

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3900 OF 2013

Commissioner of Income Tax (Central), Pune

Petitioner

versus

Income Tax Settlement Commission(ITSC),
Additional Bench, Mumbai

Respondent

Mr.Tejveer Singh for Petitioner.

Mr.Ravi Kadam, Senior Counsel with Mr.Ashish Kamat and
Mr.Nikhil Rajani i/by M/s.V.Deshpande & Co. for Respondent no.2.

CORAM : DR.D.Y.CHANDRACHUD AND
A.A.SAYED, JJ.

DATE : 13 June 2013

JUDGMENT - (PER : DR.D.Y.CHANDRACHUD, J.) :

1. Rule. Learned counsel for the Respondents waives service. By consent, the Rule is made returnable forthwith. The writ petition is taken up for hearing and final disposal, by consent and on the request of learned counsel.

2. The Revenue has in these proceedings under Article 226 of the Constitution challenged the validity of an order passed by the Settlement Commission under Section 245D of the Income Tax Act, 1961.

3. A search and seizure action under Section 132 of the Act was carried out at the business premises of the Second Respondent, which is a company by the name of ZF Steering Gear Ltd; on 13 November 2011. The case of the Department is that during the course of the search action, documents and papers relating to bogus purchases were seized and a systematic pattern of siphoning of money was found by inflating the purchases made by the assessee. For this purpose, it is alleged, a separate software module was developed within the software employed by the assessee by which goods inward notes and corresponding bill passing purchase vouchers were generated in respect of the items of purchase which were never issued for the business of the assessee. The case of the department is that cheques were issued on the basis of these goods inward notes and purchase vouchers to certain parties though there was no actual receipt of material in the stores. On this basis it is alleged that the assessee booked bogus purchases in the amount of Rs.97.51 crores during financial years 2005-2006 to 2009-2010. In the post search proceedings, the department initiated investigations in respect of the purchases made by the assessee from eighteen different parties which are alleged to have supplied material to the assessee. By a letter dated 21 January 2011 the assessee in order to "buy peace" with the Revenue declared on an ad-hoc basis an amount of Rs.45.00 crores towards the value of stock lying in its scrap yards before the DDIT (Investigation), Unit-I(1), Pune. This statement, however, was retracted on 31 May 2012.

4. The Second Respondent filed an application on 17 September

2011 before the Settlement Commission ("the Commission") for settlement of its case for A.Ys.2006-07 to 2012-2013 and disclosed an additional income of Rs.21.27 crores. The Commission passed an order on 21 September 2012 under Section 245D(1) allowing the application to be proceeded with. By a communication dated 25 September 2012, the Petitioner was called upon to furnish a report, inter alia, on the validity of the application for the relevant years; the correctness and adequacy of additional taxes and interest paid by the applicant and on compliance by the applicant. The Petitioner submitted a report dated 15 October 2012. The Commission passed an order thereupon under Section 245D(2C) on 9 November 2012.

5. During the course of the hearing before the Commission, the Revenue contended that the assessee had failed to fulfill the jurisdictional requirements namely : (i) of a true and full disclosure of income; and (ii) of the manner in which the income was earned. The contention of the department is that it is in possession of evidence to indicate that the purchases which were shown by the assessee (Rs.97.51 crores for the period relevant to A.Ys.2005-2006 to 2009-2010) were bogus against which the assessee had offered a meager amount of Rs.21.27 crores in the settlement application. Moreover, it was urged that though the assessee had filed a letter dated 27 November 2011 admitting to be in possession of undisclosed scrap worth Rs.45.00 crores after the search action, this declaration was retracted on 31 May 2012 without a specific reason for this retraction at a belated stage. This submission was controverted by the Second Respondent.

6. The Commission by its order, which is impugned in these proceedings, held that while under the provisions of the Act, the applicant is required to make a true and full disclosure of the income and to specify the manner in which it has been earned, the Commission at this stage cannot hold a view that the additional income offered in the statement of facts is not a true and full disclosure¹. The Commission held that whether there was a true and full disclosure was open for further examination in proceedings under Section 245D(4) and if it was revealed that the applicant had deliberately, fraudulently or in a like manner concealed facts or had not disclosed its full and true income, consequences shall follow. The Commission then held that unless it is established by a competent authority that the alleged purchases are all bogus, the application at this stage cannot be held to be invalid although the department may have in its possession certain evidence indicating the fact that the income has not been truly and fully disclosed or that the quantum of the income disclosed in the application in comparison to the claim of the department is meager. The Commission has come to the conclusion that the application is not invalid and has allowed it to proceed further.

7. Counsel for the Revenue submits that Section 245C(1), prescribes three mandatory and jurisdictional requirements, these being -

(i) That there must be a full and true disclosure of income which has not been disclosed before the assessing officer;

¹ At para no.7 of the Order of Settlement Commission

(ii) That the disclosure is of the manner in which the income has been derived; and

(iii) There is a disclosure of the additional amount of income tax payable on such income together with other particulars as may be prescribed.

The contention of the Revenue is that these jurisdictional requirements must be fulfilled at the stage of the proceeding under Section 245D(2C). It is urged that the object of the provisions of Chapter XIX-A is to enable an assessee, who has come clean with a full and true disclosure of his income and of the manner in which it has been derived, to move the Settlement Commission. An assessee who has not done so fails to fulfill the jurisdictional requirements and in consequence such an application - it is urged - is liable to be rejected under sub section 2C of Section 245D.

8. On the other hand, it has been urged by the Senior Counsel for the Second Respondent that the Commission is not bound to consider whether there has been a full and true disclosure at the stage of a proceeding under sub-section 2C of Section 245D. Such a determination, it is urged, can be made even at the stage of Section 245D(4) when the Commission examines the report submitted by the Commissioner either under sub-section 2B or sub-section 3 of Section 245D. It has been urged that though sub-section 6 of Section 245 provides for the contents of every order passed under sub-section

4, namely, that the order must provide for the terms of settlement including any demand by way of tax, penalty or interest; the order which is referred to in sub-section 6 is an order of settlement. In other words, in his submission it is only where an order under sub-section 4 provides for the terms of settlement that sub-section 6 would come into operation. Consequently it is open to the Commission even at the stage of a proceeding under sub-section 4 of Section 245D to decline to accede to a settlement application and a determination as to whether there was a full and true disclosure of income or of the manner in which it was derived can be deferred to that stage.

9. The rival submissions now fall for consideration.

10. Section 245C provides for an application for settlement of cases. A case is defined in sub-section 245A(b) to mean any proceeding for assessment under the Act, of any person in respect of any assessment year which may be pending before an assessing officer on the date on which an application under sub-section (1) of Section 245C is made. Section 245C(1) provides as follows :

"245C. (1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the assessing officer; the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided."

Sub-section 1 of Section 245C mandates that an application to the Commission to have a case settled must contain : (i) a full disclosure of the income which has not been disclosed before the assessing officer; (ii) the manner in which such income has been derived; and (iii) the additional amount of income tax payable on such income, besides such other particulars as may be prescribed. The application has to be disposed of by the Commission in the manner which is provided thereafter. The course of the proceedings which the Commission must follow, is hence provided for in the succeeding provisions. The Settlement Commission is a creature of the statute. The course of its proceedings must follow the path which the provisions of Chapter XIX A charts out. The Commission has its role and jurisdiction defined by the statute. The cases which can be brought for settlement, the jurisdiction of the Commission and the manner in which the Commission must proceed in carriage of the cases brought before it are circumscribed by statutory provisions. All these provisions have been enacted in order to subserve the object which Parliament intended to fulfill in enacting the provisions which are conceived in the public interest. The Commission must scrupulously adhere to the statute : a body which traces its origin and jurisdiction to the statute must not transcend the limits subject to which the statute confers jurisdiction.

11. Section 245D lays down the procedure which has to be followed on the receipt of an application under Section 245C. Sub-section 1 requires the Commission to issue a notice to the applicant to

explain why the application made by him should be allowed to be proceeded with. The Commission at that stage is empowered by an order in writing to reject the application or to allow the application to be proceeded with. Where an application has been allowed to be proceeded with under sub-section 1, clause (i) of Sub-section 2B mandates that the Commission shall call for a report from the Commissioner which the Commissioner has to furnish within a period of thirty days of the receipt of a communication from the Commission. What happens thereafter is stipulated in sub-section 2C of Section 245D which provides as follows :

"(2C) Where a report of the Commissioner called for under sub-section (2B) has been furnished within the period specified therein, the Settlement Commission may, on the basis of the report and within a period of fifteen days of the receipt of the report, by an order in writing, declare the application in question as invalid, and shall send the copy of such order to the applicant and the Commissioner.

Provided that an application shall not be declared invalid unless an opportunity has been given to the applicant of being heard.

Provided further that where the Commissioner has not furnished the report within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report of the Commissioner."

12. Hence, on considering the report of the Commissioner in pursuance of a direction under sub-section 2B of Section 245D, the Commission is empowered to reject an application as invalid after

giving an opportunity of being heard to the applicant. Where an application has not been declared to be invalid under sub-section 2C, sub-Section 3 of Section 245D empowers the Commission to call for the records from the Commissioner. After examination of the records, if the Commission is of the opinion that any further inquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made a further inquiry or investigation and to furnish a report on the matters covered by the application and any other matter relating to the case. Such a report has to be furnished by the Commissioner within ninety days of the receipt of a communication from the Commission. Next, sub-sections 4 and 6 of Section 245D are of relevance and they provide as follows :

"(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.

(5)

(6) Every order passed under sub-section (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 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 Settlement Commission that it has been obtained by fraud or misrepresentation of facts."

Hence, upon examining the report which was submitted by the Commissioner under sub-section 2B or sub-section 3, the Commission may in accordance with the provisions of the Act, pass such order as it thinks fit on the matters covered by the application and upon any other matter relating to the case not covered by the application, referred to in the report of the Commissioner. Sub-section 6 stipulates that **every order** passed under sub-section 4 **shall** provide for the terms of the settlement. The terms of settlement include any demand by way of tax, penalty or interest, the manner in which any amount due under the settlement shall be paid and all other matters to make the settlement effective. The order under Sub-section 4 must provide that the settlement would be void if it is subsequently found to have been obtained by fraud or misrepresentation.

13. The requirement that the applicant must make a full and true disclosure of the income; of the manner in which it has been derived and of the additional amount of income tax payable on such income, is a condition precedent to a valid application for settlement under

sub-section 1 of Section 245C. The jurisdiction of the Commission to proceed can be invoked on the basis of an application which strictly complies with the provisions of Section 245C(1). An applicant who comes before the Commission has to make a clean breast of the income which has not been disclosed before the assessing officer; the manner in which it was derived and the additional amount of income tax payable on the income. Before conferring upon an applicant a locus to apply for a settlement of a case. Parliament has mandated a full and true disclosure. An applicant cannot make a partial disclosure of his undisclosed income by taking a chance that the rest will escape scrutiny or, if it does not escape scrutiny of then making another disclosure. The forum of the Settlement Commission cannot be used to employ such strategies. The requirements contained in sub-section 1 of Section 245C must be fulfilled so that the jurisdiction of the Commission can be invoked. Unless the Applicant fulfills the jurisdictional requirements, the application would not be maintainable. In fact, the proviso to Section 245C also requires the payment of tax and interest which would have been paid under the Act had the income disclosed in the application been declared in the return of the income before the assessing officer. This payment has to be effected before the date of making the application and proof of such payment must be attached with the application.

14. On the receipt of an application, the first stage under sub-section 1 of Section 245D is upon a notice issued to the applicant following which the Commission is empowered either to reject the application or to allow the application to be proceeded with. Where

an application is rejected, nothing further remains. But where an application is allowed to be proceeded with, the Commission has to call for a report from the Commissioner. In the second stage, sub-section 2C enables the Commission upon considering the report, to declare by its order the application as invalid. If the Commission does not issue an order declaring the application as invalid, the Commission is still empowered to order a further investigation or inquiry and thereafter under sub-section 4, upon an examination of the records and the report of the Commissioner received under sub-section 2B or sub-section 3 to pass such orders as it thinks fit on the matters covered by the application and any other matter not covered by the application but referred to in the report of the Commissioner. Sub-section 6 provides that **every order** under Sub-section 4 shall provide for the terms of settlement which includes the demand by way of tax, penalty or interest, the manner in which the amount is to be paid and all other matters to make the settlement effective. The contents of an order under sub section 4 are specified in sub section 6.

15. Section 245F(2) stipulates that where an application made under Section 245C has been allowed to be proceeded with under Section 245D, the Commission shall until an order is passed under sub-section 4 of Section 245D, have exclusive jurisdiction to exercise the powers and perform the functions of an income-tax authority under this Act in relation to the case. Section 245HA provides for abatement of the proceedings before the Commission where, inter alia, an application has been rejected under Section 245D(1) or has been declared invalid under sub-section 2C of Section 245D. Upon

the abatement of a proceeding, the assessing officer has to dispose of the case as if no application had been made under Section 245C. The assessing officer is then entitled to use all material and information produced by the assessee before the Commission or the result of the inquiry held or evidence recorded by the Commission as if this has been produced before or recorded by him in the course of proceedings under the Act. Section 245K(2) stipulates that once an application has been allowed to be proceeded with under sub-Section 1 of Section 245D, such a person shall not be subsequently entitled to make an application under Section 245C. These provisions are indicative of the importance which Parliament has ascribed to the conditions attached to proceedings for cases of settlement before the Commission. Once a case has been allowed to proceed before the Commission, the Commission has, until an order is passed under sub-section 4 of Section 245D, exclusive jurisdiction to perform the functions of an income-tax authority and to exercise powers under the Act. Where an application has been rejected or declared as invalid under sub-sections 1 or 2C of Section 245D, the proceedings abate before the Commission upon which the consequence which has been envisaged in sub-sections 2 and 3 of Section 245HA would ensue.

16. The Supreme Court has held in **Ajmera Housing Corporation and another Vs. Commissioner of Income Tax**² that disclosure of full and true particulars of undisclosed income and the manner in which such income had been derived are the prerequisites for a valid application under Section 245C(1) of the Act. Moreover, unless the Commission records its satisfaction on this aspect, it will not have the

² (2010)326-ITR-642

jurisdiction to pass any order on the matter covered by the application.

17. In a judgment of a learned Single Judge of the Madras High Court in **V.M.Shaik Mohammed Rowther Vs. Settlement Commission (IT & WT) and others**³ the following principles were laid down :

"5. No assessee has a right to approach the Commission without disclosing or making a full and true disclosure of his income, as such disclosure is a necessary precondition for invoking the Commission's jurisdiction under S.245C. An application to the Commission is not intended to enable the dishonest assessee to continue his dishonest conduct and still claim the benefits which can be conferred by the Commission if the Commission were to ultimately make an order for settlement.

The Settlement Commission is not meant to be an optional forum chosen at the option of the assessee for the settlement of the tax liability of the assessee as also his liability for further proceedings or prosecution under this Act or other Acts, even while the assessee continues to be dishonest and deliberately fails to make a true and full disclosure of the extent of the income which he had not disclosed before the AO. The machinery of the Settlement Commission is available to the assessee who, after exhibiting his dishonest conduct by filing a return in which true income has not been disclosed, has availed of the chance to correct himself by making a true and full disclosure before the Commission. There is no right in the assessee to invoke the Commission's jurisdiction even while he continues with his dishonest conduct."

³ (1999)236-ITR-581 (Mad)

18. In a judgment of a Division Bench in **Hassan Ali Khan Vs. Settlement Commissioner and others**⁴, this Court held that the Commission must be satisfied from the report of the CIT and upon hearing the applicant that the application is not invalid under Section 245D(2C). Moreover, an application which is invalid would be non est from its inception :

"In that context if we examine the phraseology of Section 245D(2C) it would be clear firstly that the application must meet the requirements of Section 245C(1). In other words complying with the requirements of full and true disclosure and the manner in which such income has been derived. On complying with those requirements the next step would be to follow the procedure under Section 245D. It is not as if the moment an application is made and there is compliance of the requirements of Section 245D that the Commission is bound to entertain the application and allow it. The Commission has then to consider whether the application is invalid under Section 245D(2C). The Commission must be satisfied from the report of the CIT and on hearing the applicant that the application is not invalid. The Settlement Commission can treat the application as invalid meaning thereby non est if the applicant has not made a true and full disclosure and further must disclose how the income has been derived. The expression "invalid" will have to be given a meaning of `non est', in other words as if not made on and from the inception. If on the material it arrives at a conclusion even prima facie that there was no true and full disclosure, it has then a right to declare the application as invalid. Read in this context, there is power conferred on the Commission based on the material before it, to form an opinion if the party has concealed facts and/or not made true disclosure during a search operation."

4 (2008)299-ITR-127

19. The judgment of the Supreme Court in **Ajmera Housing Corporation** is a clear authority for the principle that in order to constitute a valid application under Section 245C(1), there must be a full and true disclosure of income which has not been disclosed and of the manner in which it has been derived besides a computation of the income tax payable on such undisclosed income. It is only upon the satisfaction of the Commission that the application meets the prerequisites of a valid application that the Commission shall have the jurisdiction to proceed. The Commission is bound to determine in the course of its proceedings under sub-section 2C of Section 245D as to whether the application is invalid. The Commission has to be satisfied from the report of the Commissioner and upon hearing the applicant that the application is not invalid. For, it is only then that the Commission has the jurisdiction to proceed.

20. The error in the order of the Commission in the present case lies in permitting the application to proceed without that satisfaction being recorded by the Commission, which is a fundamental aspect which goes to the root of its jurisdiction to entertain an application under Section 245C. The Commission has proceeded on the basis that at this stage it cannot hold a view that the income offered in the statement of facts is not a true and full disclosure. In the same vein, the Commission was of the view that the subject of true and full disclosure is open for examination in the proceedings under sub-section 4 of Section 245D. In holding this, the Commission has moved over to the stage of Section 245D(4) without entering upon the fundamental issue as to whether the application was or was not

invalid. This exercise had to be carried out by the Commission at the stage of the proceedings under sub-section 2C of Section 245D on the basis of the report submitted by the Commissioner and after hearing the applicant. The Commission has abdicated the discharge of that obligation at that stage, by deferring its consideration at a later stage. The Commission, in our view, was completely in error in holding that unless it is established by a competent authority that the purchases are all bogus, that the application at this stage could not be held to be invalid, though the department may have in its possession certain evidence indicating the fact that the income has not been truly and fully disclosed, or that the quantum of income disclosed in the application in comparison to the claim of the department is meager. The Commissioner had submitted his report under the provisions of sub section 2B of Section 245D. The Commission could not have declined to determine as to whether the application fulfilled the requirements or prerequisites of a valid application under Section 245C(1). We may clarify, however, that we are not for the purposes of this case inclined to hold that the Commission cannot at a later stage of the proceedings reject the application where facts come to its knowledge even subsequently that there is either a suppression of full and true material facts, a misstatement or failure on the part of the assessee to make a full and candid disclosure. The existence of such a power at a subsequent stage cannot obviate the discharge of a statutory duty to determine whether the jurisdictional requirements are fulfilled, once a report is received under sub section 2C of Section 245D. The Commission has to consider as to whether or not the application is invalid.

21. For these reasons we are of the view that the impugned order of the Settlement Commission is unsustainable and would have to be quashed and set aside. We accordingly allow the petition by setting aside the impugned order of the Settlement Commission dated 9 November 2012 and restore the proceedings back to the Commission for reconsideration in terms of the observations contained in this judgment. Rule is made absolute in the above terms. There shall be no order as to costs.

(DR.D.Y.CHANDRACHUD, J.)

(A.A.SAYED, J.)

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