

Application for Settlement of Cases as Amended by Finance Act, 2011

Income-tax Settlement Commission had been set up under the Section 245B of Income-tax Act 1961, w.e.f. 1-4-1976 with its headquarters at New Delhi. Being a quasi judicial body, its establishment had been recommended by the Direct Taxes Enquiry Committee. The chief objective was to provide a body comprising persons of integrity and outstanding ability, having special knowledge of and experience in problems relating to direct taxes and business accounts. It started its journey with one Chairman and two members, but w.e.f. 10-9-1986, it can have as many Vice-Chairmen and Members as the Central Government thinks fit. This change was to augment the strength of the Commission, to facilitate quicker disposal of cases and to liquidate arrears of pending cases. Read on to know about the application for settlement of cases under the amended Finance Act, 2011...



CA. Thakur Repudaman

(The author is a member of the Institute and he may be contacted at thakur_repudaman@yahoo.com.)

Chapter XIX-A of the Act provides for the process and procedure to be followed by an assessee for determination of its tax liability, particularly, in respect of undisclosed income by the *Settlement Commission*. Chapter XIXA [Section 245A to 245L], incorporating the recommendations of the *Wanchoo Committee*, was enacted by the Taxation Laws (Amendment) Act, 1975 with effect from 1st April, 1976, as discussed below:

- (i) The Central Government has constituted a Settlement Commission, consisting of a Chairman and as many Vice-Chairmen and other members as the Central Government thinks fit. Where a member of the Central Board of Direct Taxes is appointed as the Chairman or a member of the Commission, he ceases to be a member of the Board.
- (ii) Such persons are appointed by 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.
- (iii) The Commission functions within the Department of Revenue and Banking of the Central Government.

A) Definition of Case [Section 245A (b)]

Case means any proceeding for assessment, being pending, on the date of an application under Section 245C(1), provided that a proceeding for —

- (i) Assessment or reassessment or recomputation under Section 147;

- (ii) Assessment or reassessment for any of the assessment years referred to in Clause (b) of Section 153A in case of a person referred to in Section 153A or Section 153C; [Note 1, *infra*]
- (iii) Assessment or reassessment for the assessment year referred to in Clause (b) of Section 153B(1) in case of a person referred to in Section 153A or Section 153C; [Note 1, *infra*]
- (iv) Making *fresh assessment* in pursuance of an order under Section 254 or 263 or 264, setting aside or cancelling an assessment, shall *not be a proceeding for assessment* for the purposes of this clause.

Example: An assessee's case is pending in appeal before the Income Tax Appellate Tribunal for the assessment year (AY) 2009-10. Since the appeal is pending, the assessee wishes to file an application to the Settlement Commission for disclosing additional income, the income tax on which is ₹55 lakh. Is it possible to make such application? Will your answer be different if the Tribunal sets aside the case and restores the matter to Commissioner (Appeals)?

Answer: By virtue of Section 245A (b): CASE means any proceeding for assessment, being pending, on the date of an application under Section 245C(1). The case covers only the case of pendency of assessment (including appeal before income tax authority). Hence, it is not possible to make an application for the Settlement Commission in case of pendency of appeal before ITAT. Even if the Tribunal sets aside the assessment and restores the matter to CIT (A), the application cannot be made to Settlement Commission, in view of specific exclusion, as contained in the definition under Section 245A(b).

NOTES:

1) The Finance Act, 2010 seeks to extend settlement of cases by Settlement Commission also in case of search or requisition, with effect from 1-6-2010. Pursuant to

————— ■ —————

Pursuant to the deletion of Clauses (ii) and (iii) under the proviso, now, the definition of CASE includes proceedings for assessment or reassessment resulting from a search (Section 132) or as a result of requisition (Section 132A) of books of account or other documents or other assets, initiated under the Act (pursuant to Section 153A/153C).

————— ■ —————

the deletion of Clauses (ii) and (iii) under the proviso, now, the definition of CASE includes proceedings for assessment or reassessment resulting from a search (Section 132) or as a result of requisition (Section 132A) of books of account or other documents or other assets, initiated under the Act (pursuant to Section 153A/153C).

Example: A search was carried out on 1-7-2011. Accordingly, the proceedings for assessment or reassessment could be for:

- a) 6 assessment years preceding the AY 2012-13, i.e. AY 2006-07 to AY 2011-12.
- b) AY relevant to the previous year in which the search was carried out, AY: 2012-13.

2) *Period for Pending Case:* Explanation below Section 245A (b) provides for the date of commencement of proceedings for assessment or reassessment.

To define such period, in relation to search or requisition case, Clause (iiia), as inserted by Finance Act, 2010 provides that in relation to proceedings for assessment or reassessment for 6 AYs prior to the assessment year relevant to previous year in which search or requisition took place, it shall be deemed to have commenced on the date of issue of notice (Section 153A) initiating the proceedings and concluded on the date on which the assessment is made. Accordingly, during that period it could be said that assessment proceedings are pending before an Assessing Officer.

In relation to assessment of the AY relevant to previous year in which the search or requisition took place, for determining the period Clause (iv) of Explanation would apply and in that case, it shall be deemed to have commenced from 1st day of AY and concluded on the date on which the assessment is made.

3) An application under Section 245C can be made, only if the assessment [including an appeal before CIT(A) & revision under Section 263/264 against the assessment] is pending on the date of such application, before income-tax authority. Hence, application under Section 245C cannot be made, during the pendency of a case before ITAT/Court because ITAT/Court is not an income-tax authority.

4) If neither assessment nor appeal/revision is pending against the assessment for an AY, but either an application under Section 154 or penalty proceeding is pending, or an appeal against such application/

the penalty order is pending, then an application cannot be made under Section 245C to the Settlement Commission for such AY.

5) Pending: *Rescuwear Corporation, In re. (2009) 177 Taxman 281 (ITSC)(SB)*

- a. For years in which returns have been filed, but have neither been processed under Section 143(1) nor notices have been issued under Section 143(2), proceedings for assessment would be deemed as pending as described under Section 245A(b).
- b. In view of the CBDT's Circular No.3 of 2008, dated. 12-3-2008, for years for which returns have been processed under Section 143(1) but no time is left for issue of notices under Section 143(2), proceedings for assessment can be said to be pending.
- c. Meaning and scope of *date of conclusion of proceedings* under Clause (iv) of Explanation to Section 245A(b) is that proceedings for assessment can be said to be pending before an Assessing Officer in respect of only those AYs for which he can still take action/initiate proceedings under the Act.
- d. If in a composite settlement application for several years, *assessment proceedings are pending for some assessment years* and are not pending for other years, application can be admitted for those years for which proceedings are pending and can be held as invalid for other years; *whole of application need not be declared as invalid in such case.*

B) Application for Settlement of Cases [Section 245C read with Rules 44C & 44CA and Form 34B & 34BA]

1) An assessee may, at any stage of a case, being pending, relating to him, make an application in form no. 34B along with fee of ₹500/-, and

- containing 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 and
- such other particulars as may be required by the Settlement Commission

Proviso to Section 245C(1):

- Provided that no such application shall be made unless — the additional amount of income-tax

payable on the income disclosed in the application exceeds

- ₹50 lakh, w.e.f. 1-6-2010 as per Finance Act, 2010, where proceedings for assessment or reassessment have been initiated as a result of search or as a result of requisition of books of account or other documents or any assets;
- ₹10 lakh, w.e.f. 1-6-2010 as per Finance Act, 2010 (before 1-6-2010: ₹3,00,000) in other cases; and

2) Such tax and the interest thereon, has been paid on or before the date of making the application and the proof of such payment is attached with the application.

B-1: Amendments by Finance Act, 2011

Finance Act, 2011 has widened the scope of applicant and extend the process or procedure for settlement of cases to a *related person* of an applicant to whom Section 153A or 153C (the *Existing Applicant*) w.e.f. 1-6-2011.

For the purpose, Section 245C(1) is amended as follows:

- (i) In the proviso, Clause (ia) is inserted to include the applicant (referred as *specified person* in the clause), who is related to the Existing Applicant; and
- (ii) Explanation is inserted below Section 245C(1) to define *specified person*.

B-1A: *As per Clause (ia):* Specified person can be an applicant, for settlement of case, if he fulfills the following conditions:

- (a) The specified person is related to the Existing Applicant, who has filed an application for settlement; and
- (b) The additional amount of income-tax payable on the income disclosed in the application is in excess of ₹10 lakh.

Thus, the specified person can also be an applicant, although, in his case the proceedings of search or requisition were not initiated.

Example: The business and residential premises of X were searched on April 4, 2011. After completion of search, the income-tax authorities have started assessment/reassessment proceedings in the case of X (as well as in the case of Y) under Section 153A to 153C. In this case, X can approach the Settlement Commission if the additional amount of income-tax payable on the income disclosed in the application exceeds ₹50 lakh. Y can also approach the Settlement

Commission if the following conditions are satisfied –

- i. If Y is *related* to X (meaning of the expression “related” is given below).
- ii. X has filed an application before the Settlement Commission (as mentioned earlier, X can approach the Settlement Commission only if the additional amount of income-tax payable on the income disclosed in the application exceeds ₹50 lakh).
- iii. Assessment/Reassessment proceedings have been started in the case of Y under Section 153A to 153C.
- iv. The additional amount of income-tax payable on the income disclosed in the settlement application by Y exceeds ₹10 lakh.

B-1B: Explanation Defining *Specified Person*: As stated above, the specified person must be related to the Existing Applicant. The nature of relationship prescribed or described in the Explanation is identical with the relationship prescribed or described for the purposes of Section 40A (2)(b) of the Act (providing for disallowance of payments to related parties in certain circumstances).

B-1C: Summary: Meaning of the expression Related

Status of X (Specified Person)	Status of Y (Related Person)
X is an Individual	Any relative (e.g. if Y is the husband, wife, brother or sister or any lineal ascendant or descendant of X)
X is a company, firm, association of persons or Hindu undivided family	Y is any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member
X has a business/profession	Y has a <i>substantial interest</i> in the business/profession of X or Y is a “relative” of a person who has a <i>substantial interest</i> in the business/profession of X
X has a business/profession	Y is a company, firm, AOP or HUF having a <i>substantial interest</i> in the business/profession of X. Alternatively, Y is a director, partner, or member of such company, firm, AOP or HUF, or any relative of such director, partner or member

Status of X (Specified Person)	Status of Y (Related Person)
X has a business/profession	Y is a company, firm, AOP or HUF and a director, partner, or member of Y has a <i>substantial interest</i> in the business/profession of X.
X is an Individual	Any relative of X has a <i>substantial interest</i> in the business/profession of Y.
X is a company, firm, association of persons or Hindu undivided family	Any director of X, partner of X, member of X or any relative of such director/partner/member has a <i>substantial interest</i> in the business/profession of X.

B-1C-1: The term relative [Section 2(41)] in relation to an individual means the husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

B-1C-2: A person is deemed to have *Substantial Interest* in the business or profession if such person is the beneficial owner of at least 20% equity capital (in the case of a company) or if such person is entitled to 20% profits of a concern (in any other case) at any time during the previous year. [Section 2(32)/Explanation (b) is inserted below Section 245C (1) by the Finance Act, 2011].

Notes

- i. An application, once made, cannot be withdrawn. [Section 245C(3)]
- ii. On the date of making an application under Section 245C(1) to the Settlement Commission, an assessee shall also intimate to the Assessing Officer, in Form No. 34BA, of having made such application to the said Commission.
- iii. *Ajmera Housing Corporation vs. CIT (2010) 193 Taxman 193 (SC)*
 - Section 245C (1) mandates *full and true* disclosure of the particulars of undisclosed income and the *manner* in which such income was derived and, therefore, unless the Settlement Commission records its satisfaction on this aspect, it will not have the jurisdiction to pass any order on the matter covered by the application.
 - Even when the Settlement Commission decides to proceed with the application,

it will not be denuded of its power to examine as to whether in his application under Section 245C (1), the assessee has made a *full and true* disclosure of his undisclosed income.

A *full and true* disclosure of income, which had not been previously disclosed by the assessee, being a pre-condition for a valid application under Section 245C(1), the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No. 11 of Form 34B.

C) Calculation of Additional Income Tax Payable [Section 245C (1A)]

Section 245C(1B): Where the income disclosed in the application relates to only one previous year —

Situations	Deemed total income	Additional income-tax payable
No Return Furnished	Income disclosed in the application	Tax on such disclosed income
Return Furnished	Aggregate of the total income returned and the income disclosed in the application	Tax calculated on such aggregate income less tax calculated on returned income

Section 245C(1D): Where the income disclosed in the application relates to more than one previous year, then the above procedure is to be adopted

Answer: Aggregate income	=	10,00,000+15,00,000+20,00,000
	=	₹45,00,000/-
Return income	=	₹10,00,000/-
Additional Income	=	₹35,00,000/-

Tax payable on such additional income = 30% of ₹35,00,000 + Cess
= ₹10,50,000 + ₹31,500

Additional income-tax payable under Section 245(1C) = ₹10,81,500/-

As the additional amount of income-tax payable exceeds ₹10,00,000/-, the application can be made under Section 245C. ■

Finance Act, 2011 has widened the scope of applicant and extend the process or procedure for settlement of cases to a related person of an applicant to whom Section 153A or 153C (the Existing Applicant) w.e.f. 1-6-2011.

in respect of each previous year and the aggregate of tax payable is to be calculated.

Examples:

1) Returned loss ₹3 crore Assessing Officer assessed the loss under Section 143(3) ₹2 crores assessee files an appeal to CIT(A) against the order of Assessing Officer. Further, the assessee wants to make an application to the Settlement Commission and declare the correct loss of ₹1 crore. Can he do so?

Answer: One of the conditions for making an application Section 245C is: The additional amount of income-tax payable on the income disclosed in the application exceeds ₹10 lakh, w.e.f. 1-6-2010. As nothing is payable on account of tax, hence, such application cannot be made under Section 245C.

2) An assessee, being an individual, filed a return of income showing an income of ₹10,00,000/-. The Assessing Officer detects income of ₹15,00,000/- during the assessment proceedings. Before the Assessing Officer passes the order under Section 143(3), the assessee files an application to the Settlement Commission disclosing ₹15,00,000/- and an additional income of ₹20,00,000/-.