*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on:4th July, 2012
% *Date of Decision: 13th July, 2012*

\+ **W.P. (C) No.7975/2011**

M/S OMAXE LTD. THROUGH JAI BHAGWAN GOEL .....Petitioner
Through: Mr. Ajay Vohra, Ms. Kavita Jha and Mr. Amit Sachdeva, Advocates.

Versus

ASSTT. COMMISSIONER OF INCOME TAX AND ANR.. ....Respondent
Through: Mr. Abhishek Maratha, Sr. Standing Counsel with Ms. Anshul Sharma, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

1. This writ petition under Article 226/ 227 of the Constitution of India has been filed by M/s. Omaxe Limited, the petitioner herein, with the prayer to quash the notice dated 30.06.2010 issued by the respondent No.1 who is the Assistant Commissioner of Income Tax, Central Circle-4, New Delhi, under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') and the proceedings initiated pursuant to the notice including the order dated 03.10.2011 passed by him dismissing the petitioner's objections to the reopening of the assessment.

2. C.M. Application No. 19469/2011 was thereafter filed seeking amendment of the writ petition by adding certain grounds as well as prayer for issuance of a writ quashing the order dated 08.11.2011 passed by the respondent in the meantime under Section 147 read with Section 143(3) of the Act. The amended writ petition was taken on record by order dated 09.01.2012.

3. The brief facts giving rise to the filing of the writ petition may now be noted. The petitioner is a public limited company engaged in the business of real estate. It is assessed to income tax by the first respondent and falls under the administrative charge of the second respondent who is the CIT (Central)-III, New Delhi. On 22.09.2005 a search was carried out in the business premises of the petitioner under Section 132 of the Act. Thereafter the petitioner filed a return of income for the assessment year 2006-07 on 30.11.2006 declaring taxable income of ₹89,20,76,630/-. In the return, the petitioner claimed deduction of ₹78,99,00,509/- under Section 80IB (10) of the Act in respect of the profits of the housing projects undertaken by the petitioner. In the meantime the first respondent had issued notice on 19.04.2006 under Section 153A of the Act for the assessment years 2000-01 to 2005-06 and in response to those notices, the petitioner filed returns of income on 30.05.2007. In respect of the assessment year 2006-07 which is under consideration, the Assessing Officer issued inquiry notices under Section 142(1) and Section 143(2) of the Act along with detailed questionnaire. These notices were issued on 12.07.2007. Before the issue of such notices, the petitioner filed an application before the Income Tax Settlement Commission ('ITSC' for short) under Section 245C (1) of the Act on 31.05.2007. It was a consolidated application for settlement of the petitioner's income tax cases for the 7 assessment years, namely, assessment years 2000-01 to 2006-07. In this application the petitioner declared an aggregate additional income of ₹18.25 crores including additional income of ₹18,00,000/- for the assessment year 2006-07.

4. It would appear that the settlement application was allowed to be proceeded with by the ITSC and after considering the application, the report of the CIT and other materials, a final order of settlement was passed on 17.03.2008 under Section 245D (4) of the Act. In the final order the ITSC computed the total income of the petitioner as follows: -

Sl. No.	**A.Ys**	**Total Income**
1	2000-01	2,06,67,415
2	2001-02	1,95,76,928

3	2002-03	2,06,07,002
4	2003-04	5,29,59,964
5	2004-05	14,66,44,760
6	2005-06	43,98,19,780
7	2006-07	89,38,76,630
	TOTAL	**159,41,52,479**

5. On 30.06.2010 the Assessing Officer issued notice under Section 148 of the Act for the assessment year 2006-07 and called upon the petitioner to file its return of income. The notice was issued on the ground that income chargeable to tax had escaped assessment for the assessment year 2006-07. The reasons recorded for reopening the assessment have been filed before us in the amended writ petition. The reasons run into several pages and therefore we have not considered it necessary to reproduce the same verbatim herein. Suffice to note that the reasons recorded show that the Assessing Officer was of the opinion that the deduction under Section 801B (10) claimed by the assessee in the return of income, to the extent of ₹55,58,96,486/-, was not allowable. This amount related to 5 projects, namely, Omaxe City Lucknow, Omaxe City Sonepat, Omaxe Heights Sonepat and Omaxe Heights Faridabad. According to the reasons recorded by the Assessing Officer the commercial area in these projects was more than the limit prescribed by the Act and therefore the profits from these projects were not eligible for deduction. In paragraph 2 of the reasons recorded the Assessing Officer adverted to the order of the ITSC settling the income of the assessee for the assessment year 2006-07 at ₹89,38,76,630/-, but stated that the ITSC "did not adjudicate the issue of allowability or otherwise of the above deduction claimed by the assessee u/s 80IB (10). The assessee also did not offer any undisclosed income in this respect".

6. The petitioner filed detailed objections by letter dated 30.07.2010, a copy of which is annexed to the writ petition. Again it is not necessary to refer to these objections in detail and suffice to note that in this letter the attention of the first respondent was drawn to Section 245I of the Act which provided that the order of

settlement passed by the ITSC was conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided for, be reopened in any proceeding under the Act or under any other law for the time being in force. It was pointed out that all matters pertaining to the assessment order 2006-07 are covered by the order of the ITSC and they are conclusive and therefore the first respondent did not have jurisdiction to issue notice under Section 148 to reopen the assessment.

7. The Assessing Officer, apparently without meeting the objections raised by the petitioner to the reopening of the assessment, appears to have issued notice under Section 143(2) on 18.07.2011 calling for information from the petitioner in relation to the point taken in the notice under Section 148. The petitioner reiterated its objections by letter dated 18.08.2011. The Assessing Officer, by order dated 13.10.2011 rejected the objections taken by the petitioner against the assumption of jurisdiction and simultaneously issued a notice under Section 142(1). In the order rejecting the objections which runs into several pages the Assessing Officer (the first respondent herein) primarily held that the order of the ITSC was conclusive only with regard to 7 issues on which the petitioner filed the application for settlement, that the claim of deduction under Section 80IB (10) did not form the subject matter of consideration by the ITSC in its order and therefore there was no bar in initiating and proceeding with the reassessment proceedings. Reference was also made by the first respondent to Section 245F (4) to observe that no finality is attached to any matter which was not before the ITSC.

8. The petitioner thereafter filed the writ petition before this Court seeking quashing of the notice issued under Section 148 of the Act as well as the order passed by the first respondent rejecting the objections filed by the petitioner against the assumption of jurisdiction to reopen the assessment. The writ petition came up for hearing before this Court on 14.11.2011 on which date this Court was informed by the petitioner that immediately after the first respondent passed the order on 03.10.2011 rejecting the objections of the petitioner, he had also passed the reassessment order under Section 147 read with Section 143(3) of the Act on 08.11.2011. A prayer was

made to this Court on behalf of the petitioner to amend the writ petition. Permission was granted by this Court by order dated 09.12.2011. Thereafter the petitioner filed the amended writ petition which was taken on record by this Court on 09.01.2012. In the amended writ petition the petitioner has challenged, in addition to the notice issued under Section 148 and the order passed by the first respondent on 03.10.2011, the reassessment order passed on 08.11.2011 in which he has disallowed and added back an amount of ₹65,65,17,999/- under Section 80IB (10) and thereby enhancing the total income of the petitioner to ₹155,03,94,630/- as against the total income of ₹89,38,76,630/- computed by the ITSC under Section 245D (4). Certain further grounds have also been taken by the petitioner in the amended writ petition in addition to the grounds taken in the writ petition filed earlier. In the additional grounds the petitioner as *inter alia* challenged the reassessment order passed on 08.11.2011 as a "mere attempt by respondent No.1 to sit in judgment over the order passed by the Settlement Commissioner under Section 245D (4) of the Act" and has contended that it is wholly without jurisdiction. A specific prayer has also been added to the effect that the reassessment order dated 08.11.2011 may be quashed.

9. The main argument of the learned counsel for the petitioner is that once the ITSC has passed a final order of settlement for an assessment year under Section 245D (4), the assessment becomes conclusive and the Assessing Officer has no jurisdiction to reopen any matter relating to that assessment year under Section 148 of the Act. In order to appreciate the contention it is necessary to refer to a few provisions of the Act relating to the jurisdiction, powers etc. of the ITSC. Section 245C provide for application for settlement of cases and permits an assessee to approach the ITSC with a full and true disclosure of its income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived and the additional amount of income tax payable on such income and such other particulars as may be prescribed and have the case settled by the ITSC. The assessee can approach the ITSC "at any stage of a case relating to him" under sub-section (1). The word "case" was originally defined in clause (b) of Section 245A as "any proceeding under this Act for the

assessment or reassessment of any person in respect of any year or years, or by way of any appeal or revision in connection with such assessment or reassessment, which may be pending before an income tax authority on the date on which an application under sub-section (1) of Section 245C is made". With effect from 01.06.2007 the Finance Act, 2007 amended the definition of the word "case" to mean "any proceeding for assessment under this act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which the application under sub-section (i) of Section 245C is made". On receipt of application, the ITSC has to issue a notice to the applicant requiring him to explain why the application be allowed to be proceeded with and after hearing the applicant an order shall be passed permitting or rejecting the application to be proceeded with. This has to be done within a time frame. This order is to be passed under Section 245D (1). Sub-section (4) of the Section provides as under: -

> "*(4) After examination of the records and the report of the Commissioner, if any, received under –*
> *(i) sub-section (2B) or sub-section (3), or*
> *(ii) the provisions of sub-section (1) as they stood immediately before their amendment by the Finance Act, 2007,*
>
> *and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner.*"

10. Sub-section (6) of Section 245D provides that every order passed under sub-section (4) shall stipulate the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due in the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the ITSC that it has been obtained by fraud or misrepresentation of facts. Sub-section (7) provides that where a settlement becomes void, the proceedings with respect to the matters covered by the settlement

shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the ITSC and the income tax authority concerned may complete such proceedings at any time before the expiry of two years from the end of the financial order in which the settlement became void.

11. Section 245E empowers the ITSC, for reasons to be recorded in writing, to reopen any proceeding connected with the case which has been completed under the Act before the application under Section 245C was made. The caveat is that this can be done by the ITSC only for the proper disposal of the case pending before it. There are other conditions by which the power is hedged but they are not relevant for our purpose. Section 245F provides for the powers and procedures of the ITSC. Sub-section (1) says that in addition to the powers conferred upon it by Chapter XIX-A, the ITSC shall have all the powers which are vested in an income tax authority under this Act. Sub-section (4) declares, for the removal of doubt, 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 provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission". Section 245H empowers the ITSC to grant the assessee immunity from penalty and prosecution under the Act or under the IPC or any other Central Act in force. The immunity may be withdrawn if the assessee does not comply with the terms of the order of settlement or if it is shown that the assessee has conceded any particular material to the settlement or has given false evidence. Section 245I provides for the conclusiveness of the order of settlement. It says that every order of settlement passed under Section 245D (4) "*shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter be reopened in any proceeding under this Act or under any other law for the time being in force*".

12. A conjoint reading of the aforesaid provisions indicates that the ITSC is a high powered body vested with powers to settle the case of an assessee. The order of settlement is conclusive as expressly stated in Section 245I but the argument of the Revenue is that it is conclusive only with regard to matters stated in the order of

settlement and in respect of matters not stated therein, the Assessing Officer has the power to reopen the assessment. It is further submitted that the assessee did not approach the ITSC with regard to settlement of its claim for deduction under Section 80IB (10) of the Act and there was no adjudication of the said claim in the order of the ITSC. It is therefore submitted that the issue relating to deduction under Section 80IB (10) is not a matter covered by the order of the ITSC, and can be reopened by the Assessing Officer.

13. We are afraid that the submission of the Revenue overlooks the fact that in the return the assessee had claimed deduction of ₹78,99,00,509/- u/s. 80IB (10) and it was only after claiming such deduction that the net taxable income was declared at ₹89,20,76,630/-. The Assessing Officer issued notices under Section 143(2) and 142(1) on 12.07.2007 but even before the questionnaire was issued the petitioner had approached the Settlement Commission by an application filed on 31.05.2007. Under Section 245F(1), the ITSC, in addition to the powers conferred on it under Chapter XIX-A, shall have all the powers which are vested in an income-tax authority under the Act. By virtue of the provisions of Section 245F (2) once the application for settlement was filed and an order was passed allowing the application to be proceeded with, it was the ITSC which has the exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act relating to the case, till the final order of settlement is passed under Section 245D (4). Thus the moment the application of the assessee was allowed to be proceeded with by the ITSC till the final order of the settlement is passed on 17.03.2008, it was the ITSC which had exclusive jurisdiction in relation to the assessee's case. Therefore, all matters which could be examined by the Assessing Officer could be examined by the ITSC in these proceedings, including the assessee's claim for deduction under Section 80IB (10). The total income of the assessee for the assessment year 2006-07 has been computed by the ITSC at ₹89,38,76,630/- which is ₹18,00,000/- more than the income of ₹89,20,76,630/- declared by the petitioner, which figure is after the petitioner claimed deduction of ₹78,99,00,509/- under Section 80IB (10). It is irrelevant that no undisclosed income was offered by the petitioner in regard to the housing project. Again a harmonious

reading of the provisions of the statute would show that it does not postulate the existence of two orders, each of a different income tax authority, determining the total income of an assessee for the same assessment year. If the contention of the Revenue is accepted, not only will the finality of the order of settlement be disturbed, but it will also result in different orders relating to the same assessment year and relating to the same assessee being allowed to stand. We have grave doubts whether such a result, which is likely to create chaos and confusion in the tax administration could have been intended. The order of the ITSC can be reopened only in cases of fraud and misrepresentation and in no other case.

14. Moreover, as earlier pointed out, it is difficult to say that the deduction under Section 80IB (10) was not a matter covered by the order of the ITSC. In the return itself the assessee had claimed the deduction and it was also before the ITSC when the total income was determined by the ITSC in its final order, that took into consideration the deduction claimed and thus formed part of the various matters decided in the final order. Therefore, even factually it is not possible to accept the contention of the Revenue that the deduction under Section 80IB (10) was not a matter covered by the final order of settlement.

15. In the recent judgment of a Division Bench of the Bombay High Court in *Major Metals Ltd. v. Union of India and Ors.*, in W. P. No.397/2011 rendered on 22.02.2012, it was observed as follows: -

> "*……Parliament intended that the entire assessment is before the Settlement Commission. The Commission completes the process of assessment – as the decision in Brij Lal holds – as part of the settlement of the case. Until the Settlement Commission is seized of the proceedings, there is no parallel assessment contemplated in law. Comprehensiveness, finality and conclusiveness are the three attributes of the function assigned to the Commission. That object is achieved when the entire assessment is completed, as part of the jurisdiction to settle a case. To dilute this position would defeat the object which Parliament intended to achieve. Once an assessee moves the Settlement Commission, the statute expressly mandates that the application cannot be withdrawn. Unless the Commission in a given case decides to reject the application, it is entitled to resolve the case by settlement. An*

> *assessee who moves the Settlement Commission cannot be allowed to be anything other than fair and candid. Nor can he assert an unqualified right that the Settlement Commission should either accept what he discloses or leave him to another round of assessment before the Assessing Officer.*"

16. These observations fortify our conclusion. In fact in the earlier part of the judgment, the Bombay High Court also observed that the expression "case" itself is defined to mean any proceeding for assessment under the Act which is pending before the Assessing Officer. If the order of settlement is an assessment order and under Section 245I there is a finality attached to it, it is difficult to conceive of a situation where the Assessing Officer would be empowered to reopen the assessment of the income made by the ITSC on any ground. The only ground by which the finality of the order of the ITSC can be disturbed is where it is subsequently found by the ITSC itself that its order has been obtained by fraud or misrepresentation of facts. The learned counsel for the petitioner has also drawn our attention to a judgment of the Allahabad High Court in *Commissioner of Income Tax v. Smt. Diksha Singh*, (2012) 247 CTR (All) 215. The High Court held that since the legislature in their wisdom had conferred powers on the ITSC to reopen the proceedings in certain circumstances and to deal with the situation in the event of commission of fraud or misrepresentation and has thus left it to the ITSC to deal with such contingencies, it cannot be postulated that the Assessing Officer or any other income tax authority will have jurisdiction to assess the tax for the same financial year despite the finality and conclusiveness of the order of settlement. It was further held that there cannot be piecemeal determination of the income of an assessee for the relevant period, one by the ITSC and another by the assessing authority, and to hold otherwise would be to frustrate the very purpose of filing an application before the ITSC for settlement. This judgment also supports the view canvassed by the assessee.

17. The learned standing counsel for the Revenue, however, relied on the judgment of the Supreme Court in *CIT v. Damani Brothers*, (2003) 259 ITR 475, a judgment of a three – Judge Bench of the Supreme Court. He strongly relied on the observations

made in the judgment and reported at page 484 of the report. The observations on which reliance was placed by him are as follows: -

> "*While determining the total income the Commission has to take note of both the disclosed income and the undisclosed income. This is logical because there cannot be two different total incomes for the same assessment year, i.e., disclosed total income and undisclosed total income. Aggregation of both the disclosed and undisclosed income is also necessary because in several years different rates of tax for various slabs of income are provided. By way of an illustration, it may be said that supposing the disclosed income is rupees two lakhs and the undisclosed income is five lakhs, the rate of tax levied on rupees two lakhs may be one but may be different for an income of rupees seven lakhs and the undisclosed income is five lakhs, the rate of tax levied on rupees two lakhs may be one but may be different for an income of rupees seven lakhs. For the purpose of computation of taxes, there is a requirement to club both the disclosed and undisclosed income. But that does not empower the Commission to deal with the disclosed income before deciding to proceed with the petition.*"

18. In order to appreciate the impact of the observations it is necessary to read the entire paragraph in which the observations appear in light of the plea taken. In the cited case, the stand of the assessee was that before the ITSC decides to proceed with the matter, that is, before an order is passed under Section 245D (1), it exercises the functions of an income tax authority and it is only after deciding to proceed with the settlement application, that is only after an order under Section 245D (1) is passed, that it exercises a dual function – one as ITSC and the other as an income tax authority. This plea was considered untenable by the Supreme Court. The reason given by the Court, in its own words, are as under: -

> "*The plea is untenable for more reasons than one. Before the Commission decides to proceed with the petition, it cannot complete assessment in respect of a return which is pending before the Assessing Officer or even cannot act as an appellate or revisional authority. The return filed is in respect of disclosed income. Similar is the position vis-à-vis the appellate and the revisional authority. The petition before the Commission is in respect of undisclosed income, therefore, the situation is different till the Commission decides to proceed with the matter. That being the position, the income-tax authorities are free to proceed in the*

prescribed manner till the Commission decides to proceed with the petition."

Thus if the observations made by the Court in the paragraph at page 484 of the report are read as a whole, it would be clear that the Court was dealing with a plea which attributed an active role as an income tax authority to the ITSC even during the pendency of the application till an order under Section 245D (1) was passed and thereafter once an order was passed allowing the application to be proceeded, a role combining the functions of both an assessing authority and an authority settling the case. The Court repelled the plea by clarifying certain observations made by the Supreme Court in *CIT v. Express Newspapers Ltd.*, (1994) 206 ITR 443. What the learned standing counsel relied upon before us are observations of the Court clarifying the earlier observations made in the case of Express Newspapers Ltd. (supra). The gist and purport of the observations made by the Supreme Court in the case of Damani Brothers (supra), however, is not what the learned standing counsel would like us to accept. These observations of the Supreme Court in Damani Brothers (supra) do not at all support his plea that the matter relating to the deduction under Section 80IB (10) could not have been before the ITSC. The observations of the Supreme Court in Damani Brothers (supra) clarifying the observations of the Court in Express Newspapers Ltd. (supra) only mean that the ITSC does not deal with the disclosed income of the assessee even before it decides to proceed with the case by passing an order under Section 245D (1). It does not however imply that once an order is passed under the aforesaid provision, the ITSC does not deal with both the disclosed and undisclosed incomes of the assessee. On the contrary, it would inevitably follow that once a settlement application is allowed to be proceeded with, the entire case stands transferred to the ITSC and thereafter it is the ITSC alone which shall have exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act in relating to the case, as emphatically stated in sub-section (2) of Section 245F of the Act. In Damani Brothers (supra) the Supreme Court was explaining the position during the pendency of the settlement application till an order is passed under Section 245D (1) allowing the application to be proceeded with. In the case before us, we are not concerned with that position. The question here is what would be the

position when an order under Section 245D (4) is passed by the ITSC and whether such an order can be construed as one dealing with the entire gamut of the return filed by the assessee and the issues raised therein. While opining that the observations of the Supreme Court in Damani Brothers (supra) are not relevant to the factual situation or the legal dispute arising therefrom in the present case, we hold that since the exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority in relation to the case vests with the ITSC after an order is passed under Section 245D (1) till the final settlement order is passed under Section 245D (4), it is not possible to countenance a situation where it can be said that the assessee's claim for deduction under Section 80IB (10) was not the subject matter of the order passed by the ITSC under Section 245D (4). It is further necessary to keep in mind that Section 245B (3) requires that the ITSC shall be manned by "persons of integrity and outstanding ability having special knowledge of, and, experience in, problems relating to direct taxes and business accounts". The provisions of Chapter XIX-A suggest that all matters in relation to the case of the assessee shall be dealt with by the ITSC just as an assessing authority would deal with them while completing an assessment under Section 143 (3) of the Act. If this is the position, it would be difficult to sustain the argument of the revenue that the matter relating to the deduction under Section 80IB (10) was not the subject matter of the final order of settlement. It follows that the Assessing Officer had no jurisdiction to reopen the assessment for the assessment year 2006-07 by issuing a notice under Section 148 of the Act on the ground that the deduction was wrongly allowed.

20. The issue can also be viewed from another angle. Barring the exception of the provisions relating to appeal and revision, the Act does not contemplate or provide for disturbing the finality of an order or proceeding passed or completed by an income-tax authority, by any order or proceeding passed or initiated by a different income-tax authority. An assessment order passed by an Assessing Officer can be rectified or amended under Section 154 or Section 155 or reopened under Section 148 only by him, and by no other income-tax authority. Similarly, an assessment by way of settlement of a case, which is made by the ITSC, can be reopened only by the ITSC and that too only

in certain circumstances. Applying this general principle that runs through the Act, an assessment by way of a settlement order passed by the ITSC cannot be reopened by a different authority, viz., the Assessing Officer. The fact that the ITSC has not been designated as an "income-tax authority" under Section 116 of the Act makes the position '*a fortiori*'. Section 147 of the Act does not employ language that permits him to do so, nor are the powers and orders of the ITSC made subject to the provisions of Section 147. Section 147 does not appear to fit into the general scheme of Chapter XIX-A, which has been held to be a self contained code by the Supreme Court in *Brij Lal and Ors. v. CIT*, Jalandhar, (2010) 328 ITR 477 (SC).

21. For the above reasons, we quash the impugned notice issued by the first respondent under Section 148 of the Act for the assessment year 2006-07 and also the reassessment order passed under Section 147/ 143(3) of the Act on 08.11.2011 for the same assessment year. The writ petition is allowed with no order as to costs.

R.V.EASWAR, J

S. RAVINDRA BHAT, J

JULY 13, 2012
hs