Chapter-2

Settlement Commission: Composition, Jurisdiction and Powers
2.1 General

The Settlement Commission was set up in 1976 on the recommendation of the Wanchoo Committee\(^1\) to provide a high level Machinery for settlement of individual cases of tax evasion. The Commission was established as a forum for mediation and as a means to settle across the board tax liabilities in complicated cases thereby avoiding endless and prolonged litigation and consequential strain on the investigational resources of the Income-Tax Department. It was therefore intended to play a crucial role in settlement of cases with a resultant gain to revenue.

The principal bench of the Settlement Commission was established at New Delhi in 1976 and then additional benches in Kolkata, Mumbai, and Chennai were opened. And more benches are likely to be created at other places in near future. The principal bench consists of a Chairman and two other members and the other benches consist of a Vice-President and two other members. Each bench is assisted by a Secretary and his allied staff and a Director of Investigation, Additional Directors and allied staff.

The main objectives for setting up of the Settlement Commission were:

➢ To provide a machinery for errant tax payers to make a clean breast of their affairs through compromise and settlement.

\(^1\) K.Srinivasan & D.C.Taneja, Law of Tax Settlement and Disclosures, page 3-5.
➢ To ensure disclosure of modus operandi in tax evasion by errant tax payers wishing to avail of the settlement machinery.
➢ To reduce litigation.
➢ To ensure speedy collection of taxes at low cost.

2.2 Composition of the Settlement Commission

Under section 245B²,

(1) The Central Government shall constitute a commission to be called the Income-Tax Settlement Commission (hereafter referred as the “Settlement Commission”) for the settlement of cases.

(2) The Settlement Commission shall consist of a Chairman and two other members and shall function within the department of the Central Government dealing with direct taxes.

(3) The Chairman and other members of the Settlement Commission shall be appointed 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:

Provided that, where a member of the Board is appointed as the Chairman or as a member of the Settlement Commission, he shall cease to be a member of the Board:

Provided further that, until the members are appointed under this sub-section, it shall be competent for the Central Government to require, from time to time, any two members of the Board to serve as members of the Settlement Commission for such

² Section 245B of Income-Tax Act, 1961
period as the Central Government thinks fit, in addition to their duties as members of the Board.

Sanction of the President of India was accorded to the setting up of the Settlement Commission (Income-Tax & Wealth-Tax) in the Department of Revenue and Banking with effect from April 1, 1976.

The post of the Chairman of the Settlement Commission was also created with effect from April 1, 1976. Initially two member of the Central Board of Direct Taxes were required to serve as member of the Board, under the second proviso to sub-section (3).

Two posts of members of the Settlement Commission were created in December 1976. The qualification of the Chairman and members of the Settlement Commission mentioned in sub-section (3) have been prescribed on the basis of the recommendation of the Direct Tax Enquiry Committee (Wanchoo Committee). The recommendation 2.34 of the Committee read as under:

“2.34 The success of this measure will, to a very large extent, depend on the confidence which this Tribunal (the committee has recommended setting up of the Tribunal-words in bracket added) can inspire in the mind of the taxpayers as to its fairness and impartiality.

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For these reasons ‘we considered 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’.

Initially there was only one bench of Settlement Commission at Delhi. Three more benches, one at Mumbai, Kolkata and Chennai, have been set up in 1987. The bench at Delhi is known as Principal bench. The other three benches are known as additional benches.

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Chapter XIX A of the Income-Tax Act, 1961 (Section 245A to 245L) and chapter VA of the Wealth-Tax Act, 1957 (Section 22A to 22L), containing the entire gamut of provisions and procedures relating to the Settlement Commission, were introduced by the Taxation Laws (Amendment) Act 1975 and became effective from 1.4.1976.

FLOW CHART OF SETTLEMENT COMMISSION

Assessee

Settlement Commission

Commissioner of Income-Tax

After Assessee being heard

NO

For Action
Under
Provisions of
Acts

Commissioner of Income-Tax

For Compliance
Assessing Officer

YES

Settlement Commission

Commissioner of Income-Tax

With detailed report and
any other related
information other than
called for by Settlement
Commission

After passing Final
order, providing terms
for settlement
determining demand
of tax, penalty/interest
stating manner in
which payable

For Compliance

Disclosed income not
disclosed earlier before
Assessing Officer

For report within 45 days

For further report
within 45 days
enclosing all related
documents submitted
by applicant
2.3 Jurisdiction

It is quasi judicial body with unique features of its functioning. Some of the unique features of the functioning of the Commission may be noted as under:

i) This is the only institution independent of a Tax Administration Department to settle tax liability totally and finally to bring quietus to a dispute.

ii) All proceedings before the commission are transparent to the effect that admission of a case to be proceeded with for settlement as well as the final terms of settlement are set out and pronounced in the court.

iii) The commission is empowered to grant immunity from any offence under the Direct Taxes Acts or under any other Central Acts and also to grant immunity from imposition of penalty under the Income Tax and Wealth Tax Acts.

iv) All proceedings before the commission are confidential in the course of statutory arbitration for settlement.

v) The orders of the Commission are subject to only judicial review in terms of Articles 136 and 226 of the constitution\textsuperscript{8}.

vi) The constitution of the Commission is 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 specially laid down in the statute itself.

There is no time-limit for settlement of cases. The Income-tax Act, 1961 has provided various time-limits for completion of

assessments / re-assessments / rectification of mistakes or amendments etc. But there is no time-limit for Settlement Commission for disposal of the pending cases.

"Under section 245L, any proceeding before the Settlement Commission shall be deemed to be a judicial proceeding within the meaning of section 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860)".

This section provides that any proceeding under chapter XIX A is deemed to be judicial proceeding within the meaning of section 193 and 228 and for the purposes of section 196 of the Indian Penal Code, 1860. These sections read as follows:

"Under Section 193 of IPC, Punishment for false evidence:-
Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either for description for a term which may extended to seven years, and shall also be liable to fine;

According to section 193 of the Indian Penal Code, any person who intentionally give false evidence during the course of a judicial proceeding or fabricates false evidence for using the same in the course of the judicial proceeding, is liable to imprisonment as also fine. It, therefore, follows that any person who either gives false evidence or fabricates false evidence during the course of any proceeding before the Settlement Commission will face

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imprisonment and fine as provided for in section 193 of the Indian Penal Code.

And whoever intentionally gives or fabricates false evidence in any other case, shall be punished with the imprisonment of either description for a term which may be extended to three years, and shall also be liable to fine.

**Explanation 3 under section 193**: “An investigation directed by a Court of Justice according to law and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding though that investigation may not take place before a Court of Justice”\(^\text{10}\).

“Under Section 228\(^\text{11}\) of IPC, International insult or interruption to public servant sitting in judicial proceeding: - Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”

According to section 228 of the Indian Penal Code, any person who intentionally insults or causes any interruption to any public servant who is sitting in any stage of judicial proceeding will face imprisonment and also a fine. Since the proceeding before the Settlement Commission are considered to be judicial proceeding under section 245L, any person who insults or causes interruption to the Chairman or any of the members of the

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\(^\text{10}\) Section 193, of Indian Penal Code, 1860

\(^\text{11}\) Section 228, of Indian Penal Code, 1860
Settlement Commission will face imprisonment and / or fine as the case may be.

This section further provides that for purposes of section 196 of the Indian Penal Code, any proceeding before the Settlement Commission shall be deemed to be a judicial proceeding. Section 196 of the Indian Penal Code provides that any person who corruptly uses or attempts to use as true or genuine evidence, any evidence which he knows to be false shall be punished in the same way as if he gave or fabricated false evidence.

“Under Section 196\textsuperscript{12} of IPC, using evidence known to be false:-

Whoever corruptly uses or attempts to use as true or genuine or any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.”

Before concluding it will be worthwhile to refer to Explanation \textsuperscript{3}\textsuperscript{13} of section 193 of the Indian Penal Code. According to this Explanation, any investigation which is ordered to be done by the Court of Justice according to law is a stage of the judicial proceeding even though the investigation itself may not take place before the court. In other words, even if the investigation being conducted by the some other person on the orders of the court, such investigation is considered to be a part of the judicial proceeding and any person who gives false evidence will face the same consequences as if he has committed the offence before the court itself.

\textsuperscript{12} Section 196, of Indian Penal Code, 1860

\textsuperscript{13} Section 193(Explanation 3), of Indian Penal Code, 1860
The Settlement Commission has been empowered to order investigation before it finally decides a matter. It, therefore, the Settlement Commission has directed that investigation should be done by the Commissioner, for instance, any false evidence given or fabricated during the course of the proceeding before the Commissioner will result in punishment under section 193 because the investigation being done by the Commissioner is treated as part of the judicial proceeding before the Settlement Commission itself.

2.4 Powers of Settlement Commission

Under section 245F of Income-Tax, powers of Settlement Commission defined as follows:

1. In addition to the power conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in an income-tax authority under this Act.\(^\text{14}\)

2. Where an application made under section 245C has been allowed to be proceeded with under section 245D, the Settlement Commission shall, until an order is passed under subsection (4) of section 245D, have, subject to the provisions of sub-section (3) of that section, exclusive jurisdiction to exercise the power and perform the functions of an income tax authority under this Act in relation to the case.\(^\text{15}\).

3. Notwithstanding anything contained in sub-section (2) and in the absence of any express direction to the

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\(^{14}\) Sub-Section (1) of section 245F of Income-Tax Act, 1961

\(^{15}\) Sub-Section (2) of section 245F of Income-Tax Act, 1961
contrary by the Settlement Commission, nothing contained in this section shall affect the operation of any other provision of this Act requiring the applicant to pay tax on the basis of self-assessment or by way of advance tax in relation to the matters before the Settlement Commission\textsuperscript{16}.

(4) For the removal of doubt, it is here by declared that, in the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provision of the Act in so far as they relate to any matter other than those before the Settlement Commission\textsuperscript{17}.

(5) The Settlement Commission shall, subject to the provision of this Chapter, have power to regulate its own procedure (including the fixation of places and times of its meeting) and may act notwithstanding that all the members of the Settlement Commission are not present at any of its meetings\textsuperscript{18}.

2.4.1 \textit{Powers of income-tax authority vests in Commission}

Sub section (1) vests on the Settlement Commission with the powers which are vested in an income-tax authority under the 1961 Act in addition to the powers conferred on it under Chapter XIXA\textsuperscript{19} of the Act. (it may be clarified here that the powers which are

\textsuperscript{16} Sub-Section (3) of section 245F of Income-Tax Act, 1961
\textsuperscript{17} Sub-Section (4) of section 245F of Income-Tax Act, 1961
\textsuperscript{18} Sub-Section (5) of section 245F of Income-Tax Act, 1961
vested in the Settlement Commission are the power of an income
tax authority under the Act, in addition to the power under chapter
XIXA). Section 116 enumerates the income tax authorities which
are as under:

1. The Central Board of Direct Taxes constituted under the
   Central Board of Revenge Act, 1963.
2. Directors of Inspection.
3. Commissioners, Commissioners (Appeals) and Additional
   Commissioners.
4. Assistant Commissioners who may be either Appellate
   Assistant Commissioners or Inspecting Assistant
   Commissioners.
5. Income Tax officers.
6. Inspectors of Income tax.

It is relevant to point out here that a Tax Recovery Officer is
not included as an income tax authority and the significant of this
omission is discussed while dealing with sub-section (2). The
powers of income tax authority which is available to the case
pending before them. This has been made clear in sub-section (2). It
is, thus, clear that the Settlement Commission can exercise all the
powers of an income tax authority mentioned in section 116,
including the Central Board of Direct Taxes only in relation to a
case pending before it.

Such wide powers are necessary because, during the course
of hearing and examination of the evidence that may be placed
before it, the Settlement Commission may itself raised some further
issue may be raised before it by the applicant or the Income tax
Department and it may be necessary to adjudicate upon issues/
matters before the case can be settled. Thus the Settlement Commission exercising its power under section 245F (1), read with section 148 and 151, may, in appropriate cases, reopen the earlier 8 years or even 16 years assessment proceedings of the applicant (necessary under section 245E), nor the approval of the Central Board of Direct Taxes (necessary under section 151) \(^{20}\) is needed.

It may be mentioned here that action under sub-section (1) \(^{21}\) the Settlement Commission can simultaneously exercise the powers of more than one income tax authority. For example, in a case before the Settlement Commission, it may be considering some matters which were pending before the Income tax Officer, some before the Appellate Assistant Commissioner and some before the Commissioner. The Settlement Commission need not pass separate orders in relation to those matters but may dispose of all these proceeding or matters in the case by one order. For exercise these powers the matter need not be pending before separate authorities but in some cases the Settlement Commission may even pre-empt the requisite prior action of the lower authority thus obviating the necessity of exercise of power by the lower authority.

2.4.2 *Exclusive jurisdiction of Commission:*

Sub-section (2) \(^{22}\) lays down that the Settlement Commission shall have exclusive jurisdiction to exercise powers and perform the functions of income tax authority under the Act in relation to the case which has been allowed to be proceeded with under

\(^{20}\) Section 151, of Income-Tax Act, 1961

\(^{21}\) Sub-Section (1) of section 245F of Income-Tax Act, 1961

\(^{22}\) Sub-Section (2) of section 245F of Income-Tax Act, 1961
section 245D (1) till an order under section 245D(4) is passed. The grant of such power is necessary because the exercise of power and jurisdiction over the case by another authority while the Settlement Commission is also seized of the case may create conflict of view and approach and might obstruct an effective settlement. This means that while the Settlement Commission is seized of a case, the jurisdiction of all income tax authorities in relation to that case ceases and the Settlement Commission alone will perform all the functions of all income tax authorities in relation to the case till the order under section 245D (4) is passed. This power is, however, subject to sub-section (3) where it has been clarified that the liability of an applicant to pay tax in relation to the matter before the Settlement Commission will not be affected unless there is any express direction to the contrary by the Settlement Commission. The position, therefore, is that so far as the matters which are not before the Settlement Commission, the normal procedure outlined in the Act will govern those matters unless the Settlement Commission has given any direction to the contrary.

2.4.3 Can Settlement Commission act as Tax Recovery Officer

Since sub-section (2)\textsuperscript{23} vests exclusive jurisdiction on the Settlement Commission to exercise the power and function of income tax authorities, the question that arises is whether the Settlement Commission cans also initiate recovery proceedings and then assume the jurisdiction and powers of Tax Recovery Officer. The Settlement Commission can assume jurisdiction only over pending proceedings, therefore, let us first examine the proceeding

\textsuperscript{23} Sub-Section (2) of section 245F of Income-Tax Act, 1961
which may be pending before the various income tax authorities. The main such pending proceeding could be as under:

1. An assessee voluntarily files return of income or the income tax Department issues a notice under section 139(2) and the assessment is pending.

2. The income tax Officer completes the assessment but the applicant files a rectification application which is pending.

3. The applicant goes in appeal/revision against the assessment and such appeal/revision is pending.

4. The income tax Officer initiates reassessment proceedings and these are pending before him.

5. The assessment has become final and penalty proceedings are pending.

6. The assessment has become final but the assessee has not paid the outstanding taxes and recovery proceedings have been started and pending.

7. Recovery certificate has been issued in a case and is pending even through assessment has not become final in the sense that rectification/appeal or revision proceedings are pending before the different income tax authorities.

In situation (1) above, since even the original assessment is pending, there is no question of any recovery proceedings and assuming the jurisdiction and exercising the powers of a Tax Recovery Officer.

In situation (2), (3) and (4) above recovery proceedings may have to be started because the demand may not have been stayed
and the time limit within which recovery proceedings may be
started may be fast approaching. The question is as to who should
initiate recovery proceedings? The answer is: the Income tax
Officer concerned, because, as has been discussed in the chapter
dealing with the definition of case, recovery proceedings, not being
proceedings for or in connection with assessment or reassessment,
do not fall within the jurisdiction of the Settlement Commission.

Even though under the provision of section 245D(4) “shall
provide for the terms of settlement including any demand by way
of tax penalty or interest, the manner in which any sum due under
the settlement shall be paid......”, the actual recovery of tax is not
the function of the Settlement Commission. This has to be done by
the income tax Officer/Tax Recovery Officer. Therefore, the
recovery certificate in this situation will have to be issued by the
Income tax Officer even though the Settlement Commission has
exclusive jurisdiction over the case in the matter of the pending
proceedings, mentioned at situation (2), (3) and (4) above.

In situation (5) above also, penalty proceedings not being
proceedings for or in connection with assessment or reassessment,
the Settlement Commission does not have any jurisdiction over
such a case.

In cases mentioned at situations (6) and (7), the Settlement
Commission cannot interfere in the matter of recovery because (a)
the Tax Recovery Officer not being one of income tax authorities as
enumerated in section 116, the Settlement Commission cannot
assume jurisdiction over the proceedings pending before him, and
(b) as mentioned earlier, recovery proceedings are not proceedings
for or in connection with assessment or reassessment, so they are outside the jurisdiction of the Settlement Commission.

2.4.4 **Can demand be stayed by Settlement Commission?**

It may however, he clarified that the Settlement Commission may on the application of an applicant stay the recovery of demand by the Income tax Officer i.e. before it is certified to the Tax Recovery Officer, because in doing so it will only be assuming the function of the Income tax Officer/Inspection Assistant Commissioner/Commissioner who can stay recovery by the Income tax Officer. Similarly, the Settlement Commission may, perhaps, also ask the Income tax Officer to request the Tax Recovery Officer to stay the recovery proceedings while the case is pending before the Settlement Commission.

2.4.5 **Interest under section 220(2)**

Another question that arises from the exercise of exclusive jurisdiction is with reference to the charging of interest under section 220(2). Can the Settlement Commission waive this interest while exercising power under sub section (2)\(^{25}\)? There can be two answers to this question. That first is that the Settlement Commission has the power to waive the interest under section 220(2). This is based on the argument that:

a. Section 245D(6) lays down that the order passed by the Settlement Commission under sub section (4) of section 245D shall provide for the terms of settlement, including any demand by way of tax, penalty or interest and the

\(^{24}\) Sub-Section (2) of section 220 of Income-Tax Act, 1961

\(^{25}\) Sub-Section (2) of section 245F of Income-Tax Act, 1961
manner in which any sum due under the Settlement shall be paid, and

b. Section 245J lays down that any sum specified in an order of Settlement passed under section 245D(4) may, subject the such conditions, if any, as may be specified therein, be recovered by the Income tax Officer having jurisdiction over the case.

This means that the Settlement Commission has the power to decide whether or not the interest is to be charged and how much to be charged and how it is to be recovered. In respect of the demand which has arisen not as a result of the order of the Settlement Commission but which is pending separately in respect of the case settled, the normal provisions of the Act would apply.

The second answer is that the Settlement Commission cannot waive the interest chargeable under section 220(2). The argument in support of this view is that the Settlement Commission while exercising the powers of an income tax authority cannot go beyond the powers which are vested in an income tax authority. Since the Act does not vest the power of waiver of interest under section 220(2) in an income tax authority but makes the charging of interest mandatory, the Settlement Commission cannot waive this interest.

Sub-section (2) of section 220 reads as under:

“(2) if the amount specified in any notice of demand under section 15626 is not paid within the period limited under subsection (1), the assessee shall be liable to pay simple interest at

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26 Section 156 of Income-Tax Act, 1961
twelve percent per annum, from the day commencing after the end of the period mentioned in sub-section (1):

Provided that, where as a result of an order under section 154, or section 155, or section 250, or section 254, or section 260, or section 262, or section 264, the amount on which interest was payable under this section had been reduced, the interest paid, if any, shall be refunded.”

Sub-section (3) of section 220 which empowers the income tax Officer to extend the time for payment of demand or allow it to be paid in instalments, start with the words “without prejudice to the provision contained in sub-section (2)...”. This means that extending the time for payment of demand or allowing it to be paid in instalment of imposing any condition for payment, will not affect the provisions regarding charging of interest under section 220(2), which is mandatory.

The second answer being in consonance with the provision of the Act appears to be the correct one, viz., that the Settlement Commission does not have any power to waive interest chargeable under section 220(2).

2.4.6 Liability to pay interest- Date from which chargeable

The next question which arises from this discussion is from what date is the interest chargeable- whether from the date of the expiry of 35 days from the service of demand notice conquest to the order to the Settlement Commission or from the date on which the last instalment was due in terms of the Settlement Commission’s order?

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27 Section 154,155,250,254,260,262,264 of Income-Tax Act, 1961
It is submitted that in a case where the Settlement Commission has made the original assessment, the calculation of interest would start immediately after the expiry of 35 days from the service of notice of demand consequent upon the Settlement Commission’s orders, notwithstanding the fact that the Settlement Commission has allowed the demand to be paid in instalments. In a case where the assessment was originally completed by the Income tax Officer but the applicant had come before the Settlement Commission from the stage of appeal/revision, the calculation of interest would commence from the end of 35 days from the date of service of assessment order of the income tax Officer/demand notice and not from the date of the service of order of the Settlement Commission.

As the law stands at present, the income tax Officer does not seem to be empowered to reduce the interest in terms of the order of the Settlement Commission under section 245D(4). This appears to be a lacuna in the Act because while section 154, 155, 250, 254, 260, 262 and 264 have been mentioned in the proviso to section 220(2), section 245D (4) has not been mentioned. As a result of this, as far as interest under section 220 (2) is concerned, the income tax Officer cannot consider any reduction in demand as a result of the order of the Settlement Commission but will have to charge interest on the demand outstanding under the order from which the case has come before the Settlement Commission.

This omission, it is submitted, needs to be corrected by amendment of proviso the section 220(2).

28 Section 154,155,250,254,260,262,264 of Income-Tax Act, 1961
2.5 Settlement Commission’s power – When limited\textsuperscript{29}

Sub-section (3) provides an exception to the sweeping powers given to the Settlement Commission under sub-section (2). The exception related to demands of advance tax or self-assessment tax. But even here the Settlement Commission’s power to pass an order has not been fully taken away as is clear from the following words of the sub-section: “….. in the absence of any express direction to the contrary by the Settlement Commission...”. These words appear to authorize the Settlement Commission to ignore even this limitation when and if they think it proper or necessary to do so.

This means that in appropriate cases the Settlement Commission may even debar the income tax authority to collect advance or self assessment tax. The use of the words “... in the absence of any express direction to the contrary by the Settlement Commission... “Has to be understood with reference to the operation of provisions relation to self-assessment tax and advance tax. The directions of the Settlement Commission here cannot be with reference to any other matter except these two matters of collection of self assessment tax or advance tax.

2.5.1 Extension of Settlement Commission’s power

Sub section (4)\textsuperscript{30} grants wide powers to the Settlement Commission and is clarificatory in nature. It is laid down in this sub section that in the absence of “any express directions by the

\textsuperscript{29} Sub-Section (3) of section 245F of Income-Tax Act, 1961

\textsuperscript{30} Sub-Section (4) of section 245F of Income-Tax Act, 1961
Settlement Commission to the contrary, nothing in chapter XIXA\(^{31}\) shall affect the operation of the provisions of the income tax Act in so far as they relate to any matter other than those before the Settlement Commission”. Again this implies that the Settlement Commission can even give directions with reference to any matter which is not before it. This is a very wide power granted to a statutory authority and is, naturally, expected to be utilized in a judicial manner by any authority, which is the Settlement Commission here. It may, however, be pointed out that the Settlement Commission has been given a power to issue “direction” and not to “pass an order”. The two words differ only in degree. An “order” is more pre-emptory than a “direction”\(^{32}\).

Thus, the power given to the Settlement Commission under sub section (4) viz. issuing of directions to stop the operations of any provisions of the Act in relation even to those matters which are not before it, is an extraordinary power.

2.5.2 Regulation of Settlement Commission’s procedure

Sub-section (5)\(^{33}\) authorities the Settlement Commission to regulate it own procedure. The important provision of this sub section is that the meeting of the Settlement Commission can be held, that is, hearing of cases can take place even if all the members are not present in the meeting. It may be clarified here that meeting does not necessarily mean a hearing because the SettlementCommission.

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\(^{32}\) Bashiruddin Ashraf v Bihar Subai Sunni Majlis Awaqf AIR 1965 (SC) 1206

\(^{33}\) Sub-Section (5) of section 245F of Income-Tax Act, 1961
Commission does not have to give a hearing to an applicant to take a decision in each and every matter.

For example, where all the conditions for allowing the application to be proceeded with have been fulfilled and the Commissioner has no objection to the case being allowed to be heard, no hearing is required to be given to either the applicant or to the Commissioner. The question of admission of these cases can be decided by the Chairman and members of the Settlement Commission among themselves. However, when the Commissioner objects to the case being allowed to be proceeded with under section 245D (1A) or there might be other reasons for which the Settlement Commission decides not to allow the case to be proceeded with, a hearing is necessarily to be given to the applicant and the Commissioner, or both, as the case may be. For these hearing also the Settlement Commission may decide that it is not necessary for all the members to be present to take a decision.

However, one point may be made very clear here, which is, that a meeting of the Settlement Commission can take place or a hearing can be given be less than all the members of the Settlement Commission only when all the members, including the Chairman, are in position, i.e. the Settlement Commission is fully constituted but one or other member is unable to be present in the meeting or hearing owing to illness or for some other reason.

Let this situation be clarified further. If one of the members of the Settlement Commission retired and his replacement has not joined then it is submitted, the Settlement Commission cannot function and no hearing can be given because to lay down its own procedure the full membership of the Settlement Commission is
required to authorize less than the full strength to work and take a decision. If, however, out of the Chairman and two members, one member is on casual/earned leave or though not on leave but for some other reason is not able to sit at the hearing, the remaining members can hear the case and take a decision. In case these members differ between themselves, the matter has to be reheard by all the members constituting the Settlement Commission.

This raised a further question whether it is necessary that the Chairman should be present in each and every meeting because what the sub section says is “may act notwithstanding that all the members of the Settlement Commission are not present at the meeting”. In our view, for the interpretation of sub section (5), “member” includes Chairman also. Therefore, even if the Chairman is not present at a meeting but the two members are, meeting can be validly held and decision takes.

The working of sub section (5) appears to be contradictory to the provisions of section 245D (5) which reads: “The materials brought on record before the Settlement Commission shall be considered by all the members thereof before passing any order under sub section (4) and, in the case of a difference of opinion among the members, the opinion of the majority shall prevail and such order shall prevail and such order shall be expressed in terms of the view of the majority”.

However, since sub section (5) comes after section 245D (5) and authorizes the Settlement Commission to hold its meeting and transact its business even if all the members are not present, it, to our mind, overrides the provisions of section 245D (5). But as has been mentioned earlier, in case there is difference of opinion in the
meeting of the Settlement Commission in which all the members are not present, then another meeting will have to be held so that the majority opinion can be obtained. If a meeting is held by two members and a unanimous decision is taken another meeting is not necessary. In this context, rule 15 of the settlement commission (procedures) Rules may be seen.

2.6 **Power of Settlement Commission to grant immunity from prosecution and penalty**

Section 245 H (1)\(^{34}\), The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 245C has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person, subject to such condition as it may think fit to impose, immunity from prosecution for any offence under this Act or the Indian Penal Code (45 of 1860) or under any other Central Act for the item being in force and also from the imposition of any penalty under this Act, with respect to the case covered by the settlement.

(2)\(^{35}\) An immunity granted to a person under sub section (1) may, at any time, be withdrawn by the Settlement Commission, if it is satisfied that such person has not complied with the condition subject to which the immunity was granted or that such person had, in the course of the settlement proceeding, concealed any, particular material to the settlement. Or such person had given

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\(^{34}\) Sub-Section (1) of section 245H of Income-Tax Act, 1961

\(^{35}\) Sub-Section (2) of section 245H of Income-Tax Act, 1961
false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the settlement and shall also become liable to the imposition of any penalty under this Act to which such person would have been liable, had not such immunity been granted.

2.6.1 Immunity from prosecution and penalty

This section empowers the Settlement Commission to grant immunity from:

a) Prosecution under the income Tax Act, Indian Penal Code and all other Central Acts, and  
b) Imposition of penalty under the income tax Act.

2.6.2 Conditions for immunity

However, this immunity can be granted only if certain conditions are fulfilled. These conditions are that the applicant:

a) Co-operation with the Settlement Commission in the proceedings before it,  
b) Makes a full and true disclosure of his income, and  
c) Makes full disclosure of the manner in which such income has been derived.

It must be said at the outset that what is granted under this section is immunity from prosecution and penalty. According to The Readers’ Digest Great Encyclopaedia Dictionary, the word “immunity” as applicable the legal matter means “freedom from” and “exemption from”. In common parlance what is understood by immunity is a quality which prevents infection to take place. In

\footnote{36 Section 245H of Income-Tax Act, 1961}
legal terms, “infection” may be substituted by “prosecution or imposition of penalty”.

This would mean that immunity can be granted only before prosecution is launched or even if it has been launched; proceedings are pending before the courts. Once a person has been proceeded or a penalty has been imposed, no relief under the section can be granted.

Another point to be noted in this connection is that the use of the word “may” in the section, would suggest that the Settlement Commission has discretion to either grant or not grant immunity from penalty and prosecution provided the conditions laid down in the section are fulfilled. This discretion, no doubt, has to be judicially exercised. However, in connection with the cases under section 271 (4A) (now section 273A) some of the High Court\(^{37}\) have held that if the conditions laid down for waiver or reduction of penalties under that section are satisfied, the Commissioner has no discretion in the matter; he has to reduce or waive the penalty imposable\(^{38}\).

It appears that normally the relation of these decisions will be applicable to the decision of the Settlement Commission under section 245H with respect to the case covered by the settlement. In other words, if there is a nexus between the offence committed for which an applicant is being prosecuted or likely to be prosecuted under another Central Act and the concealed income disclosed before the Settlement Commission, there will be a case for granting

\(^{37}\) S. Sannaiah v. CIT [1974] 95 ITR 435 (Mysoor)

\(^{38}\) Shakuntla Mehra v CWT [1976] 102 ITR 301(Delhi)
immunity from prosecution under the Central Acts and for grant of immunity from penalty under the Income Tax Act.

Immunity under this section can be granted only if the applicant has made a full and true disclosure of his entire income before the Settlement Commission. The ordinary dictionary meaning of the word “disclose” is “remove cover from”, “expose to view”, “make known” and “reveal” and “disclosure” means “disclosing” and “thing disclosed”. This means that to obtain relief under this section, the disclosure should be before the Settlement Commission, i.e. the concealed income should not have been known or detected or found out earlier by the income tax Department.

For one thing if the concealment is known to the Department, there would be an objection from the Commissioner under section 245D (1A) and, secondly, the disclosure should be full and true meaning there by that when the applicant comes before the Settlement Commission he comes with a clean breast and does not hide or hold back anything from the Settlement Commission.

2.6.3 Types of cases where immunity indicated

It follows that this section would apply to the following types of cases which are only illustrative and not exhaustive:

1) The applicant has never been assessed to tax though he had been earning taxable income and there is a change of heart and he wants to make amends for his past behaviour and comes before the Settlement Commission and discloses the income earned and concealed in the earlier years.
2) The applicant has been assessed to income tax but on an income which is lower than his true income. Concealment of income by him has not been detected by Income Tax Department and he comes before the Settlement Commission disclosing his true income.

3) The returns of income submitted by an applicant have not been accepted by the Income Tax Department in the past and some addition have been made every year, the applicant comes before the Settlement Commission disclosing his true income and the commissioner does not raise any objection under section 245D (1A).

4) In the case at (3) above, even if the Commissioner raises an objection under section 245D (1A) but is overruled by the Settlement Commission and the case is allowed to be proceeded with.

5) Search and seizure operation has taken place in the case of an applicant but the Commissioner does not raise an objection under section 245(1A) because either there is no material or there is incomplete material to come to the conclusion that a concealment has been established or is likely to be established.

6) The Department discovers cash credits and the applicant either fails to prove the source or his explanation regarding the source is not accepted but there is nothing on record to say definitely that the cash credit represents the applicant’s income from a definite source.

In these cases the Settlement Commission may grant immunity from prosecution or imposition of penalty.
2.6.4 No immunity indicated

There may, however, be a case where the applicant has a history of concealment year after year and comes before the Settlement Commission where also he does not disclose his full income in the statement of facts but gradually goes on disclosing some concealed income at different stages of proceedings before the Settlement Commission. In such a case it is submitted that the section would not have any application for the simple reason that it cannot be said that the applicant has either made a full and true disclosure or that he has cooperated with the Settlement Commission.

Granting of immunity in such cases was also far from the mind of the Wanchoo Committee which had made the recommendation to provide for immunity from prosecution and penalty to those tax-payers who had been following a wrong path but wanted to mend their ways and lead an honest life. In paragraph 2.32\textsuperscript{39} of their report the Wanchoo Committee has observed:

“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 resource of the department in case of doubtful

\textsuperscript{39} S.N.Nautial, T.S.Kasturi & K.D.Dwivedi, Settlement of Income-Tax cases, Page 102, Taxman(1980)
benefit to revenue. While needlessly proliferating litigation and holding up collections.” (Emphasis provided).

However, the Wanchoo Committee has cautioned in later paragraph as under;

"......We wish to emphasize that the Tribunal (meaning the Settlement Commission) will proceed with the petition filed by a taxpayer only if the department raises no objection to its petition being so entertained. We consider that this will be a salutary safeguard, because otherwise the Tribunal might become an escape route for tax evaders who have been caught and who are likely to be heavily penalized or prosecuted .”

(Words in the parenthesis added)

The application of this section is further limited by the condition that the condition that the assessee should also disclose to the Settlement Commission the modus operandi of earning concealment of income by other persons by using the same method may be unearthed.

Therefore, all the three condition have to be fulfilled by an applicant before the Settlement Commission then, immunity under this section can be granted.

It will be a repetition, that under this section no partial immunity from prosecution or imposition of penalty can be granted. That is, there cannot be any waiver or reduction of penalty under this section. If the Settlement Commission finds that penalty already imposed is to be waived or reduced or that the applicant should not be allowed to go scot free and some penalty should be imposed on him, then it can do so under the other provisions of the
Act such as section 271 (1)(c) or section 273 A\textsuperscript{40} but not under section 245H.

2.6.5 *Withdrawal of immunity:*-

Sub-section (2)\textsuperscript{41} provides that immunity granted to an applicant under sub-section (1) may be withdrawn at any time by the Settlement Commission if it is satisfied that

a. All the conditions subject to which the immunity was granted have not been fulfilled,

b. The disclosure made before the Settlement Commission was not full and complete and he had concealed any particulars of his income, or

c. Has obtained immunity on the basis of incorrect or false evidence.

2.6.6 *Consequence of withdrawal of immunity:*-

The consequence of withdrawal of immunity is that such a person:

a. May be tried for offence with respect to which the immunity was granted, or

b. May be tried for any other offence to which he appears to have been guilty in connection with the settlement, or

C. Shall also become liable to the imposition of any penalty under the 1922 Act or the 1961 Act, as the case may be, to which such person would have been liable had such immunity not been granted.

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\textsuperscript{40} Sub-Section (1c) of Section 271 & 273A of Income-Tax Act, 1961

\textsuperscript{41} Sub-Section (2) of Section 245H of Income-Tax Act, 1961