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

+ WRIT PETITION (CIVIL) NO. 1900/2013

Date of decision: 18th September, 2013

MARC BATHING LUXURIES LTD.

..... Petitioner

Through Mr. Kaanan Kapur, Advocate.

versus

INCOME TAX SETTLEMENT COMMISSION & ANR.

..... Respondents

Through Mr. N.P. Sahni, Sr. Standing
Counsel.

WRIT PETITION (CIVIL) NO. 1921/2013

MARC SANITATION PRIVATE LTD.

..... Petitioner

Through Mr. Kaanan Kapur, Advocate.

versus

INCOME TAX SETTLEMENT COMMISSION & ORS.

..... Respondents

Through Mr. N.P. Sahni, Sr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL):

Marc Bathing Luxuries Limited and Marc Sanitation Private Limited, the two sister concerns, have invoked writ jurisdiction under Articles 226 and 227 of the Constitution of India to question common

order dated 1st March, 2013 passed by the Income Tax Settlement Commission under Section 245D(2C) of the Income Tax Act, 1961 (Act, for short). As the facts are inter-linked and the reasons given by the Settlement Commission are in a common order, we are disposing of these writ petitions by one order.

2. As the issues and arguments raised before us are limited and lie in a narrow compass, we deem it appropriate to refer to relevant and pivotal facts necessary to decide the two petitions. The petitioners herein had filed two applications under Section 245C of the Act relating to Assessment Years 2005-06 to 2012-13 on 31st December, 2012. At that time, assessment proceedings under Section 153A and 143(3) were pending before Additional Commissioner of Income Tax, Central Circle-10, New Delhi. By order dated 14th January, 2013 under Section 245D(1) of the Act, applications were allowed to be proceeded with and a report under Section 245D(2B) was sought from the concerned Commissioner of Income Tax. The Commissioner submitted reports on 15th February, 2013 and the two petitioners were heard on 22nd February, 2013 and 1st March, 2013. The petitioners had filed written submissions on 28th February, 2013 and 1st March, 2013.

3. The impugned order passed by the Settlement Commission is rather brief and we would like to reproduce paragraphs 4 to 6 of the said order to understand and appreciate the contention of the

petitioners. The said paragraphs which record and give reasons for dismissing the applications read as under:-

“4. After the admission of both the cases u/s 245D(1) of the IT Act vide order dated 14.1.2013 holding that the applicants have prima facie fulfilled the condition for admission, CIT Central-II, New Delhi furnished detailed reports u/s 245D(2B) of the I.T. Act dated 13.02.2013. In these reports CIT for detailed reasons and after examining the outcome of searches by the Central Excise Department and Income Tax Department on the applicants arrived at the figure of short disclosure by the applicants as under:-

1. M/s MARC Sanitation Pvt. Ltd.
Rs.22,85,09,933/-
2. M/s MARC Bathing Luxuries Ltd.
Rs.35,35,75,834/-.

5. In response to this, the applicants filed detailed submissions on 28.02.2013 and 01.03.2013. The cases of both the applicants were heard on 1.3.2013. The Learned Counsel for the applicants and learned CIT (DR) accompanied by A.O. strenuously argued their respective cases. Apart from the issues raised by the CIT in his reports it was noticed that in several respects the applicants were not maintaining their accounts as per law nor were they revealing the real income. In the case of M/s MARC Sanitation Pvt. Ltd. stock on the date of search was found short but no income on the business carried on outside the books of sale of this stock was declared. The applicant contended that stocks as per books have been inflated to paint a rosy picture before the banks. However at page 26 of the SOF para 19 it was seen that the applicant company had in Assessment Year 2012-13 reduced the level of stocks in the books of accounts by

Rs.5,88,14,889/- without proper entries in the respective years. It was also noticed that this deviation from the normal accounting principles was sought to be suppressed by the applicant and its C.A. in the audit report. In the case of M/s MARC Bathing Luxuries Ltd. also apart from the suppression of income pointed out by CIT it was also noticed that the applicant had filed Profit & Loss Account (actually manufacturing and trading account) which had neither the opening stock nor the closing stock disclosed in the accounts. This appears to be an attempt to complicate the accounts.

6. It is apparent that the applicants have indulged in suppression of Income even before the Settlement Commission where they are required to declare full and true income. The applicants have not come before the Commission with clean hands and have indulged in creative accounting to suppress their income.”

4. Learned counsel for the petitioners submits that the Settlement Commission has completely erred in not examining and dealing with the contentions raised, facts stated and submitted. He has referred to the written submissions filed on 28th February, 2013 and 1st March, 2013. Even oral submissions have not been adjudged and reflected upon. Our attention is drawn to paragraph 5 wherein it is recorded that the matter was strenuously argued by both sides. It is submitted by the petitioners that the finding of the tribunal in the case of Marc Sanitation Private Limited that the said company had wrongly reduced the level of stock in the books of accounts by Rs.5,88,14,889/- without

proper entries was not objected to and adversely commented upon by the Commissioner in his report. It is accordingly submitted that the Settlement Commission was swayed by factors which even the Commissioner did not consider, were relevant. The petitioner contends that stocks were inflated to paint a rosy picture before the bank. With regard to the objection noticed in the case of Marc Bathing Luxuries Limited, it is submitted that there is a gross error as an extract of the profit and loss account was separately filed and the Settlement Commission has ignored the full account/profit and loss account and computation of income with the opening and closing stock were duly on record. Thus, there was a lapse and obvious error on the part of the Settlement Commission in not considering the papers filed before them. The applications have been erroneously dismissed by recording and relying upon wrong and factually incorrect findings.

5. The two petitioners were subjected to search under the Central Excise Act, 1944 on 25th September, 2008 and by the Income Tax Department on 26th April, 2010.

6. After the search by the Excise Department, Marc Bathing Luxuries Limited had approached Customs and Central Excise Settlement Commission by way of an application on 30th May, 2011. The said application was disposed of vide order dated 1st November, 2011. In the order passed by the Settlement Commission, unaccounted

manufactured items were quantified and valued at Rs.20,11,59,509/-. The Settlement Commission while computing the said amount took the average cost of manufactured items at Rs.505.50 per kg. In the case of Marc Sanitation Private Limited, the assessee had surrendered unconcealed or unrecorded turnover of Rs.13,17,00,000/- before the adjudicating authority. They had paid excise duty of Rs.2,14,00,000/- on the said unrecorded turnover.

7. Learned counsel for the petitioners has drawn our attention to the statement of affairs filed before the Settlement Commission and it is pointed out that the entire amount of unaccounted turnover which became subject matter of orders passed by the Settlement Commission under the Excise Act or by the adjudicating authority were disclosed in the said applications. It is further submitted that the income tax department had substantially relied upon the documents and material seized during the search under the Excise Act. It is stated that the main dispute and the contention was not the quantum of turnover, though the said issue had been raised, but the gross profit rate, which should be applied on the unaccounted for but now declared turnover.

8. The petitioners had declared a GP rate of 10.21%, whereas the Revenue, i.e., Commissioner was claiming GP rate of 25% was appropriate and should be applied.

9. We have referred to the said contentions in some detail to

highlight the contentions/issues raised and which required consideration and application of mind. Aforesaid facts and the dispute inter se parties have not been reflected upon and adverted to in the impugned order. With some hesitation, we record that the order under challenge is cryptic and is not focused on the issues and contentions, which were raised by the petitioners and by the Commissioner. The Settlement Commission earlier had directed and decided to proceed with the applications on 14th January, 2013 in the two cases. They had set out points, which had to be adjudicated and decided. These included turnover of the two applicants for the assessment years covered, determination of the issues arising out of the stock, including valuation by the Department, allowability of excise duty for the Assessment Year 2009-10 and determination of year-wise additional income. All these factors and facts have been shunned and ignored. The Settlement Commission has rejected the applications for all assessment years, without referring to facts and issues relating to each year.

10. Learned counsel for the Revenue accepted that there were some factual errors in the impugned order like opening and closing stock were on record, and accepts that the Commissioner had not objected to inflation of stock issue. However, he has submitted that assessment proceedings under Section 153A read with Section 143(3) are pending

and all issues and questions can be thrashed out and decided there.

11. We cannot accept the said submission as the petitioners have a right to invoke jurisdiction of the Settlement Commission, which is provided under the statute, i.e., Income Tax Act. Once an application is filed, then the said application must be dealt with in accordance with law, i.e., refer to the contentions of the petitioners, the contention of the Revenue and then an objective, considered and a reasoned decision has to be taken. This is only when the stand of the two sides are fully noticed and considered before an order under Section 245D(2C) is passed. The impugned orders do not meet the said legal requirements.

12. The petitioners must come clean and be honest and admit their faults and cannot but declare their true and full undisclosed income. However, their plea and explanation that their declarations are genuine and truthful, cannot be rejected without a legitimate and fair consideration. The two searches were conducted in earlier years and not in the period relevant to the Assessment Year 2012-13. The Settlement Commission's order has not referred to any specific issues and documents or made references to the contentions of the Commissioner. Facts stated are incorrect or that Commissioner had not objected to the stock reduction is not adverted to. May be the applications deserve dismissal for the said reasons but full factual position should be noted, before opinion is formed whether there has

been full and true disclosure. There has been error and failure in the decision making process and the failure vitiates the order passed.

13. In view of the aforesaid discussion, we set aside the impugned order dated 1st March, 2013 in the case of the two petitioners and pass an order of remand. The proceedings will commence from the same stage as on 1st March, 2013 and after hearing the parties, a fresh order without being influenced by the earlier order will be passed. The Settlement Commission will deal with the application in accordance with law. The effect of the present order is that the settlement application will be treated as pending and necessary consequences in law will flow. Merits of the case will be examined, without being influenced by the present order. Nothing stated in this decision, will be treated as binding opinion on merits of the case of the parties.

14. The writ petitions are disposed of. No costs.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

SEPTEMBER 18, 2013
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