

# **Income Tax Settlement Commission – Approach and Process**

**by**

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## **1. Introduction**

1.1 Chapter XIX - A of Income Tax Act, 1961 provides for settlement of cases. Income Tax Settlement Commission (referred to as ITSC hereafter) was set up in the year 1976 on the recommendation of Direct Tax Enquiry Committee headed by former Chief Justice of India, Shri K. N. Wanchoo. The purpose, intent and necessity of Settlement Commission is revealed by recommendation in para 2.32 to 2.34 of Chapter of the report of the Committee as follows:

*"2.32 This, however, does not mean that the door for compromise with the errant tax payer should forever 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 onetime tax evader or an un intending defaulter from making a clear 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 scheme 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 practice.*

*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 risk of having to face adverse criticism which, we are told, has been responsible for the slow rate of disposal of disclosure petitions."*

1.2 The Income Tax Settlement Commission has certain unique features, such as:

- (a) An institution, though within the Tax Department, but independent of the same to settle tax liability to give quietus to a dispute.
- (b) The ITSC is empowered to grant immunity from prosecution for any offence and also to grant immunity from imposition of any penalty under the Act.
- (c) The proceedings before the ITSC are confidential.
- (d) The orders of the ITSC are final and not appealable. The orders are only subject to judicial review in terms of Articles 136 and 226 of the Constitution.
- (e) The constitution of the ITSC by the Central Government from amongst "*persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts*" has been specifically laid down in the statute itself.

1.3 The process of settlement is set rolling by the assessee making an application for settlement, which must have a true & full disclosure of income concealed from the Department and the manner in which such income is earned. This admission of assessee helps the department in:

- (a) avoiding long drawn investigation and litigation to prove that income was earned and concealed by the assessee,
- (b) Immediate recovery of taxes as the assessee is liable to pay tax on admitted income before filing the application for settlement, and

- (c) Plugging loopholes due to in depth knowledge gained about manner of earning of income concealed.

The assessee gains by way of immunity from penalty and prosecution. Also, putting a quietus to disputed matters helps in avoiding long drawn and ruinous litigation.

## **2. Important amendments from time to time**

2.1 Like all provisions of the Income Tax Act, even provisions of Chapter XIX A have undergone amendment from time to time. The present note explains law as applicable to applications filed on or after 01.06.2007. Following amendments over a period of time are crucial to understand the provisions of Chapter XIXA and those are discussed.

### **Amendment of section 245C – offer of additional income**

2.2 S. 245C(1) as originally enacted in the year 1976 read as follows:

*"(1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner and containing such particulars as may be prescribed to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided."*

Provisions of sub section (1) were amended by Taxation Laws (Amendment) Act, 1984 w.e.f. 1-10-1984 and words as follows were inserted in section 245C(1): *"a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income-tax payable on such income"*.

2.3 The provisions as enacted in the year 1976 did not require an applicant to disclose income which had not been disclosed to the Assessing Officer along with the application for settlement. Form 34B prior to the said amendment did not have clause 11 and the confidential annexure thereto. Instead Rule 7 of ITSC Rules provided for calling for statement of facts from the applicant after the commission passed an order admitting the application. Prior to the year 1984, applicant was required to make full and true disclosure of income only after application was admitted for settlement.

2.4 It is only after the amendment in the year 1984, the statement of facts and declaration of income is required to be made along with

application for settlement. As the same was to be filed with the application, Rules provided for confidentiality of the statement of facts till the time application was admitted for settlement.

**Amendment of section 245D – objection of department to the application being admitted for settlement**

2.5 S. 245D(1) deals with admission of application filed for settlement. As originally enacted, it provided that an application may be admitted having regard to complexities of investigation involved or the nature and circumstances of the case.

2.6 Second proviso to sub section (1) of S. 245D as originally enacted in 1976 and till its deletion by Finance Act, 1979 w. e. f. 1.4.1979 provided that objection of the Commissioner of Income Tax to admission of the application on the ground that concealment has been established or is likely to be established would be fatal and application could not be admitted at all. The proviso read as follows:

*"Provided further that an application shall not be proceeded with under this sub-section if the Commissioner objects to the application being proceeded with on the ground that concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading by tax or other sum chargeable or imposable under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, has been established or is likely to be established by any Income-tax authority, in relation to the case."*

2.7 The observation of the hon'ble Supreme Court in B. N. Bhattacharjee's case, 118 ITR 461, that purpose of settlement commission is not to provide shelter for big tax dodgers, was in context of the said second proviso to S. 245D(1).

2.8 Simultaneous with the deletion of second proviso as above, subsection (1A) was inserted which provided that such an objection of the Commissioner of Income Tax could be overruled by ITSC if satisfied that such an objection was not correct and accordingly pass an order admitting the application after giving an opportunity of being heard. Subsection (1A) was on statute book from 1.4.1979 till its deletion by Finance (No.2) Act, 1991 w. e. f. 27.9.1991 and it read as follows:

*'(1A) Notwithstanding anything contained in sub-section (1), an application shall not be proceeded with under that sub-section if the Commissioner objects to the application being proceeded with on the*

*ground that concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax or other sum chargeable or imposable [\*\*\*\*] under this Act, has been established or is likely to be established by any income-tax authority, in relation to the case:*

*Provided that where the Settlement Commission is not satisfied with the correctness of the objection raised by the Commissioner, the Settlement Commission may, after giving the Commissioner an opportunity of being heard, by order, allow the application to be proceeded with under sub-section (1) and send a copy of its order to the Commissioner.'*

2.9 The judgment of the hon'ble Supreme Court in Express Newspaper's case, 206 ITR 443 is in context of provisions of S. 245D(1A) as above.

2.10 After amendment in 1991, the only conditions that remained for admission of application was that ITSC had to be satisfied that "*having regard to the nature and circumstances of the case or complexities of investigation involved*". These conditions were in the statute book since inception in 1976.

2.11 In the year 2007, even this requirement has been done away with. The provisions relating to the admission u/s. 245D(1) can be briefly summarized as follows:

- i) from 1976 to 1979 – application could be admitted having regard to nature and circumstances of the case or complexities of investigation involved. However, if, CIT objected that concealment has been established or likely to be established, application could not be proceeded with at all – objection was fatal.
- ii) from 1979 to 1991 - application could be admitted having regard to nature and circumstances of the case or complexities of investigation involved. However, if, CIT objected that concealment has been established or likely to be established, than ITSC could examine whether the said objection of the CIT is correct. If ITSC satisfied that the objection was correct, application could not be admitted and if objection was incorrect, than application could be admitted.
- iii) from 1991 to 2007 – application could be admitted having regard to nature and circumstances of the case or complexities of investigation involved.

iv) 2007 till date – there is no specific and separate condition prescribed for admission of an application.

2.12 It is only an application that satisfies conditions prescribed by S. 245C that can be considered for admission. Whether an application satisfied conditions of S. 245C was always examined by the ITSC before the admission of application. Conditions prescribed by S. 245D(1) to considered only in case of an application which satisfies conditions of S. 245C. For applications filed before 01.06.2007, such hearing was held in camera, in absence of department, as statement of facts and annexure to the application was confidential till case was admitted by order u/s. 245D(1). For applications filed after 01.06.2007, the applications are admitted u/s. 245D(1) and allowed to be further proceeded with u/s. 245D(2C) considering whether the application satisfies conditions of section 245C.

### **3. Application for settlement – S. 245C**

3.1 Section 245C deals with application for settlement and the provisions of section 245C can be briefly summarized as follows:

- i) Application can be filed for a case,
- ii) Application must contain full and true disclosure of income not disclosed before the Assessing Officer,
- iii) Manner of earning such income has to be disclosed,
- iv) Additional tax payable on income declared should exceed the prescribed limit,
- v) Additional tax and interest payable on income declared has been paid before filing of application,
- vi) Intimation is given to the Assessing Officer about application filed for settlement.

3.2 Section 245K provides for certain disqualifications to filing of application for settlement.

### **4. Case**

4.1 Sub-section (1) of section 245C provides that an assessee can prefer an application at any stage of a case relating to him. The term “case” is defined by clause (b) to section 245A as proceeding for assessment for

any assessment year or years which is pending before the assessing officer on the date of filing application.

4.2 The words used are year or years and therefore case can mean more than one assessment year. Therefore a single application has to be filed for any number of years as long as each of those assessment years satisfies condition of being a case.

4.3 In respect of application filed on or after 01.06.2007, only assessment proceedings pending before Assessing Officer is case and it has been specifically provided that proceedings would be pending from the first day of assessment year to the date on which assessment is made. Reassessment proceedings, appeal proceedings, and even assessment proceedings on set aside are not case and application for settlement can be filed only when assessment proceedings u/s. 143(3) are pending.

4.4 The provisions were amended by Finance Act 2010 and proceedings for assessment or reassessment in accordance with S. 153A or 153C is also a case and are valid proceedings for the purposes of filing application for settlement.

4.5 For the first category of assessment proceeding pending before Assessing Officer, the question arises whether proceedings are pending till an assessment u/s. 143(3) is made or merely because time to make an assessment u/s. 143(3) has expired, it can be said that proceedings are not pending though an assessment u/s. 143(3) has not been made.

4.6 The issue first arose before Bombay Bench of ITSC in an unreported case and it was held that merely because 143(3) assessment has not been made it cannot be said that assessment proceedings are pending before Assessing Officer specially when time to issue notice u/s. 143(2) has expired.

4.7 In a subsequent case, special bench was constituted at Calcutta in case of Rescuewear and it was held that if assessment has not been made u/s. 143(3) than assessment proceedings are pending before Assessing Officer even if time to issue notice u/s. 143(2) or time to make assessment u/s. 143(3) has expired.

4.8 The issue than came up before hon'ble Calcutta High Court in a case reported in (2012) 1 CAL LT 309 and it was held that if time to make assessment u/s. 143(3) has expired than proceedings are not pending and application for settlement for such an year cannot be filed. Similar issue

arose before hon'ble Delhi High Court in a case reported in 212 Taxman 511 and similar view was expressed.

4.9 In a case before hon'ble Gujarat High Court in case reported in 210 Taxman 529 and 259 CTR 329, issue before ITSC was of both types of cases – one where time to make assessment u/s. 143(3) had expired and second where time to issue notice u/s. 143(2) had expired but time to make 143(3) had not expired and notice u/s. 143(2) had not been issued. The department had before the hon'ble Gujarat High Court challenged only those years where time for 143(3) had expired and did not challenge where only time to issue notice u/s. 143(2) had expired. The hon'ble Gujarat High Court held that proceedings are not pending.

4.10 In a recent case before hon'ble Bombay High Court in a case reported in 262 CTR 28, the only issue was whether when notice u/s. 143(2) has not been issued and time to issue 143(2) expired, whether assessment proceedings can be said to be pending merely on the ground that time to make assessment u/s. 143(3) has not expired. After referring to all the earlier judgments, the hon'ble Bombay High Court agreeing with the said judgments held that as time to make assessment u/s. 143(3) has not expired, assessment proceedings are pending, even though notice u/s. 143(2) was not issued and time to issue notice u/s. 143(2) has expired.

## **5. Full and true disclosure of income not disclosed before the Assessing officer**

5.1 Sub-section (1) of section 245C requires that the application must contain a full and true disclosure of income, not disclosed before the Assessing officer. This is one of the most important conditions and one of the most litigated issues under Chapter XIXA of the Act.

5.2 As discussed in paragraph 2.2 hereinabove, the condition was always prescribed but prior to the year 1984, statement of facts and full and true disclosure of income had to be furnished by the assessee after the application was admitted. After amendment in the year 1984, such a statement has to be filed along with application for settlement.

5.3 From the year 1984 till very recently, the Statement of facts was treated as confidential till the time the application was allowed to be further proceeded with by order u/s. 245D(2C). Recently, in January 2014, Rule 44CA of Income Tax Rules has been amended to provide that if



application is admitted by order u/s. 245D(1), than the application and statement of facts shall be forwarded to department for report.

5.4 The term "*income*" has not been specifically defined for the purpose of Chapter XIXA. The Hon'ble Supreme Court in Commissioner of Income-tax v. Express Newspapers Ltd. 203 ITR 443 (SC) has held that offer of income for this purpose would not include withdrawal of claim for losses or expenses. As such, to constitute a valid offer of income in application for settlement, income offered must be income as earned, and not the extended meaning thereof u/s 147 which includes withdrawing of claim for losses, expenses and deductions.

5.5 However as discussed in paragraph 16.2 hereafter, settlement is not only of income offered and therefore even income which requires to be added will have to be considered and the application will not be restricted to income as earned. The application must have disclosure of income as earned to satisfy the condition of offer of income not known to the Assessing Officer, but computation of total income is not restricted to the said income and total income will have to be computed in accordance with provisions of the Act, considering full and true disclosure of facts relating to the case.

5.6 The offer should be of an income, which has not been disclosed before the Assessing officer.

5.7 The need to make full and true disclosure in an application for settlement cannot be over emphasized. Though an assessee has to make full and disclosure even in return of income as required by section 139, the said condition in Chapter XIX A is prescribed twice. Section 245C prescribes conditions for a valid application and one of the main conditions is full and true disclosure of income. The same condition is again prescribed in S. 245H. S. 245H prescribes immunities that may granted by the ITSC and the conditions on satisfaction of which the said immunities may be granted. Therefore, full and true disclosure is required to make a valid application and the application may be declared as invalid if found lacking on said count at the time of admission u/s. 245D(1) or 245D(2C). Further at the time of settlement, if application is found to be lacking on the said count, immunities may be denied.

5.8 What constitutes full and true disclosure can be determined on facts of each case. One can say that requirement of section 245C(1) are fulfilled if:

- i) All material facts are disclosed, and
- ii) Computation of income offered on the basis of such primary material facts is bonafide, fair and reasonable.

## **6. Manner in which income derived**

The application should also disclose manner in which income disclosed is derived. The modus operandi of earning income has to be disclosed.

## **7. Additional tax payable should exceed Rs. 10,00,000/-**

7.1 The additional tax payable on additional income offered must exceed Rs. 10,00,000/-. If the case is in pursuance of notice u/s. 153A or 153C, the additional tax payable has to exceed Rs. 50,00,000/-. If however, despite being a case in pursuance of notice u/s. 153A or 153C, if the case is connected to a case for which application has been filed, and such connection is as prescribed under the Act, then the additional tax payable has to exceed Rs. 10,00,000/-.

The mode of computation of computing additional tax is provided by sub-section (1A) to (1D) of section 245C.

7.2 If the application is for more than one assessment year, then additional tax shall be determined as prescribed for each of the assessment year and the aggregate thereof shall be treated as additional tax payable as per the application.

## **8. Payment of additional tax and interest thereon**

8.1 Though under the old provisions existing before 01.06.2007, additional income was required to be disclosed in the application, tax thereon was payable only after application was admitted and allowed to be proceeded with in accordance with S. 245D(1). There was no provision for payment of interest u/s. 234A, etc except when final order was passed u/s. 245D(4) r. w. s. 245D(6).

8.2 Under the new scheme, proviso to s. 245C(1) provides that tax along with interest has to be paid along with application itself and proof of

payment has to be attached. Interest has to be computed as if such income has been disclosed in return of income and date of filing application for settlement is date of filing return for the purpose of calculation of interest.

## **9. Intimation to the Assessing Officer**

9.1 Sub-section 4 of section 245C requires that the assessee has to give intimation of having filed the settlement application to the Assessing Officer on the date of filing settlement application itself. In an unreported case, the Bombay bench of ITSC has held an application as invalid on the ground that intimation was not filed on the same date but on day after the date of filing application.

9.2 The purpose of said condition is to give effect to amendment of S. 245F. Before amendment in the year 2007, exclusive jurisdiction vested in the ITSC from the date of admission of application by order u/s. 245D(1). Under the amended provisions, exclusive jurisdiction vests in the ITSC from the date of filing settlement application. By the said intimation the assessing officer is informed that exclusive jurisdiction over the case now vests in ITSC.

## **10. Disqualification for filing an application**

10.1 Section 245K provides for disqualifications from making an application for settlement. The disqualifications apply only to persons who have earlier made an application and do not apply to persons who are filing application for the first time.

10.2 Clause (i) provides that where the order u/s 245D(4), passed in the case of the said assessee in an earlier application, provided for levy of penalty for concealment of income, the said assessee can never make an application for any case.

10.3 Clause (ii) provides that if after passing of an order u/s 245D(4), the assessee has been prosecuted under chapter XXII of Income Tax Act for any offence in relation to the said case, the said assessee cannot apply for settlement for any other matter.

10.4 Clause (iii) provides that where in case of an assessee, the case has been sent back in accordance with provisions of section 245HA before 01.06.2002, the assessee cannot thereafter make an application.

10.5 In respect of application made on or after 01.06.2007, if application is allowed to be proceeded with u/s. 245D(1), assessee shall not be entitled to make an application ever again.

10.6 If an assessee had earlier made an application prior to 01.06.2007, disqualification from filing second application applies only if any of the 3 conditions are satisfied. Where the earlier application was filed after 01.06.2007, once the said application is admitted by order u/s. 245D(1), assessee cannot file second application.

## **11. Other issues relating to application**

11.1 Fees of Rs. 500/- are payable as settlement fees and the paid challan has to be enclosed with the application as proof of payment. Fees payable are per application irrespective of number of assessment years for which application is preferred.

11.2 Sub-section (3) of section 245C provides that an application cannot be allowed to be withdrawn by the assessee.

11.3 Under the old scheme prior to 01.06.2007, proviso to S. 245C(1) provided that application for settlement could be filed only if assessee has filed return of income which was due. It was subject to lot of criticism and the proviso has been done away with and it is no more necessary that assessee has filed return of income before he is eligible to file application for settlement. As pendency of proceedings is from first day of assessment year, an assessee may instead of filing return of income due u/s. 139(1) and even before such time expires, directly file an application for settlement.

## **12. Admission of application**

12.1 Under the old scheme prior to 01.06.2007, S. 245D(1) provided that an application for settlement may be admitted having regard to complexities of investigation involved or nature and circumstances of the case. It created lot of litigation as to which applications are fit for admission and led to uncertainty as to whether a case would be admitted or not.

12.2 The scheme for admission of a case has been completely altered w.e.f. 01.06.2007 and admission of an application would now be in two stages.

12.3 Section 245D(1) is substituted and it provides that a notice be issued by the ITSC to the applicant within 7 days of filing of application, to explain as to why his application be allowed to be proceeded with. Within 14 days of filing an application, ITSC has to decide whether to admit the application or to reject the same. If no order is passed within 14 days, application shall be deemed to be admitted. No conditions or criteria have been prescribed for deciding whether an application is fit for settlement. Therefore one can say that only conditions prescribed in S. 245C(1) are relevant for deciding whether to allow an application to be proceeded with. At this first stage, no report or communication from department is required for ITSC to decide whether or not to allow an application to be proceeded with.

12.4 In the second stage of admission of an application for settlement, S. 245D(2B) provides that if application is allowed to be proceeded with in first stage, a report has to be called for from the Commissioner of Income Tax (referred to as CIT hereafter) within 30 days of filing of application and CIT has to furnish report within 30 days of receipt of communication. If report u/s. 245D(2B) is received within time, then on the basis of report, the ITSC may declare the application as invalid in accordance with S. 245D(2C). Such an order has to be on the basis of the report and within 15 days of receipt of the report. Opportunity of being heard is to be allowed to applicant if application is to be declared as invalid. If report is not received within specified time, ITSC has to proceed without the report. Again no condition or criteria have been prescribed to decide whether application is invalid, therefore only if condition prescribed by S.245C(1) not satisfied, that an application can be declared as invalid.

12.5 Orders of the hon'ble ITSC u/s. 245D(1) and 245D(2C) have been challenged in a few recent cases. The judgments (listed hereafter) deal with the issue of nature of enquiry and finding required to be recorded by the ITSC in such orders. At each of the above two stages, the ITSC has to examine whether the conditions of a valid application are satisfied, but at both the interim stages, the finding of ITSC is tentative in that at a subsequent stage on the basis of evidence available it may arrive at a finding that conditions of a valid application are not satisfied and dismiss the petition. ITSC has a right to look at validity of application at each stage. However, though prima facie, but finding has to be recorded before

admitting application at an interim stage and ITSC cannot without giving any finding record that the issue of full and true disclosure will be looked into at stage of final settlement u/s. 245D(4).

V M Patel, 31 taxman.com 99 (Guj)

262 CTR 10 (Del)

216 Taxman 246 (Guj)

Vysya bank ltd 282 itr 185 kar

35 taxman.com 443 (Bom)

Godwin Steels P Ltd 206 Taxman 96 (Del)

### **13. Powers of Settlement Commission**

13.1 S. 245F(1) of the Act provides that in addition to provisions of Chapter XIXA, the ITSC has all the powers of an Income Tax Authority.

13.2 Sub section (2) thereof gives exclusive jurisdiction to ITSC over the case from the date of filing of an application till order is passed u/s. 245D(4). The Assessing Officer cannot pass assessment order once an application is filed and intimation of filing application has been served.

13.3 Further, sub-section (3) of section 245F provides that in absence of express direction to the contrary by the ITSC, the provisions of this section shall not effect the operation of provisions requiring an assessee to pay self-assessment tax.

13.4 Sub-section (4) of section 245F provides that nothing contained in this section shall effect the operation of any provisions of the Act in relation to matters not before the commission.

13.5 From the date of filing application till the date of final order u/s. 245D(4), exclusive jurisdiction vests in the ITSC relating to the case. Therefore, during pendency of application it is ITSC which has to decide about release of jewellery seized as held in AMS Jewelers 139 taxman 34 (Del).

### **Powers to Direct commissioner to make further enquiry – S. 245D(3)**

14. Sub-section (3) of Section 245D provides that the ITSC may direct the Commissioner of Income-tax to make further enquiry or investigation and furnish a report if it is of the opinion that further enquiry or investigation is called for.

### **Provisional attachment to protect revenue- Section 245DD**

15 During the pendency of proceedings before it, the Commission may direct provisional attachment of the property belonging to the applicant in accordance with the second Schedule, if it is of the opinion that it is necessary to protect the interest of the revenue. Such order would be valid for a period of six months, though the Commission may extend the period.

### **16. Settlement – order u/s. 245D(4) r.w.s. 245D(6)**

16.1 Sub-section (4) of section 245D provides that after considering the application, reports of the Commissioner of Income-tax and such other materials, the Settlement Commission, may, in accordance with the provisions of the Act, pass such orders as it thinks fit. The provisions grant the widest powers to the Commission to pass an order as it deems fit and the only restriction on the powers is that the order has to be in accordance with the provisions of the Act.

#### **Settlement is of case and not only of income offered**

16.2 Though s. 245C requires an application to "*... and containing a full and true disclosure of his income which has not been disclosed before the assessing officer and the manner in which such income is derived ...*", it is not an application only relating to undisclosed income but application u/s. 245C(1) is for settlement of case as defined in s. 245A(b). A case means assessment or reassessment, pending before the Assessing Officer, settlement is of case and not only of income not disclosed before the assessing officer.

16.3 Therefore, though disclosure of income is one of the conditions for making an application for settlement, settlement is of the whole case and not merely of undisclosed income.

#### **Terms of Settlement – Section 245D(6)**

16.4 Sub-section (6) of section 245D provides that every order u/s 245D(4) shall provide for: -

- i. terms of Settlement;
- ii. demand by way of tax, interest or penalty;
- iii. the manner in which sum due shall be paid;

iv. all other matters to make settlement effective;  
v. that the settlement shall be void, if it is subsequently found by the Commission to have been obtained by fraud or misrepresentation.

16.5 Sub-section 6 provides that all the aspects of the case are decided and nothing remains pending as section 245I provides that order u/s. 245D(4) is final in respect of matters stated therein.

16.6 Interest u/s. 234A, 234B and 234C are mandatory and even ITSC does not have power to waive said interest except to the extent the CIT/CCIT can waive the same in accordance with circulars of the CBDT. Interest u/s. 234B is chargeable only up to date of order u/s. 245D(1). (see Anjum Mohammed Ghaswala, 252 ITR 1 (SC), Hindustan Bulk Carriers 259 ITR 475 (SC) and Brijlal 328 ITR 477 (SC)).

#### **Payment of sum due**

16.6 The Order u/s 245D(4) also provides for manner of payment and the Commission has power to grant instalments for payment of sum due. However, once the manner of payment is prescribed by Order u/s 245D(4), the applicant is duty bound to pay the same in accordance with the manner so prescribed.

#### **Immunity withdrawn if taxes not paid as prescribed**

16.7 Sub-section (1A) of section 245H provides that where sum due is not paid as prescribed by Order u/s 245D(4) or within such further time as may be allowed by the Commission, the immunity granted from penalty and prosecution shall stand withdrawn.

16.8 Therefore, if there is failure to pay amount as prescribed by Order u/s 245D(4) and the Commission does not grant further time or if amount due is not paid within such extended time, the immunities shall stand withdrawn.

16.9 Sub-section (6A) of section 245D provides for charges of mandatory interest at the rate of 15% per annum on amount remaining unpaid for the period commencing from the end of 35 days from the date of receipt of order and ending with the date of payment. Interest is payable irrespective of time granted by the Commission.

16.10 Section 245J provides that subject to order u/s 245D(4), the sum due by such order may be recovered by the Assessing Officer having jurisdiction over the applicant and penalty for default may imposed in accordance with the provisions of Chapter- XVII. The jurisdiction to



recover amount due as per Order u/s 245D(4) is vested with the Assessing Officer having jurisdiction over the case, though he is bound by the terms of payment prescribed by the Commission.

### **17. Immunities from penalty and prosecution- Section 245H**

17.1 Sub-section (1) of section 245H provides that the Settlement Commission may grant immunity from prosecution for any offence under Income Tax, 1961, the Indian Penal Code (45 of 1860) or under any other Central Act. It may also grant immunity, either wholly or in part, from imposition of any penalty under the Act. The immunity can only be in respect of case covered by the Settlement Commission. Also, the Commission may impose any conditions subject to which immunity is granted.

17.2 Immunity may be granted by the Commission, if following conditions are satisfied: -

- i. the applicant has co-operated with the Commission in proceedings before it;
- ii. the applicant has made full and true disclosure of his income;
- iii. the applicant has disclosed the manner in which such income has been derived.

#### **Restrictions on powers to grant immunity**

17.3 The Commission does not have jurisdiction to grant immunity from prosecution in a case where prosecution proceedings have been instituted before the date of filing of application u/s 245C.

#### **Withdrawal of immunity**

17.4 Immunities granted by order u/s 245D(4) may be withdrawn in two circumstances. One being non-compliance with Order u/s 245D(4) and second being order obtained by fraud or misrepresentation of facts.

17.5 Sub-section (1A) of section 245H provides that the immunity shall be withdrawn if amount due as per order u/s 245D(4) is not paid within specified time or such further time as may granted by the Commission or if the applicant fails to comply with other conditions subject to which immunity is granted.

17.6 Sub-section (2) of section 245H provides that the Settlement Commission may withdraw the immunity granted if it is satisfied that the

applicant had during settlement proceedings concealed particulars material to settlement or has given false evidence.

### **18. Order to be conclusive- Section 245I**

18.1 Section 245I provides that every order passed u/s 245D(4) shall be conclusive as to matters stated therein. Further, no matter covered by such order can be reopened in any proceedings under the Act or any law for time being in force except as otherwise provided under Chapter XIX-A. The Order u/s 245D(4) is final and no appeal or revision is provided under the Act.

18.2 Once orders have been passed u/s. 245D(4), the department cannot take any action in respect of assessment years covered by settlement application. Even action to reopen assessment u/s. 147 cannot be taken by the department, whether or not the issue on basis of which notice is issued is dealt with in order u/s. 245D(4). If at all, the department can approach the ITSC with the information it has, seeking appropriate action u/s. 245H(2). (See Om Prakash Mittal 273 ITR 326 (SC), Omaxe Ltd 209 Taxman 443 (Del), CIT v. Diksha Singh 201 Taxman 378 (All) and Chandragiri Construction Co 334 ITR 211 (Mad)).

### **Rectification of mistake apparent from record**

18.3 In context of charging interest u/s. 234B, the hon'ble Supreme Court held in case of Brijlal, 328 ITR 477 that the ITSC cannot after passing order u/s. 245D(4) pass rectification order u/s. 154 to charge interest u/s. 234B. After the said judgment, to put the issue beyond doubt, sub-section 6B has been inserted to provide that ITSC can rectify any order within a period of 6 months of the month in which order u/s. 245D(4) has been passed.

### **19. 245HA – Abatement of proceedings**

19.1 Proceedings before the ITSC shall abate and proceedings shall revive before respective IT authority as if no application was made, if:

- i) Application is rejected u/s. 245D(1),
- ii) Application is declared invalid u/s. 245D(2C),

iii) Order u/s 245D(4) is not passed within 18 months of the end of month in which application is filed.

19.2 The IT authority shall be entitled to use all material produced by applicant as well as any information gathered by ITSC.

19.3 For determination of time limit for making assessment as well as for computing time for payment of interest on refund, the period from date of application to date of abatement shall be excluded.

#### **245HAA – credit for taxes paid**

19.4 Once proceedings abate as above, AO has to give credit for taxes paid at time of making application or before ITSC.

## **20. Conclusion**

The provisions of Chapter XIXA provides an avenue to tax payer to settle contentious issues in his tax assessment. The process of settlement can be set into motion only by an assessee. The condition of making full and true disclosure is prescribed both at entry point, as a precondition for valid application, and again at exit point, as a condition for granting immunities from penalty and prosecution. The importance of the application satisfying the said condition has been explained by the judgment of Supreme Court in Ajmera's case 326 ITR 642. The opportunity granted by the Legislature to an assessee to come clean can be availed off only if an assessee faithfully complies with the conditions prescribed and is amenable to mend his ways.