tax Authority in the proceedings before him and has made a full and true disclosure of his income and the manner in which said income has been derived. If before the Settlement Commission a stand has already been taken it is impossible to conceive that the Income Tax Authority will take a view different from the view taken before the Settlement Commission. .

In our opinion, the amendment made by the Finance Act 2008 in no way will remedy the unconstitutionality and the arbitrariness of the impugned provisions and in fact disclose the harshness of the consequences thereunder by attempting to create an illusory remedy.

37. Section 245HA(1)(iv) will, therefore, in the ordinary course have to be held to be arbitrary, unreasonable and violative of Article 14 of the Constitution of India in as such as such an applicant cannot be visited with such great hardship, disadvantage and prejudice for no fault of its own but solely by reason of the inability of the Settlement Commission to dispose of such application by the specified date. Even in cases where the applicant has paid the additional tax and the interest thereon as required under the amended provisions of the Act and has fully co-operated with the Settlement Commissioner in ensuring expeditious disposal of its application, the availability of such confidential information to the Income Tax Authorities is made dependent solely on this fortuitous circumstance, of the inability or failure on the

part of the Settlement Commission to dispose of the application within a specified date an event over which the applicant has no control. Thus even two applicants who had filed their applications on the same date, equally fulfilled requirements of payment of tax and interest and had equally co-operated with the Settlement Commissioner, could be classified differently on the aforesaid fortuitous circumstance.

38. In **Bidhannagar (Salt Lake) Welfare Association v. Central Valuation Board, AIR 2007 SC 2276** the Court held that where an independent Authority was conferred with a decision making power which was unlimited and plenary powers, and taken away from such independent person and statutorily conferred on persons who are not independent or are otherwise have an interest in the matter, then such provisions of law are per se unreasonable and the provisions per se contravene the values attached to the principles of natural justice. When there is substantive unreasonableness in a statute, it may have to be declared unconstitutional and the decision making process may suffer from an institutional bias."

39. Reading Down the Provisions to Uphold Their Constitutionality:

The choice, therefore, before the Court is whether considering the discussion above, to strike down Section 245D(4A)(1), Section 245HA(1)(iv) and Section 245HA(3) or read them down to uphold their constitutionality. We may at this stage note that in the petition the petitioners have not sought a prayer challenging the vires of Section 245D(4A)(1), on the ground that fixing of 31st March, 2008 for disposal of applications filed before 1.6.2007 is arbitrary, though the said plea has been taken and arguments advanced.. This Court in Narang Overseas Pvt. Ltd. vs. ITAT, (2007)

295 ITR 22 (Bom.) read down the provisions of Section 254(2A) of the Act as amended by the 2007 Act which purported to curtail the power of the Tribunal to grant or continue an order of stay beyond the prescribed period period where the appeal was not disposed of within such period, even in cases where the delay in disposal of the appeal was in no way attributable to the assessee relying on the judgment of the Supreme Court Commissioner of Customs & Central Excise vs. Kumar Cotton Mills (P) Ltd. 2005 13 SCC 296.. This Court had held that where the plain literal interpretation produces an absurd or manifestly unjust result which could never have been intended by the legislature, the court might fine tune the language used by the legislature so as to achieve the intention of the legislature and produce a rational construction. This Court also held that Courts must construe provisions of statutes consistent with the constitutional mandate and the principle to avoid a provision being rendered unconstitutional. Therefore, we held that the purported object of the amendment was not to protect an assessee who dragged on an appeal whilst enjoying the benefit of an interim order but correspondingly to impose a duty on the Tribunal to dispose of an appeal within the prescribed time limit. The Court, therefore, read the provision as imposing a limitation on the power of the Tribunal to continue interim relief in a case where the hearing of the Appeal has been delayed for acts attributable to the assessee. Thus the Court observed that it cannot mean that a construction be given that the power to grant interim relief is denuded even if the acts attributable are not of the assessee but of the Revenue or of the Tribunal itself.

40. Considering the discussion and findings, the fixing of cut-off date under Section 245D(4A)(1), the abatement under section 245HA(1)(iv), making available the confidential information under and section 245HA(3) of the Act, as inserted by the 2007 Act, would be clearly ultra vires the Constitution and are liable to be struck down as null and void ab initio. It is,

however, open to this Court instead of striking down the impugned provision in its entirety to read down such provision in such a manner so as to set at naught the unconstitutional portion.

41. In ***D.S. Nakara v. Union of India*** the Supreme Court, while reading down the provisions of the impugned memoranda, excluded the words "*that in respect of the government servants who were in service on March 31, 1979 and retiring from service on or after that date*" and "*the new rates of pension are effective from April 1, 1979 and will be applicable to all service officers who became/become non-effective on or after that date*" occurring therein, in order to uphold the constitutional validity of the impugned memoranda. In paragraph 59 of the judgment, the Court observed as follows: "*In reading down the memoranda, is this Court legislating? Of course 'not'. When we delete* [sic] *basis of classification as violative of Article 14, we merely set at naught the unconstitutional portion retaining the constitutional portion.*"

42. In ***Ahmedabad Municipal Corpn v. Nilaybhai R. Thakore*** [(1999) 8 SCC 139 the Supreme Court read the words "*and includes a permanent resident of the Ahmedabad Municipality who acquires the above qualifications from any of the high schools or colleges situated within the Ahmedabad Urban Development Area*" into the impugned rule in order to save the same from offending Article 14. The Court did so "*with a view to iron out the creases in the impugned rule which offends Article 14*". The Court relied on "*the famous and oft-quoted principle*" relied on by Lord Denning in the case of ***Seaford Court Estates Ltd. v. Asher*** [(1949) 2 All ER 155 (CA)] wherein Lord Denning held "*When a defect appears a Judge cannot simply*

fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of the Parliament, … and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. … A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

43. In ***Arun Kumar v Union of India*** [286 ITR 89 (SC)] The Hon'ble Supreme Court had to consider the validity of Rule 3 of the Income Tax Rule as amended in 2001. The Court "read down" the provisions of the Rule, holding the same only to apply in cases where there was "a concession" in respect of accommodation. Where there is no concession the Court held the Rule can not apply. The Court also laid down –

> *"In considering the validity of a statute the presumption is always in favour of constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. For sustaining the constitutionality of an Act, a court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all other facts which are relevant. It must always be presumed that the Legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds and considerations. It is also well-settled that courts will be justified in giving a liberal interpretation in order to avoid constitutional invalidity. A provision conferring very wide and expansive powers on an*

authority can be construed in conformity with the legislative intent of exercise of power within constitutional limitations. Where a statute is silent or is inarticulate, the court would attempt to transmute the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven. These principles have given rise to the rule of "reading down" the provisions if it becomes necessary to uphold the validity of the law."

44. It has been submitted on behalf of the petitioners in this petition and other companion petitions that to avoid striking down, in their entirety, the impugned provisions as unconstitutional, this Hon'ble Court ought to read section 245HA(1)(iv) as under:

"*in respect of any other application made under section 245C, **where due to reasons attributable to the assessee** an order under sub-section (4) of section 245D has not been passed within the time or period specified under sub-section (4A) of section 245D*"

45. Just, Equitable and Reasonable Interpretation

It is further submitted that following settled principles of statutory interpretation, this Hon'ble Court would read the provisions of section 245HA(1)(iv) in the manner suggested by the petitioners. viz. it is only applications where the applicants have, by some willful act or omission, prevented the Settlement Commission from fulfilling its statutory mandatory duty under section 245D(4A) would stand the application abate.

46. Ordinarily the Court assumes that that the entire legislative process is

influenced by considerations of justice and reason, and avoids a *construction which is inequitable or onerous or operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason. Where the plain literal interpretation of a statutory provision produces a discriminatory or incongruous or manifestly absurd or unjust result which could never have been intended by the Legislature, the court may modify the language used by the Legislature or even "do some violence" to it, so as to achieve the obvious intention of the Legislature and produce a rational construction.* [See ***Bhudan Singh and Ano v Nabi Bux and Ano –*** (1969) 2 SCC 481, ***K. P. Varghese v. ITO*** - (1981) 4 SCC 173, ***C.W.S. (India) Ltd. v C.I.T.*** - 1994 Supp (2) SCC 296,***Calcutta Gujarati Education Society v Calcutta Municipal Corpn.*** - (2003) 10 SCC 533.

47. In ***Narang Overseas P. Ltd. v ITAT*** [supra] the Division Bench referred to the observation of the Supreme Court in ***C.I.T. v J.H. Gotla –*** (1985) 156 ITR 323] that:

> "*Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than injustice, then such a construction should be preferred to the literal construction.*"

48. This Court whilst interpreting the third proviso to Section 254(2A) in ***Narang Overseas P. Ltd. v ITAT*** had relied on a decision of the Supreme Court in ***Commr. Of Customs & Central Excise v Kumar Cotton Mills (P) Ltd (supra)*** which had considered a similar provision as contained in section 35-C(2A) of the Central Excise Act which provided that the stay granted by the Tribunal shall stand vacated if the appeal is not disposed of within the

period prescribed thereunder. The Court noted that the provision was made for the purpose of curbing dilatory tactics of those assesses who had obtained interim orders and sought to continue such order by delaying the disposal of the appeal, depriving the Revenue not only of the benefit of the assessed value but also a decision on points which may have impact on other pending matters. This Court then held as under:

> "*The sub-section which was introduced in terrorem cannot be construed as punishing the assessees for matters which may be completely beyond their control. For example, many of the Tribunals are not constituted and it is not possible for such Tribunals to dispose of the matters. Occasionally, by reason of other administrative exigencies for which the assessee cannot be held liable, the stay applications are not disposed of within the time specified. … … However, we should not be understood as holding that any latitude is given to the Tribunal to extend the period of stay except on good cause and only if the Tribunal is satisfied that the matter could not be heard and disposed of by reason of the fault of the Tribunal for reasons not attributable to the assessee.*"

49. The principles set out above in the abovementioned decisions squarely apply in the present case where the purported objective of the amendments introduced in Chapter XIX-A by the 2007 Act is to streamline the proceedings before the Settlement Commission and to ensure expeditious disposal of pending cases. The said amendments cannot be construed as punishing an applicant for the inability or failure of the Settlement Commission to dispose of its application within the period specified in section 245D(4A) where such delay in disposal is not attributable to the applicant.

The time limit for disposal of an application under Section 245D(4A)(1) will have to be read as 'may' to the extent that it is not on account of the fault of the applicant. It does do some violence to the language, but at the same time the constitutionality of the provision can be upheld. To do otherwise would be to punish an applicant for the inability of the Settlement Commission to fulfill its statutory obligation, for matters completely beyond the applicant's control. As set out above, the Court will presume that the legislature enacts laws which are honest, fair and equitable and that the legislative process is influenced by considerations of justice and reason. Accordingly, an interpretation leading to such an unjust, inequitable, harsh and absurd result must be rejected. Consequently section 245HA(1)(iv) must be read in the manner set out above only to applications where the applicants have, by some willful act or omission, prevented the Settlement Commission from fulfilling its statutory mandatory duty under section 245D(4A) only such applications will abate. will abate. To do so will also avoid the inequitable and unjust result whereby an applicant, who has been induced to pay the tax on the income disclosed and interest thereon by reason of a statutory assurance that its application will be settled by the Settlement Commission on or before 31st March 2008, is penalized for no fault of its own by the abatement of its application and the attendant consequences, including disclosure of the confidential information and material to the IT Authorities for use in proceedings before them as also possible proceedings for penalty and prosecution. It is for the Settlement Commission to decide the aspect of the matter.

50. A Harmonious Interpretation of Section 245D(4A) and Section 245HA(1)(iv) would remove the vice of arbitrariness and save the provisions

from being struck down as unconstitutional. Following settled principles of statutory interpretation, this Court should read the amended provisions of Chapter XIX-A of the Act harmoniously and in a manner so as to avoid any provision being rendered nugatory or redundant or unconstitutional to the extent possible.

51. Section 245D(4A)(i) provides that the Settlement Commission "*shall pass an order under sub-section (4)*" in respect of an application filed prior to 1st June 2007 that has been allowed to be proceeded with "*on or before the 31st day of March, 2008*". If "*good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed*" See ***Ram Krishna Dalmia v Justice Tendolkar*** , it must also be presumed that the Settlement Commission (being an instrumentality of the State) would fulfill the aforesaid mandatory statutory command and dispose of all such applications by the specified date. In that case there would be no question of any application abating under section 245HA(1)(iv) by reason of an order under section 245D(4A)(1) not having been passed within the specified time, and section 245HA(1)(iv) being rendered otiose and redundant. Accordingly, for an application to abate under section 245HA(1)(iv) it must mean that Parliament assumed that the Settlement Commission would disregard the aforesaid mandatory statutory command to dispose of all such applications by the specified date – an assumption or intention, it is submitted, that can never be ascribed to Parliament. However, even if such an intention could be ascribed to Parliament, the result would necessarily be to render section 245D(4A)(i) redundant and otiose.

52. In ***Surjit Singh Kalra v. Union of India*** (1991) 2 SCC 87, the

Supreme Court relied on Craies' *Statute Law* (7th Edn., pg 109). The Court held "*True it is not permissible to read words in a statute which are not there, but 'where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words'*". The Court also relied on the decision in ***Siraj-ul-Haq v S.C. Board of Waqf*** AIR 1959 SC 198.

53. By reading the words "*any other application made under section 245C*" in section 245HA(1)(iv) as "*any other application made under section 245C, **where due to reasons attributable to the assessee***" this Court would avoid rendering any part of either section 245D(4A)(i) or section 245HA(1)(iv) otiose, meaningless or redundant. The two provisions, read in such a harmonious manner, would mean that the Settlement Commission must fulfill its mandatory statutory duty in disposing of such applications as are referred to in section 245D(4A)(i) by the date specified therein except where prevented from doing so due to any reason attributable on the part of the applicant, and that an application in respect of which the Settlement Commission has been prevented from fulfilling the aforesaid mandatory statutory duty due to any reasons attributable on the part of the applicant shall abate on the specified date under section 245HA(1)(iv). In this manner both section 245D(4A)(i) and section 245HA(1)(iv) will have applicability, meaning and effect. We may also clarify that the expression 'reasons attributable' should be reasonably construed. While so dealing, the Settlement Commission also to consider whether in the petition before this Court the petitioner had averred that the proceedings were delayed not on account of any reason attributable to him, and whether the State had denied the same. If there be no denial then to consider that circumstances in favour of the petitioner.

54. From the above discussion having arrived at a conclusion that fixing the cut-off date as 31st March, 2008 was arbitrary the provisions of Section 245HA(1)(iv) to that extent will be also arbitrary. We have also held that it is possible to read down the provisions of Section 245HA(1)(iv) in the manner set out earlier. This recourse has been taken in order to avoid holding the provisions as unconstitutional. Having so read, we would have to read Section 245HA(1)(iv) to mean that in the event the application could not be disposed of for any reasons attributable on the part of the applicant who has made an application under Section 245C. Consequently only such proceedings would abate under Section 245HA(1)(iv).

Considering the above, the Settlement Commissioner to consider whether the proceedings had been delayed on account of any reasons attributable on the part of the Applicant. If it comes to the conclusion that it was not so, then to proceed with the application as if not abated.

Respondent No.1 if desirous of early disposal of the pending applications, to consider the appointment of more Benches of the Settlement Commission, more so at the Benches where there is heavy pendency like Delhi and Mumbai.

55. Rule made absolute accordingly. There shall be no order as to costs.

(J.H. BHATIA,J.) **(F.I. REBELLO,J.)**