IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "A" MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 1201/Mum/2013 (Assessment Year- 1990-91)

ACIT Central Circle-10, Room No. 802, 8th Floor, Old CGO Annexe Bldg., M.K. Road, Mumbai-400020.	**Vs.**	M/s Ajmera Housing Corporation "Citi Mall", Link Road, Andheri (W), Mumbai-53. **PAN: AAAFA3654J**
(Appellant)		(Respondent)

Revenue by	:	Shri R.P. Meena (DR)
Assessee by	:	Shri Prakash K. Jotwani (AR)
Date of hearing	:	23.04.2018
Date of Pronouncement	:	27.04.2018

<u>Order Under Section 254(1) of Income Tax Act</u>

<u>PER PAWAN SINGH, JUDICIAL MEMBER:</u>

1. This appeal by Revenue under section 253 of Income Tax Act is directed against the order of Commissioner (Appeals)-37, Mumbai dated 14th November 2012 for Assessment Year 1990-91. The appeal before the ld. CIT(A) arises from the order of Assessing Officer in order giving effect to the order of Income-tax Settlement Commission under section 245D(4) dated 03.05.2011and under section 154 dated 14.11.2011. The Revenue has raised the following grounds of appeal:

> On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned on the ground enumerated below:
>
> 1. "That on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the interest charged u/s. 220(2) amounting to Rs. 129,561,952/- without considering the final order of Hon'ble Settlement Commission reckoning the due date w.e.f. 01.05.1993, holding order being reframed afresh vide order of the Settlement Commission dated 03/05/2011

> without appreciating the fact that the order of the Hon'ble ITSC was equated with assessment order only."
>
> 2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that the initial order of Hon'ble ITSC was set aside only for limited purpose and as such the case clearly falls under para-2 of Board's circular no. 334 dated 03/04/1982 wherein interest u/s. 220(2) was to be computed with reference to the due date reckoned from original demand notice and with respect to the tax finally determined.

2. Brief facts of the case are that the assessee company filed its return of income for relevant year declaring total income of Rs. 4.00 lakhs (Aprox.). The assessment in case of assessee was finalized under section 143(3) on 31.03.1993 determining the total income of assessee at Rs. 4,01,97,683/-. In the assessment, the Assessing Officer made various addition/disallowances. The assessee filed appeal before the ld. CIT(A). Subsequently, during the pendency of appeal before the ld. CIT(A), the assessee along with its group companies filed applications under section 245D before Income Tax Settlement Commission on 17.11.1994. The Settlement Commission passed the final order under section 245D (4) on 29.01.1999, computing the total income of Rs. 55,34,393/- for Assessment Year 1990-91. Aggrieved by the order of Settlement Commission, the Revenue filed Writ Petition before the jurisdictional High Court. The order of Settlement Commission was set-aside by Hon'ble Bombay High Court vide order dated 28.07.2000 in Writ Petition No. 2191 of 1999. The assessee filed further appeal before the Hon'ble Supreme Court, the order of Hon'ble Bombay High Court dated 28.07.2000 was set-aside and the case was restored back to the Hon'ble Bombay High Court. The Hon'ble Bombay High Court in its order dated 08.07.2009 set-

aside the order of Settlement Commission with a direction to decide the application of the assessee afresh. The assessee again filed appeal before the Hon'ble Supreme Court and the matter was restored back to the Settlement Commission for deciding the issue afresh, vide order dated 20.08.2010 in Civil Appeal No. 6827-6848 of 2010. Therefore, Income-Tax Settlement Commission passed a fresh order on 10.04.2011, computing the total income of assessee for assessment year under consideration at Rs. 11,04,40,674/-. Consequent, upon the assessing officer passed an order dated 03.05.2011 for giving effect to the order of Income-tax Settlement Commission. The Assessing Officer worked out the interest under section 220(2) for Rs. 129,561,952/-. The assessee filed application under section 154 for seeking the rectification of the order dated 03.05.2011. the assessing officer rejected the application under section 154, vide its order dated 14.11.2011. Aggrieved by the order charging interest under section 220(2), and the order on application under section 154, dated 14.11.2014, the assessee filed appeal before the ld. CIT(A) and succeeded thereon. Thus, aggrieved by the order of ld. Commissioner (Appeals), the Revenue has filed the present appeal before this Tribunal.

3. We have heard learned Departmental representative (DR) for the revenue and learned Authorized Representative (AR) of the assessee and perused the material available on record. The ld. DR for the Revenue supported the order of Assessing Officer. The ld. DR for the Revenue submits that as per

Circular issued by Central Board of Direct Taxes (CBDT) i.e. Circular No. 334, dated 03.04.1982, the assessee is liable to pay interest w.e.f. 01.05.1993 on the income assessed by Income-tax Settlement Commission in its order dated 10.04.2011. The ld. DR for the Revenue submits that para 2.2 of the Circular No. 334, categorically made it clear that when the order passed by Assessing Officer is either varied or set-aside by appellate authority or restored either in part or wholly, the interest payable under section 220(2) has to be computed with reference to the due date reckoned from original demand notes and reference to the tax liability finally determined. The ld. DR for the Revenue emphasized that during the intervening period, there was no tax payable by the assessee under any operative order would make no difference to this portion. In support of his submission, the ld. DR for the revenue relied upon the decision of Bangalore Tribunal in J.P. Narayanaswamy Vs ACIT [2015] 63 taxmann.com 365 and the decision of Income Tax Settlement Commission, (Special Bench) in Home Metal & Mineral Corporation [193 ITR 57 ITSC- (SB)].

4. On the contrary, the ld. AR of the assessee supported the order of ld. CIT(A). The ld. AR of the assessee submits that the order of Income-tax Settlement Commission is only order which created liability, the order of the Assessing Officer is no more in existence, when the Settlement Commissioner passed the order on 10.04.2011. The ld. AR of the assessee further submits that provision of section 220(2) attract only when any demand is pending against

the assessee. No demand on account of tax liability was ever pending against the assessee. The ld. AR of the assessee further submits that in fact the present case is covered by the decision of Tribunal in assessee's group case in DCIT Vs. Vijay Nagar Corporation in ITA No. 1176, 1177/Mum/2013 dated 23.05.2016, wherein identical issue was decided by the Settlement Commission and the assessing office created liability under section 220(2), however, on appeal the liability to pay interest was deleted by ld. Commissioner (Appeals). On appeal before the ld. Tribunal, the order of ld. Commissioner (Appeals) was upheld. Thus, the ground of appeal raised by Revenue in the present appeal is covered in favour of assessee. The ld. AR of the assessee submits that copy of the decision of Vijay Nagar Corporation is already placed on record.

5. We have considered the rival submission of the parties and have gone through the orders of authorities below and the various documents and the order of superior Courts placed on record. We have noted that Income-tax Settlement Commission, while passing order under section 245D(4) on 10.04.2011, directed to make the computation of income as per Annexure-2 in the following manner:

"Name of the applicant : Ajmera Housing Corporation, Bombay
Status : Company
Asst. Year : 1990-91

COMPUTATION OF TOTAL INCOME

1. Returned Income	Rs. 397325
2. Additions as per this order including SOF	Rs. 109857956
3. Add: Disallowance out of expenses claimed in P & L a/c (As per order u/s 245D(4) dt. 29.01.1999).	Rs. 185393

TOTAL INCOME Rs. 110440674

Since the details of tax payment are available with Assessing Officer, the AO shall compute the tax payable including surcharge and interest, if any, after giving credit for taxes already paid by the applicant and issue demand notice u/s 245D(6) of the Act."

6. In giving effect to the order of Income-tax Settlement Commission, the Assessing Officer worked out the interest under section 220(2) for Rs.12,95,61,952/- vide order dated 03.05.2011. The assessee filed an application under section 154 dated 18.08.2011 for rectification of working of interest under section 220(2). The application of assessee under section 154 was rejected by Assessing Officer on 14.11.2011. The assessee challenged both the order of Assessing Officer dated 03.05.2011and 14.11.2011. On the file of the ld. Commissioner (Appeals), the appeal against the working of interest under section 220(2) was registered being Appeal No. CIT(A) 37/I.T. No. 313/DCCC-10/11-12 and other Appeal against the order on application under section 154 was registered as CIT(A) 37/I.T. No. 415/DCCC-10/11-12. The ld. Commissioner (Appeals) dismissed the Appeal No. CIT(A) 37/I.T. No.313/DCCC-10/11-12, holding that charging of interest under section 220(2) is not appealable as per section 246A. However, in appeal against the order under section 154 in Appeal No. CIT(A) 37/I.T. No.415/DCCC-10/11-12, the ld. Commissioner (Appeals) deleted/set-aside the interest charged by Assessing Officer under section 220(2).
7. A careful reading of sub-section (1) of section 220 made it clear that in case any demand is raised under section 156, the assessee is liable to pay the same

within 30 days of service of the notice, in case the Assessing Officer has reason to believe that in case full period of 30 days is allowed, will be detrimental to the revenue, the Assessing Officer with the approval of Joint Commissioner may direct the sum specified in the notice shall be paid within period less than of 30 days. In case any appeal or any other proceeding is filed or initiated in respect of the amount specified in the notice, than such demand shall be deemed to be valid till the disposal of the appeal by the last appellate authority. Sub-section (2) make it clear that if amount specified in notice of demand under section 156 is not paid within period limited under sub-section (1), the assessee shall be liable to pay simple interest at one percent for every month or part of month comprised in period commencing from the day immediately following the end of period mentioned in the notice. The ld. AR of the assessee vehemently argued that no demand under section 156 of the Act was ever pending against the assessee. The demand was created only on passing of order by Income-tax Settlement Commission on 10.04.2011. The ld. DR has not disputed the fact that any demand under section 156 was ever pending against the assessee. In our view, the existence of any demand notice under section 156 which is one of the condition precedents for invoking sub-section (2) is necessary. In other word, if no demand is subsisting, no liability to pay interest under section 220(2) can arise. The Income-tax Settlement Commission while making computation of income made it clear to compute the tax payable including surcharge and interest, if any, after giving credit of the tax already paid. There is no express order of Income-tax Settlement Commission for charging interest under section 220(2). We have noted that in assessee's group case in Vijay Nagar Corporation, the Assessing Officer worked out the interest chargeable under section 220(2). However, on appeal before the ld. Commissioner (Appeals), the liability of interest created under section 220(2) was deleted/set-aside vide order dated 14.11.2012. The Revenue filed appeal before the Tribunal, wherein the order of ld. Commissioner (Appeals) dated 14.11.2012 was upheld in ITA No. 1176, 1177/Mum/2013 for Assessment Year 1991-92 & 1992-93 dated 25.05.2016 in DCIT Vs VijayNagar Corporation. with the following observation:

> "5. In view of the above the learned CIT(A) has decided the issue in favour of the assessee and accordingly the interest u/s.220(2) of the Act would be chargeable from passing the order dated 03.05.2011 passed by the Settlement Commissioner and the interest prior thereto is not liable to be chargeable in the eyes of law. The learned CIT(A) took the date 03 .05 .201 1 when the fresh order u/s.245D(4) was passed by the Settlement Commission assessing the income to the tune of Rs.81 ,92,874/- for A.Y.1 991-92 and Rs.79,21,543/- for A.Y. 1992-93. No doubt the earlier order passed by the Settlement Commissioner was under litigation. However the final order was passed by the Settlement Commissioner u/s. 2451)(4) on 31.12.1998 determining the income to the tune of Rs.21,91,030/- for the A.Y.1991-92 and Rs.21,19,492/- for the A.Y.1992-93. It is not under dispute that the said tax had already been paid within the prescribed period as

mentioned in the para no.2.5.7 in the CIT order. No doubt when the income was assessed on the basis of these orders then subsequently the interest is liable to be payable. The assessee has relied upon the ***law*** *settled in* [2012] 209 taxman 456 / 23 Hon 'ble High Court **of** Bombay in case **of** Commissioner **of** Income Tax - 1 Vs. Chika Overseas (P.) Ltd. and CBDT Circular no.334, F. No.44018181 dated 03.04.1982 and Hon 'ble Supreme Court iii Vikrant Tyres Ltd. 247 ITR 821 and Carbon Ltd. & Ors Vs. [1997 (6) SCC 479. *The* ***contents of the above said authority as well as circular has already been mentioned in the order CIT(A) therefore, there is no need to repeat the same. Moreover, apparently the demand was raised in pursuance of order dated 17.11.1994 u/s. 2451)(1) of the Act and in pursuance of final order dated 2451)(4) of the Act determining the income to the tune of Rs.21,91,030/- for the A.Y.1991-92 and Rs.21,19,492/- for the A.Y.1992-93 had already been paid which is not in dispute. Subsequently, the demand was raised in pursuance of order dated 03.05.2011 u/s 2451)(4) of the Act and this demand was not in knowledge of the assessee. When this demand was raised the same is required to be payable in accordance with law and not from the period of relevant assessment year i.e.1991-92 and 1992-93. Nothing new material brought before us to which it can be assumed that the learned CIT(A) has passed the order wrongly and illegally. The learned departmental representative nowhere produced any law before us, contrary to the finding of the learned CIT(A) in question. No tangible material was produced before us which may speak about the in-genuineness of the order passed by the learned CIT(A). In view of the above said circumstances we are of the view that the learned*** CIT(A) has passed the order judiciously and correctly which does not require to be interfere with at this appellate stage.

6.Accordingly both the appeals filed by the **revenue are hereby dismissed."**

8. Considering the fact of the case and the decision of Tribunal in assessee's group case in Vijay Nagar Corporation (supra), we find that the ground of appeal raised by Revenue is covered in favour of assessee. The ld. DR for the Revenue has not pointed out, if any appeal is filed before jurisdictional High Court, against the order of Tribunal in Vijay Nagar Corporation (supra). The Hon'ble Supreme Court in case of Vikrant Tyres Ltd. Vs ITO 247 ITR 821 held that when the assessee initially paid tax as per demand notice under section 156, but later got the tax refunded pursuant to the appellate order, and later on, the tax has become due from the assessee pursuant to the decision of High Court setting-aside the appellate order, the Revenue is not entitled to demand interest in regard to the amount which was refunded to the assessee on the appellate order, especially when assessee has promptly satisfied the demand made by Revenue in regard to the tax originally assessed. As we have already noted that no tax demand was pending under section 156, pursuant to the assessment order, the Revenue has not brought any material on record to show us that the assessee ever not paid the tax liability, in time, for the relevant Assessment Year. The case law cited by ld. DR for the Revenue are not applicable on the facts of the present case. In J.P. Narayanswamy Vs ACIT (supra) the entire tax as per the demand notice was

not paid in full within time allowed in the notice. In Om Metals Minerals (P.) Ltd. (supra) there was no payment of tax demanded in the notice under section 156. Thus, facts of both the cases relied by ld DR are at variance. As we have already held that no tax demand raised under section 156 was pending before Assessing Officer in the present appeal. Hence, the ratio of the case law relied by ld. AR are not applicable. In view of the above discussion, we do not find any merit in the ground of appeal raised by Revenue. The ld. Commissioner (Appeals) has passed the order after elaborate discussion of fact and law, which does not require any interference at our end.

9. In the result, appeal filed by Revenue is dismissed.

Order pronounced in the open court on 27th day of April 2018.

Sd/-	Sd/-
(G.S. PANNU)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 27/04/2018

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER

(Asstt.Registrar)

ITAT, Mumbai