IT: Where at time of filing application before Settlement Commission, assessment proceedings were still pending and, moreover, disclosure of additional income appeared to be prima facie full and true, impugned order passed by Settlement Commission to proceed with application did not require any interference

[2015] 58 taxmann.com 264 (Bombay)

HIGH COURT OF BOMBAY

Commissioner of Income-tax

v.

Income Tax Settlement Commission*

S.C. DHARMADHIKARI AND A.K. MENON, JJ.
WRIT PETITION NO.1767 OF 2013
MAY 8, 2015

Section 245C, read with section 69C, of the Income-tax Act, 1961 - Settlement Commission - Application for settlement of cases (Applicability of) - Assessment years 2010-11 to 2012-13 - A scrutiny assessment was undertaken, in case of second respondent, i.e., assessee, showing that it had purchased materials/goods from various parties - In assessment proceedings, Assessing Officer made addition to assessee's income under section 69C taking a view that purchases made from some parties were bogus - Assessee filed an application under section 245C before Settlement Commission for assessment years in question - Settlement Commission passed an order under section 245D(2C) directing assessee's application for settlement to be proceeded with - It was found from records that at time of filing application before Settlement Commission, assessment proceedings were still pending - Moreover, Settlement Commission took a majority view that disclosure of additional income at stage at which application was brought before it appeared to be prima facie full and true - Whether in aforesaid circumstances, impugned direction issued by Settlement Commission could not be interfered with - Held, yes [Para 40] [In favour of assessee]

FACTS

- A scrutiny assessment was undertaken, in the case of second respondent *i.e.* assessee showing that it had purchased materials/goods from various parties. Some parties, whose names appeared in the list, were suspicious.
- The names of such suspicious, bogus dealers were put up on the website of the Maharashtra Sales Tax Department.
- Relying upon aforesaid information, the Assessing Officer made certain addition to assessee's income under section 69C.
- The Assessing Officer further noticed that certain unexplained amount was deposited in the bank account of assessee-firm. He thus made addition to assessee's income under section 68 as well.
- The assessee filed an application under section 245C before the Settlement

Commission for the assessment years in question.

- The Settlement Commission, in its order passed under section 245D(2C), in its majority view, agreed with the assessee firm by holding that the matter had not reached finality as yet and as such it was debatable whether the issues and the observation made by the petitioner would apply in the facts and circumstances of the case of the assessee firm.
- Accordingly, the Settlement Commission passed an order directing that assessee's application filed for settlement had to be proceeded with.
- The petitioner filed instant petition seeking a direction to quash the aforesaid order passed by the Settlement Commission.

HELD

- Section 245C is meant for those assessees who seek to disclose income not disclosed before the Assessing Officer including the manner in which such income has been derived, Chapter XIXA is a part of the Act and must be construed consistent with the overall scheme and object. Thus, it is to enable those assessees who want to disclose income not disclosed till then together with the manner in which the same income is derived and the provisions are not meant for such assessees who come after the event or who are guilty of a fraud perpetrated on the revenue. Therefore, once the Commission has been approached, then, it has to deal with the application in terms of the sections contained in the Chapter. The Commission has to ensure that the settlement is fair, prompt and independent. It must not enable those who wish to evade taxes or avoid the consequences following the same as provided by law and particularly by the Act. [Para 29]
- It is in that light that the impugned order passed by the Settlement Commission has been perused. It held that the assessee's representative took it through the entire application and submitted that the technical requirements of admission have been complied with. The application so filed before the Commission on 18-3-2013 and the intimation of filing, in Form B, has been given on the same date to the Assessing Officer. The Commission refers to the returns for assessment years in question and finds that for assessment year 2010-11 notice under section 143(2) was issued on 29-9-2011. Thus, it found that the returns of income for the subject assessment years were filed and the proceedings are pending from April, 2011, September, 2011 and April, 2012 for the respective assessment years. For assessment year 2010-11, the notice under section 143(2) was issued, but the assessee's representative pointed out that the Assessing Officer passed the order on 18-3-2013 and on the date on which the application before the Settlement Commission was filed, a copy of the order has not been served on the applicant/second respondent.
- Thus, it was asserted that proceedings for assessment under the Act in respect of the assessment years in question are pending. [Para 30]
- The Commission observed that the assessment order is signed on 18-3-2013 and has been dispatched by post to the Applicant/Respondent No. 2 on the same day in the morning, but it was returned unserved by the postal authorities to the Department. The Commission, therefore, perused the necessary records including the envelope and found that the service was refused but after the date on which the application for settlement was presented and filed before the Commission. It is the conclusion of the Commission that delivery of the envelope to the postal authorities cannot be termed as

service. Therefore, there is no force in the contention of revenue that the assessment order having been served, the proceedings for the assessment year, namely, 2010-11were not pending.

- As far as the assessment year 2011-12 is concerned, the Commission found in the majority order that no notice under section 143(2) has been issued to the second respondent. However, a notice under section 148 dated 15-3-2013 has been issued and served on the second respondent on 18-3-2013. The Commission also, therefore, noted the arguments of the assessee that the effective date of commencement of the reassessment proceedings and which would debar the second respondent from approaching the Settlement Commission needs consideration. It was submitted that the explanation for the purpose of clause (b) of section 245A(i) refers to proceedings for reassessment and they shall be deemed to have commenced from the date on which a notice under section 148 is issued.
- The argument before the Commission was that the word 'issued' should be interpreted as 'served'. After noticing this argument and other contentions, the majority concluded that the word 'issued' in the present context will have to be read as 'served'. Therefore, for assessment year 2011-12 as well, the Commission held that the proceedings are pending. For assessment year 2012-13, the return of income was filed on 25-9-2012, but no notice under section 143(2) has been issued. However, a notice under section 148 dated 15-3-2013 has been served on the assessee on 18-3-2013, which is the date of filing the application before the Commission. Even with regard thereto, the assessee argued that there could not have been any reassessment proceedings where the time limit to issue notice under section 143(2) still exists and assessment is not barred by limitation.
- However, for present purpose, there is no need to dwell on this aspect in further details, as the thrust of revenue's submissions is that even the Member who had given dissenting note has held that the application submitted under section 245C(1) for assessment years 2010-11and 2011-12 is not maintainable and the same is treated as inadmissible but for the assessment year 2012-13, there is a inconsistent and contradictory finding by the dissenting Member.
- In para 2 of his note, the Member holds that the notice under section 148 for assessment year 2011-12 has been served on 18-3-2013 and therefore proceedings for that assessment year are not pending. However, for assessment year 2012-13, he has without referring to the majority view agreed with it that the application is maintainable and can be admitted. Thus, on when same facts he holds that proceedings for assessment year 2011-12 are not maintainable, he ought to have agreed with the majority for both years, namely, assessment year 2011-12 and assessment year 2012-13. Therefore, according to the dissenting Member, the application for assessment year 2012-13 is admissible and can be proceeded with. [Para 31]
- The dissenting member was in error in holding that for the assessment year 2010-11 the proceedings for assessment under the Act are not pending. He has, wrongly concluded that the assessment order was issued for that assessment year on 18-3-2013 and the same has been dispatched. Such a dispatch would mean service. One is not required to go into any wider controversy once again, but the understanding of the dissenting member of section 27 of the General Clauses Act, 1897 leaves a lot to be desired. While it is true that the statement of the addressee that the notice was not served on him by the post may not in every case be enough to rebut the presumption,

but it must be established that where any Central Act or Regulation made after the commencement of the General Clauses Act,1897 authorises or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The act of giving a notice is not complete on mere dispatch of the notice and further that the word 'issued' is also used in the same sense as 'served'. [Para 32]

- Thus, the Commission was not inclined to refuse the application or not entertain it or admit it only on this ground. [Para 33]
- Once the second respondent/assessee has pointed out the course of events and date wise affidavit in reply, to which one does not find any rejoinder, then, even *qua* assessment year 2011-12, the proceedings can be said to be pending. It is pointed out as to how the notice under section 148 and dated 15-3-2013 is said to have been issued and served on the second respondent on 18-3-2013, but reliance is placed on the word 'issued' and thereafter to construe it as 'served'. There is a considerable debate about this and once the dissenting Member also has found that the application for settlement is partially admissible, then, all the more the majority view cannot be interfered with. The majority view as is found to be recorded and accepting the assessee's version does not require any further debate. [Para 34]
- The thrust of the arguments is that the assessee did not make a full and true disclosure of his income and therefore sub-section (1) of section 245C is not complied with. [Para 35]
- The Commission has in the majority view found that there were certain bank accounts which have not been disclosed by the assessee to the Assessing Officer. The resultant income worked out on the basis of the entries in these accounts have been accepted by the second Respondent and he has set out the manner of earning as well as made true and full disclosure of income. [Para 36]
- Once the majority holds that the conditions regarding threshold limits for the quantum of tax for additional income, payment of tax and interest thereupon and pendency of proceedings all are fulfilled, then, the application was not liable to be rejected on any technical ground. The majority has taken care while observing that the disclosure of additional income at the stage at which the application was brought before it appeared to be *prima facie* full and true. However, this aspect would require detailed examination in the subsequent proceedings and is left open.
- Thus, the Commission was not required to give a definite and conclusive finding at the threshold. Suffice it to hold that once it has come to the above conclusion, then, the Court is not required to go any further. It is clarified here that all observations by the majority, the dissenting Member and equally by Court are tentative and *prima facie*. That would not prevent the Commission from dealing with the application in accordance with law. Suffice it to further hold that the view taken by the majority cannot be termed as perverse or based on no material. It cannot be said to be arbitrary as well. In these circumstances, just because an alternate or other view is possible is not enough to interfere in the writ jurisdiction. [Para 40]
- As a result of the above discussion, there was no substance in the writ petition and, consequently, same was to be dismissed. [Para 48]

CASE REVIEW

CIT (Central) v. *Income Tax Settlement Commission (ITSC)* [2014] 365 ITR 68/[2013] 35 taxmann.com 443 (Bom.) (para 43); *Rasik Ramji Kamani* v. *S.K. Tripathi* [1993] 203 ITR 848/[1994] 76 Taxman 77 (Bom.) (para 46) and *V. M. Shaik Mohammed Rowther* v. *Settlement Commission* [1999] 236 ITR 581/102 Taxman 546 (Mad.) (para 47) *distinguished*.

CASES REFERRED TO

CIT (Central) v. *B.N. Bhattacharjee* [1979] 118 ITR 461 (SC) (para 18), *Rasik Ramji Kamani* v. *S.K. Tripathi* [1993] 203 ITR 848/[1994] 76 Taxman 77 (Bom.) (para 18), *CIT* v. *Express Newspapers Ltd.* [1994] 206 ITR 443/72 Taxman 438 (SC) (para 18), *V.M. Shaik Mohammed Rowther* v. *Settlement Commission* [1999] 236 ITR 581/102 Taxman 546 (Mad.) (para 18), *CIT* v. *Anjum M.H. Ghaswala* [2001] 252 ITR 1/119 Taxman 352 (SC) (para 18), *CIT (Central)* v. *Income Tax Settlement Commission* (ITSC) [2014] 365 ITR 68/[2013] 35 taxmann.com 443 (Bom.) (para 18), *CIT* v. *Income Tax Settlement Commission* [2000] 246 ITR 63/112 Taxman 523 (Bom.) (para 26), *K. Narasimhiah* v. *H.C. Singri Gowds* AIR 1966 SC 330 (para 26), *R.K. Upadhyaya* v. *Shanabhai P. Patel* [1987] 166 ITR 163/33 Taxman 229 (SC) (para 32) and *V. Raja Kumari* v. *P. Subbarama Naidu* AIR 2005 SC 109 (para 32).

P.C. Chhotaray *for the Petitioner.* **J.D. Mistri**, Senior Advocate and **Nishant Thakkar** *for the Respondent.*

JUDGMENT

S.C. Dharmadhikari, J. - Rule. Respondents waive service. By consent of the parties, Rule made returnable forthwith.

2. By this Writ Petition under Article 226 of the Constitution of India, the Petitioner has prayed for issuance of a writ of certiorari or writ in the nature of certiorari or any other appropriate writ, direction or order to quash and set aside orders passed on 26th March, 2013 and 10th May, 2013, Annexures 'I' and 'J' to the Writ Petition.

3. The principal relief is claimed in the following factual background:—

> A Commission entitled as Income Tax Settlement Commission has its office at Mumbai. The second Respondent is an Assessee, who is taxed for its income by the Mumbai Income Tax Commissionerate, the Petitioner before us. It is this second Respondent who approached the Respondent No. 1 Commission seeking its intervention and under the statutory scheme. This statutory scheme is evolved within the framework of the Income Tax Act, 1961 (hereinafter referred to as "the IT Act"). We shall make a reference to this scheme a little later.

4. From the record, it appears that in the assessment year 2010-11, a scrutiny assessment was undertaken, in which it was noticed that the second Respondent (for short "the Assessee") had purchased materials/goods from various parties. Some parties, whose names appeared in the list, were suspicious. It is alleged that they issued bogus bills. There was no delivery of goods nor was there a transaction described and defined as "sale" within the meaning of the then Bombay Sales Tax Act, 1959/Central Sales Tax Act, 1956/Maharashtra Value Added Tax Act, 2002. Thus, no transaction of the nature referred to in these enactments was reported. The names of such suspicious, bogus dealers were put up on the website of the Maharashtra Sales Tax Department.

5. To verify the genuineness of purchase transactions from one such party, namely, M/s. Nutan Metals, information under section 133(6) of the IT Act was called for but the said notice was returned back.

However, on 12th February, 2013, one Shri. Panchanmal Bokadia Proprietor of M/s. Nutan Metals made a statement before the Assessing Officer confirming that the said M/s. Nutan Metals issues bills for earning commission without giving delivery of goods. Accordingly, the Assessing Officer determined the highest credit balance at Rs.28,09,288/- as appearing on 10th December, 2009 in the ledger account of M/s. Nutan Metals as the peak credit and the same was thus treated as unexplained expenditure under section 69C of the IT Act and this amount was deemed to be income of the Assessee for the relevant assessment year 2010-11.

6. As per information received from the Director of Income Tax (Intelligence and Criminal Investigation) dated 8th March, 2013, one Shri. Mahendra S. Vora was found to have made huge cash deposits during financial year 2009-10. In a statement before the Income Tax Officer (Intelligence and Criminal Investigation) - II, Mumbai, Shri.Mahendra S. Vora admitted that the deposits in the bank account did not pertain to him but to the Assessee firm. Further, statement of Shri. Rasiklal M. Morakhia, partner in the Assessee firm was also recorded on the same day and the said Shri. Rasiklal M. Morakhia admitted that these deposits pertained to the Assessee firm and did not pertain to Shri. Mahendra S. Vora. The Assessing Officer, therefore, held that the cash deposits and other deposit as agreed by Shri. Mahendra S. Vora and subsequently agreed by Shri. Rasiklal M. Morakhia totaling Rs.1,86,48,101/- belonged to the Assessee firm and the same was added as income in the hands of the Assessee firm.

7. The Assessment order dated 18th March, 2013 for Assessment year 2010-11 was not only passed but also sent to the Assessee firm through Registered Speed Post on 18th March, 2013 itself and the necessary entry on the computerized system of the Department (AST) was also made on 18th March, 2013 itself.

8. For assessment year 2011-12, a notice under section 148 was issued on 15th March, 2013 and it was served on the Assessee firm on 18th March, 2013. Thus, both, the assessment for assessment year 2010-11 and the notice under section 148 for assessment year 2011-12 have been deemed to be served/served respectively on the Assessee firm before the Assessee filed application before the Settlement Commission under section 245C of the IT Act. Annexure 'B' is the copy of the notice issued under section 148 of the IT Act dated 15th March, 2013, Annexure 'C' is the copy of reasons recorded for issuance of notice under section 147 of the IT Act, Annexure 'D' is the copy of acknowledgment of service of notice under section 148 of the IT Act and Annexure 'E' is the copy of acknowledgment of the assessment order.

9. The Assessee firm, knowing fully well that the bogus purchases shown by the Assessee had been detected by the Income Tax Department for all the years, namely, assessment year 2010-11 to 2012-13 and also that concealed income in the form of cash deposits had been detected by the Department, filed a settlement application for assessment years 2010-11 to 2012-13 on 18th March, 2013 under section 245C of the IT Act. In this settlement application, additional income was declared as follows:—

Assessment Year	2010-11	-	1,05,25,216/-
Assessment Year	2011-12	-	8,97,111/-
Assessment Year	2012-13	-	41,72,337/-

10. The relevant facts, as received from the Director of Income Tax (Intelligence and Criminal Investigation) Mumbai etc., were brought to the notice of the Settlement Commission on 21st March, 2013 itself by a letter No. CIT-15/Rasiklal & Co./2013-14/1688 dated 19th March, 2013. Copy of the assessment order for assessment year 2010-11 in the case of the Assessee firm was also before the Settlement Commission on 21st March, 2013 itself. Thus, before the date of hearing under section 245D(1) of the IT Act on 22nd March, 2013, all the relevant facts were before the Settlement Commission. The Commission was requested to take a considered view in the matter but all these were simply brushed aside and not even have been commented upon in the order of the Settlement Commission passed under section 245D(1) of the IT Act. The settlement application made under section 245C of the IT Act was allowed to be proceeded with vide order dated 26th March, 2013 passed by the Settlement Commission under section 245D(1) of the IT Act, copy of which is annexed as Annexure 'H'. A copy of the said order

dated 26th March, 2013 was forwarded by the Settlement Commission to the Petitioner asking for a report under section 245D(2B) of the IT Act. In response to this letter, the required report under section 245D(2B) dated 1st May, 2013 was submitted to the Settlement Commission.

11. In the report of the Petitioner, filed under section 245D(2B) of the IT Act, it was brought to the notice of the Settlement Commission that there was no pending assessment for assessment year 2010-11, as the assessment order was already issued before the filing of the settlement application under section 245C of the IT Act. Further, notice under section 148 for assessment year 2011-12 was also served on the Assessee firm before the Assessee filed the application before the Settlement Commission under section 245C of the IT Act. Hence, for both these assessment years, the settlement application filed under section 245C of the IT Act was invalid. Further still, it was also brought to the notice of the Settlement Commission that bogus purchases shown by the Assessee had been detected by the Income Tax Department for all the years, namely, assessment years 2010-11 to 2012-13 and also that concealed income in the form of cash deposits had been detected by the Department before the filing of the said settlement application under section 245C of the IT Act, which was much more than the undisclosed income declared by the Assessee firm. It was pointed out to the Settlement Commission that even the copies of the detected bank accounts were not submitted by the applicant in the application for settlement and thus, the application did not disclose relevant crucial material facts. Hence, the Assessee firm had not fulfilled one of the main requirements for availing the jurisdiction of Settlement Commission under section 245(1), which was to make a full and true disclosure of its income which has not been disclosed before the Assessing Officer and to specify the manner in which such income has been derived. It is submitted that if at any stage including the stage of admission or otherwise, the Department could demonstrate that the Assessee has failed on any of these counts, the application as per settled law is liable to be thrown out by the Settlement Commission.

12. The Settlement Commission did not consider the arguments of the Petitioner and has brushed aside the case of the Petitioner. The order of the Settlement Commission dated 10th May, 2013 not declaring the application of the Assessee firm as invalid under section 245D(2C) of the IT Act is woefully silent on the objections raised by the Petitioner. The Settlement Commission, in its order passed under section 245D(2C), in its majority view, merely agreed with the Assessee firm by holding that the matter had not reached finality as yet and as such it was debatable whether the issues and the observation made by the Petitioner would apply in the facts and circumstances of the case of the Assessee firm. The dissenting note of the 3rd Member Shri. S. K. Mishra, which was in accordance with the law relating to settlement of disputes as envisaged under the IT Act, was erroneously shot down by the majority view of the Members of the Settlement Commission. It is in the above facts and circumstances that the Petitioner impugns the orders passed by the Settlement Commission.

13. Mr. Chhotaray learned Counsel appearing for the Petitioner submitted that the matter involves three assessment years, namely, 2010-11, 2011-12 and 2012-13. He submits that an assessment order was passed for assessment year 2010-11, in which, it was disclosed that the Assessee firm is engaged in the business of trading in ferrous and non-ferrous metals. It consist of three partners, namely Sevantilal M. Morakhia, Rasiklal M. Morakhia and Ashok M. Morakhia. Rasiklal M. Morakhia has 34% shares in the profits and losses of the firm, whereas, the others two have 33% each. During the year under consideration, the Assessee earned gross profit of 2.47% and net profit 0.94% on a turnover of Rs.7,62,41,888/-. Mr. Chhotaray submits that during the course of scrutiny, the Assessee submitted details and claimed purchases to the tune of Rs.7,75,62,590/- and sales of Rs.7,62,41,888/-. The major items purchased by the Assessee include stainless steel, P. bronze and aluminum pipes, tubes, rods, sheets plates etc. In order to verify the genuineness of purchases, notices were issued under section 133(6) of the IT Act to the two parties, namely Nutan Metals and Mumbai Metals. Notices were issued on 9th January, 2013. Mumbai Metals gave a written reply/submission on 23rd January, 2013 and filed copy of Ledger Account

of M/s. Rasiklal Kantilal and Company and its own return of income, which was filed for assessment years 2009-10 and 2010-11. It stated that there was no transaction with M/s. Rasiklal and Company for assessment year 2008-09. In respect of Nutan Metals, there was no compliance. On 2nd January, 2013, Shri.Dinesh Joshi C. A. attended and stated that all the details called for were filed but it was noticed that the notice under section 133(6) issued to this party was returned back by postal authorities. Therefore, the Assessee was directed by a letter in writing to attend the proceedings on 11th February, 2013 and that is how the Assessee's representative attended along with the proprietor of M/s. Nutan Metals. The summons was issued and served on the proprietor of Nutan Metals and Mr. Chhotaray relies upon the answers given by this person to some of the questions posed during the course of assessment proceedings. Mr. Chhotaray relied upon para 5.3 of the assessment order to urge that if the Assessee fails to substantiate any expenditure debited to the trading/profit and loss account with adequate supporting evidence and by establishing the genuineness of the purchases, then, it is apparent that the adverse inference drawn must be sustained. The Settlement Commission failed to notice that if the Assessment has proceeded and resulted in an assessment order, then, the application for settlement and made to the Commission in terms of section 245C of the IT Act was not maintainable. There was no pending assessment for assessment year 2010-11, as the assessment order was already issued before the filing of the settlement application under section 245 of the IT Act. Further, notice under section 148 of the IT Act for assessment year 2011-12 was also served on the Assessee firm before the Assessee filed the application. The pendency of proceedings under the IT Act is a *sine qua non* for the admission of the application before the Commission. Thus, when a notice had been served and assessment order has been passed for two assessment years referred above, the Settlement Commission had no jurisdiction to accept the application. Mr. Chhotaray criticised the approach of the Commission and submitted that the Commission should have not accepted the stand of the Assessee that he had not received the assessment order. In the circumstances, Mr. Chhotaray would submit that the Commission's order is *ex-facie* erroneous, without jurisdiction and illegal. Mr. Chhotaray relied upon the observations of the Assessing Officer in the assessment order. He also relied upon the reasons which have been recorded for issuance of notice under section 144 of the IT Act. According to Shri. Chhotaray, this would indicate as to how the Assessee indulged in manipulation of accounts. There was no genuine business activity and the alleged purchases were not backed by strong and reliable evidence. These are accommodation entries and as deposed by the concerned persons during the assessment proceedings. Shri. Mahendra S. Vora has admitted the fact that the details were bogus and were sufficient to accommodate parties like the Assessee.

14. Mr. Chhotaray then submits that the Commission's orders failed to take note of the fact that the Respondent No. 2 was required to make a full and true disclosure of income and the manner in which the same was derived. He should have, in the application itself, disclosed as to how conditions precedent for a valid application are satisfied. These conditions have to be strictly complied with. Section 245C of the IT Act mandates a full and true disclosure. Unless these conditions are complied with, the application of Respondent No. 2 under section 245C of the IT Act was not maintainable. The Respondent No. 2 has admitted and owned up the two undisclosed bank accounts. He had admitted the entries reflected in these bank accounts as far as capital and profit from the undisclosed trading. He offered the amounts to tax. However, copies of the accounts did not form part of the settlement application. The disclosure of undisclosed income for assessment year 2010-11 of Rs.1,05,25,216/-, of Rs.8,97,111/- for assessment year 2011-12 and Rs.41,72,337/- for assessment year 2012-13 was much less than what had already been detected by the Department as bogus purchases and concealed income by way of cash deposit. Further, the inquiry which was made by the Directorate of Intelligence and Criminal Investigation, Mumbai, which included recording of statement of both, of the Assessee Applicant and his accomplice, were not disclosed before the Settlement Commission. The fact that M/s. Nutan Metals had denied making sales to the Assessee and that all this was known to the Department was also hidden by Respondent No. 2 from the Settlement Commission. This entire material was brought before the Settlement Commission together

with supporting documents. There is also a copy of the assessment order, wherein the partner of Respondent No. 2/Assessee's admission was recorded on 1st February, 2013. This was also not in the application filed before the Settlement Commission. It is apparent from the procedure followed that an application before the Commission is in two parts. One is open and the other is confidential. The submissions of Mr. Chhotaray pertain to the open part of this application and which, according to him, is silent on the aforestated material facts. If the application was not truthful and complete, then, the Commission was not obliged to entertain it is the submission of Mr. Chhotaray.

15. In the written arguments tendered by Mr. Chhotaray, it is submitted that in the report under section 245D(2B) of the Commissioner to the Settlement Commission, the Commissioner had also highlighted that the Assessee had not made a full and true disclosure of its income in the settlement application. Along with his communication dated 19th March, 2013, the Commissioner had also enclosed a copy of the assessment order dated 18th March, 2013 passed by the Assessing Officer. The above two reports may kindly be perused. Two preconditions should be satisfied before proceeding with the settlement application. The Assessee should make a full and true disclosure of his income which has not been disclosed before the Assessing Officer and the Assessee should also disclose the manner in which such income has been derived. Through these two communications of the Commissioner to the Settlement Commission dated 19th March, 2013 and report under section 245D(2B) of the IT Act, it was brought to the notice of the Settlement Commission about the assessment made and that the Assessee had not made a full and true disclosure of its income and the manner of earning such income.

16. The Settlement Commission was apprised of the bogus purchases by these two communications of the Commissioner to the Settlement Commission, namely, the communication dated 19th March, 2013 and the report under section 245D(2B) of the IT Act. It was also argued during the hearing before the Settlement Commission. Therefore, the Settlement Commission had material before it to hold that the Assessee had not made full and true disclosure of income and the manner of earning the same. Therefore, the Settlement Commission should have rejected the application on the ground that the disclosure was not full and true.

17. Thus, the assessee had knowledge that the Department was aware of its bogus purchases when it made the settlement application. Yet, it did not make a disclosure of these transactions in the settlement application. The Settlement Commission also was aware through the two captioned reports of the Commissioner and at the hearing about these bogus purchases before it considered the applications for passing the orders under sections 245D(1) and 245D(2C). Still it held by a majority view that full and true disclosure has been made. As rightly held by the third dissenting Member, the Assessee had not made a full and true disclosure of income and the manner of earning the income.

18. In support of the above contentions, Mr. Chhotaray relies upon the following decisions:—

1. In the case of *CIT (Central)* v. *B.N. Bhattacharjee* [1979] 118 ITR 461 (SC)
2. In the case of *Rasik Ramji Kamani* v. *S.K. Tripathi* [1993] 203 ITR 848/[1994] 76 Taxman 77 (Bom.)
3. In the case of *CIT* v. *Express Newspapers Ltd.* [1994] 206 ITR 443/72 Taxman 438 (SC)
4. In the case of *V.M. Shaik Mohammed Rowther* v. *Settlement Commission* [1999] 236 ITR 581/102 Taxman 546 (Mad.)
5. In the case of *CIT* v. *Anjum M.H. Ghaswala* [2001] 52 ITR 1/119 Taxman 352 (SC)
6. Order in Writ Petition No. 3900 of 2013 Dated 13th June, 2013 passed by a Division Bench of this Court in the case of *CIT (Central)* v. *Income Tax*

19. On the other hand, Mr. Mistri-learned Senior Counsel appearing for the original Applicant/Respondent No. 2 Assessee submits that the Writ Petition has no merit and must be dismissed. This Court cannot substitute its views with that of the Settlement Commission unless it concludes that the order of the Settlement Commission is vitiated by arbitrariness, perversity and malafides. The Settlement Commission is wholly empowered to entertain and admit the application. While admitting and entertaining it, the Commission is not obliged to consider the merits or demerits of the application or the claims raised therein. At the stage at which the matter has been considered by the Commission it is required to express only a *prima facie* opinion. It found that the disclosure made was adequate and sufficient for the purpose of admitting the Assessee's application. Such tentative and *prima facie* view should not be interfered in the Writ Jurisdiction, as that would result in complete failure of the Settlement mechanism. Mr. Mistri then submitted that the entire matter proceeds on a misconception that the Settlement Commission, while admitting an application, is obliged to go into and consider minute details and the controversy or issue on merits. In the present case, the mechanism of settlement is being stalled by the Revenue itself. That will never serve the larger public interest. The learned Senior Counsel has invited our attention to the fact that the Writ Petition is premature. Secondly, it is submitted that it is erroneous to assume that the Assessee was aware of the assessment order under section 143(3) of the IT Act. That order was never served on the Assessee. Thirdly, the proceedings before the Settlement Commission, by way of an application, were initiated unmindful of any assessment order. The application was filed on 18th March, 2013. The circumstances in this regard have been narrated in the affidavit in reply. It is urged that the requisite details have been disclosed in the application. The declaration is truthful and honest. In any event, the Settlement Commission is obliged to decide the matter in accordance with law. When the matter proceeds further, the Revenue can point out to the Settlement Commission that on the basis of the disclosures made, no relief be granted to the present Respondent No.2/Assessee/Applicant. Mr. Mistri, therefore, relies upon the stand taken by the Respondent No. 2 in the affidavit and the findings of the Settlement Commission, to urge that the Writ Petition has no merits and must be dismissed.

20. In the rejoinder, Mr. Chhotaray submits that the present Writ Petition questions the jurisdiction of the Settlement Commission to entertain the application and which was not meeting the requirements set out in law. If the statutory requirements are not complied with, then, the Settlement Commission must dismiss the application at the threshold. In the present case, the Settlement Commission has erred in not noticing the fact that the assessment order is already passed and served on the Assessee. Secondly, the disclosure as made is not enough and in law for enabling the Settlement Commission to entertain the application/admit it. In the present case, Respondent No. 2 did not include the bank statements which formed the basis and other crucial documents in order to arrive at a true and full disclosure of income. The candid admission of the Respondent No. 2 that the bank statements were handed over to the Commission only on 25th March, 2013 confirms that the settlement application was not complete at the time of filing as vital documents were not incorporated therein.

21. Mr. Mistry has relied upon para 7 of the affidavit in reply to submit that there is no merit in the contentions of the Petitioner. It is pointed out that between 4th February, 2013 and 15th March, 2013, Respondent No. 2 has paid income tax in the sum of Rs.66,28,053/-. The breakup of the same is given in para 7, at page 94 of the paper book. It is specifically stated that till 15th March, 2013, no notice was received by Respondent No. 2 for either of the three assessment years, namely, 2010-11, 2011-12 and 2012-13. It is stated that on 15th March, 2013, the second Respondent firm paid the sum of Rs.500/- as the fee prescribed for filing the application before the Settlement Commission. It is stated that if the Assessing Officer claims to have made an order under section 143(3) of the IT Act for the assessment year 2010-11, then, Respondent No. 2 had no knowledge of the same at the time of filing of the application before the Settlement Commission. It is stated that this assessment order was dispatched at 8:49 p.m. (20:49 hours)

on 18th March, 2013. Relying upon Circular No. 3 of 2008 dated 12th March, 2008 issued by the Central Board of Direct Taxes (CBDT), it is urged that the service of the Assessment Order is the crucial and relevant aspect of the matter. Then, there is a grievance made as to how the Assessing Officer, who was supposed to have acknowledged a receipt of the application for settlement, sought to force the Assessee to accept a notice under section 148 of the IT Act. It has been stated and in this paragraph as to how the Commission acted on receipt of the application and passed an order on 10th May, 2013, but this Writ Petition has been filed after two months of the said order and with a view to delay the further proceedings before the Commission.

22. Mr. Mistry submits that there is a rejoinder affidavit, but in para 3 thereof, paras 1 to 7 of the affidavit in reply have been generally dealt with. There is no denial of the fact that the assessment order was not served on Respondent No. 2/Assessee. There is only a denial about forcing the Assessee to accept the notice under section 148 of the IT Act as alleged in the affidavit in reply. Therefore, Mr. Mistry would submit that this is a case where none of the submissions and canvassed on behalf of the Petitioner deserve to be accepted. It is urged that there is no merit in the Writ Petition and it deserves to be dismissed.

23. With the assistance of the learned Counsel appearing for both sides, we have perused the Writ Petition and its all Annexures and the affidavits placed on record.

24. At the outset, it must be indicated that there are limits on this Court's jurisdiction under Article 226 of the Constitution of India, in entertaining a Writ Petition challenging a preliminary or *prima facie* opinion of the Settlement Commission.

25. Mr. Chhotaray himself has relied upon a Judgment of the Hon'ble Supreme Court in the case of *Anjum M. H. Ghaswala* (*supra*). The Constitution Bench of the Hon'ble Supreme Court in this case has analysed the entire chapter and held as under:—

> " . . . . . .
>
> It is no doubt true that the terminology "settlement" has a very wide dictionary meaning and in the absence of a statutory definition generally the word "settlement" in sub-section (4) of section 245D would give the Commission sufficient power to arrive at a settlement which it deems fit, but when the statute qualifies such expression like "settlement" with mandatory words like "in accordance with the provisions of this Act" the width of the term "settlement" becomes subject to the mandate found in that section, which would mean that while a Commission has sufficient elbow room in assessing the income of the applicant under section 245D(4) it cannot make any order with a term of the settlement which would be in conflict with the mandatory provisions of the section like in the quantum and payment of tax and/or interest. In this view of the matter, we are of the opinion that assuming that there is any room for interpretation of the provisions of Part F of Chapter XVII and Chapter XIX and Chapter XIX-A, we would hold that it would not in any manner empower the Commission to either waive or reduce interest which is statutorily payable under the provisions of Part F of Chapter XVII."

26. The observations that Mr. Chhotaray relies upon and at page 15 of this report indicate that the intention of the legislature in introducing this section is to see that protracted proceedings before the authorities or in Courts are avoided by resorting to settlement of cases. Further, in an earlier decision of this Court and of a Division Bench in the case of *CIT* v. *Income Tax Settlement Commission* [2000] 246 ITR 63/112 Taxman 523, this Court concluded that it has limited powers and cannot interfere with the order of the Settlement Commission as if it is an Appellate Court. This Court held as under:—

> ". . . . . .
>
> *Findings on the rival submissions:*

The first question we have to consider is what is the scope of the writ jurisdiction under article 226 of the Constitution of India while examining the order of the Settlement Commission? Broadly speaking an essential feature of the writ of certiorari is that the control which is exercised through it over judicial or quasi-judicial bodies is not in an appellate but supervisory capacity. One consequence of this is that the court will not review findings of fact reached by the inferior court or Tribunal, even if they be erroneous. A writ of certiorari can be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The principles are well settled when the writ jurisdiction should be exercised. It should be issued in grave cases where the subordinate Tribunals, bodies or officers act wholly without jurisdiction or in excess of it, or in violation of principles of natural justice or refuse to exercise jurisdiction vested in them. There is an error apparent on the face of the record. Whether there is an excess exercise of jurisdiction may depend upon the existence of some facts in each case. There are cases where jurisdiction of the inferior Tribunal depends upon fulfilment of some conditions precedent upon existence of some particular fact. Such a fact is collateral to the actual matter, which the inferior Tribunal has to try and determine. Whether it exists or not is logically and in sequence prior to the determination of the actual question which the inferior Tribunal, has to try. In such a case, in certiorari proceedings the court can enquire into the correctness of the decision of the inferior Tribunal as to the collateral fact and may reverse that decision if it appears to it on material before it to be erroneous. The certiorari jurisdiction can also be exercised if conclusions are perverse and, therefore, suffer from patent error on the face of the record.

With the aforesaid principles in mind, if we turn to the scheme of Chapter XIX-A of the Act then it would be clear that the said Chapter was inserted by the Taxation Law (amendment) Act, 1975, with effect from April 1, 1976. Provisions more or less similar to it contained in sub-sections (1A) to (1D) of section 34 of the Indian Income-tax Act, 1922, were introduced in 1954. The provisions of Chapter XIX-A were, however, qualitatively different and more elaborate than the said provisions in the 1922 Act. The said Chapter thereafter went through a number of changes from the date of its insertion in the Income-tax Act by virtue of amendments from time to time. Under the provisions as they stand today, the proceedings under this Chapter commence by an application made by the assessee as contemplated by section 245C. Section 245D prescribes the procedure to be followed by the Commission on receipt of application under section 245C and thereafter the Commission is obliged to follow the procedure as provided in sub-sections details of which are already enumerated while taking stock of the legislative provisions in this behalf. Section 245L of the Act declares that any proceeding under this Chapter before the Settlement Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code. When it is declared to be a judicial proceeding, the prescribed procedure has to be followed. . . ."

27. These principles, therefore, would guide us in deciding whether the Commission erred in admitting and entertaining the application of the second Respondent.

28. The Commission had before it the application from the second Respondent filed on 18th March, 2013 for three assessment years. This application was filed under section 245(1) of the IT Act. The Settlement Commission can be approached with an application for settlement of cases. The term 'case' is defined in section 245A(b) 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 an application under sub-section (1) of section 245C is made. The application for settlement of case is contemplated by section 245(1) and which provides that 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. The proviso to this sub section states that no such application shall be made unless in a case where proceedings for assessment or reassessment for any of the assessment years referred to in clause (b) of sub-section (1) of section 153A or clause (b) of sub-section (1) of section 153B in case of a person referred to in section 153A or section 153C have been initiated, the additional amount of income tax payable on the income disclosed in the application exceeds fifty lakh rupees, and in a case where sub-clauses (A) and (B) of clause (ia) of the proviso is attracted or where clause (ii) of the proviso is attracted. Upon receipt of this application, the Commission has to deal with it in terms of the procedure set out in section 245D of the IT Act. That section has various sub-sections, but we are concerned with sub-sections (2A), (2B), (2C) and (2D). These sub-sections read as under:—

"(2A) Where an application was made under section 245C before the 1st day of June, 2007, but an order under the provisions of sub-section (1) of this section as they stood immediately before their amendment by the Finance Act, 2007, has not been made before the 1st day of June, 2007, such application shall be deemed to have been allowed to be proceeded with if the additional tax on the income disclosed in such application and the interest thereon is paid on or before the 31st day of July, 2007.

Explanation. - In respect of the applications referred to in this sub-section, the 31st day of July, 2007 shall be deemed to be the date of the order of rejection or allowing the application to be proceeded with under sub-section (1).

(2B) The Settlement Commission shall, —

(*i*) in respect of an application which is allowed to be proceeded with under sub-section (1), within thirty days from the date on which the application was made; or

(*ii*) in respect of an application referred to in sub-section (2A), which is deemed to have been allowed to be proceeded with under that sub-section, on or before the 7th day of August, 2007, call for a report from the Principal Commissioner or Commissioner, and the Principal Commissioner or Commissioner shall furnish the report within a period of thirty days of the receipt of communication from the Settlement Commission.

(2C) Where a report of the Principal Commissioner or 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 sent the copy of such order to the applicant and the Principal Commissioner or 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 Principal Commissioner or Commissioner has not furnished the report within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner or Commissioner.

(2D) Where an application was made under sub-section (1) of section 245C before the 1st day of June, 2007 and an order under the provisions of sub-section (1) of this section, as they stood immediately before their amendment by the Finance Act, 2007, allowing the application to have been

proceeded with, has been passed before the 1st day of June, 2007, but an order under the provisions of sub-section (4), as they stood immediately before their amendment by the Finance Act, 2007, was not passed before the 1st day of June, 2007, such application shall not be allowed to be further proceeded with unless the additional tax on the income disclosed in such application and the interest thereon, is, notwithstanding any extension of time already granted by the Settlement Commission, paid on or before the 31st day of July, 2007."

29. We are mindful of the fact that the Settlement Commission has been set up with a laudable and avowed object. That is to promote the settlement. It is not as suggested by Mr. Chhotaray to confer a right in any tax payer to be dishonest. We are further mindful of the fact that section 245C of the Act is meant for those Assessees who seek to disclose income not disclosed before the Assessing Officer including the manner in which such income has been derived, as the Hon'ble Supreme Court held in the case of *Express Newspapers Ltd.* (*supra*) that Chapter XIX-A is a part of the Income Tax Act and must be construed consistent with the overall scheme and object. Thus, it is to enable those Assessees who want to disclose income not disclosed till then together with the manner in which the same income is derived and the provisions are not meant for such Assessees who come after the event or who are guilty of a fraud perpetrated on the Revenue. We are also aware of the recommendations made by the Wanchoo Committee and we have perused them with the assistance of Mr. Chhotaray. Therefore, once the Commission has been approached, then, it has to deal with the application in terms of the sections contained in the Chapter. We are also aware of and have perused carefully the observations of the Hon'ble Supreme Court in a Judgment in the case of *B. N. Bhattacharjee* (*supra*). We are not deviating from the principle that the Commission has to ensure that the Settlement is fair, prompt and independent. It must not enable those who wish to evade taxes or avoid the consequences following the same as provided by law and particularly by the IT Act.

30. It is in that light that we have perused the impugned order passed by the Settlement Commission. It held that the Assessee's representative took it through the entire application and submitted that the technical requirements of admission have been complied with. The application so filed before the Commission on 18th March, 2013 and the intimation of filing, in Form B, has been given on the same date to the Assessing Officer. The Commission refers to the returns for assessment years in question and finds that for assessment year 2010-11 notice under section 143(2) of the IT Act was issued on 29th September, 2011. Thus, it found that the returns of income for the subject assessment years were filed and the proceedings are pending from April, 2011, September, 2011 and April, 2012 for the respective assessment years. For assessment year 2010-11, the notice under section 143(2) was issued as above, but the Assessee's representative pointed out that the Assessing Officer passed the order on 18th March, 2013 and on the date on which the application before the Settlement Commission was filed, a copy of the order has not been served on the Applicant/Second Respondent. Then, the Settlement Commission found that reliance has been placed on para 61.2 of Circular No. 3 of 2008 dated 12th August, 2008 issued by the CBDT. Then, reliance was placed upon certain orders of the Settlement Commission in the case of ABG Shipyard Ltd. and Shivkumar Chaturmal Acharya passed in the month of January, 2012 emphasising that though the assessment order was claimed to have been passed on 18th March, 2013, it cannot be said to have been made in terms of the provisions relating to the admission of the application, because it is not served on the Applicant. Thus, reliance was placed on the definition of the term 'case' as set out in section 245A(b) of the IT Act. Thus, it was asserted that proceedings for assessment under the Act in respect of the assessment years in question are pending. Para 3 of the impugned order and passed by the majority reads as under:—

"We have considered the above argument of the AR. We find that the assessment order is signed on 18.03.2013 and has been dispatched by post to the applicant on the same date in the morning. However, it has been returned unserved by the postal authorities to the department. On the perusal of

the envelope containing the assessment order it has also been noticed that the service was refused on 19.03.2013 as well as on 20.03.2013. From the above facts it is clear that although the dispatch of the assessment order has been done on 18.03.2013 (the date on which assessment order was passed), the service to the applicant was not made by 18.03.2013. If the refusal is to be accepted as service then the earliest service is on 19.03.2013. Alternate plea of the AR that the applicant be debarred for making the application in the circumstances only w.e.f. 19.03.2013 onwards has also got considerable force. The delivery of the envelope to the postal authorities on 18th cannot be termed as service to the applicant on the same date in the present set of facts."

31. The Commission observed that the assessment order is signed on 18th March, 2013 and has been dispatched by post to the Applicant/Respondent No. 2 before us on the same day in the morning, but it was returned unserved by the postal authorities to the Department. The Commission, therefore, perused the necessary records including the envelope and found that the service was refused but after the date on which the application for settlement was presented and filed before the Commission. It is the conclusion of the Commission that delivery of the envelope to the postal authorities cannot be termed as service. We do not find, therefore, any force in the contention of Mr. Chhotaray that the assessment order having been served, the proceedings for the assessment year, namely, 2010-11 were not pending. We are not required to consider any larger controversy or the effect of any amendments which have been made to the definition of the term of the words 'case'. As far as the assessment year 2011-12 is concerned, the Commission found in para 4 of the majority order that no notice under section 143(2) of the IT Act has been issued to the second Respondent. However, a notice under section 148 of the IT Act dated 15th March, 2013 has been issued and served on the second Respondent on 18th March, 2013. The Commission also, therefore, noted the arguments of the Assessee's representative that the effective date of commencement of the reassessment proceedings and which would debar the second Respondent from approaching the Settlement Commission needs consideration. He submitted that the explanation for the purpose of clause (b) of section 245A(i) refers to proceedings for reassessment and they shall be deemed to have commenced from the date on which a notice under section 148 is issued. The argument before the Commission was that the word 'issued' should be interpreted as 'served'. After noticing this argument and other contentions, the majority concluded that the word 'issued' in the present context will have to be read as 'served'. Therefore, for assessment year 2011-12 as well, the Commission held that the proceedings are pending. For assessment year 2012-13, the return of income was filed on 25th September, 2012, but no notice under section 143(2) has been issued. However, a notice under section 148 of the IT Act dated 15th March, 2013 has been served on the Assessee on 18th March, 2013, which is the date of filing the application before the Commission. Even with regard thereto, the Assessee's representative argued that there could not have been any reassessment proceedings where the time limit to issue notice under section 143(2) still exists and assessment is not barred by limitation. However, for our purpose, we need not dwell on this aspect in further details, as we find that the thrust of Mr. Chhotaray's submissions is that even the member who had given dissenting note has held that the application submitted under section 245C(1) for assessment years 2010-11 and 2011-12 is not maintainable and the same is treated as inadmissible but for the assessment year 2012-13, there is a inconsistent and contradictory finding by the dissenting Member. In para 2 of his note at page 66, the Member holds that the notice under section 148 of the IT Act for assessment year 2011-12 has been served on 18th March, 2013 and therefore proceedings for that assessment year are not pending. However, for assessment year 2012-13, he has without referring to para 7 of the majority view agreed with it that the application is maintainable and can be admitted. Thus, on when same facts he holds that proceedings for assessment year 2011-12 are not maintainable, he ought to have agreed with the majority for both years, namely, assessment year 2011-12 and assessment year 2012-13. Therefore, according to the dissenting Member, the application for assessment year 2012-13 is admissible and can be proceeded with.

32. The dissenting member was in error in holding that for the assessment year 2010-11 the proceedings

for assessment under the Act are not pending. He has, to our mind, wrongly concluded that the assessment order was issued for that assessment year on 18th March, 2013 and the same has been dispatched. Such a dispatch would mean service. We are not required to go into any wider controversy once again, but the understanding of the dissenting member of section 27 of the General Clauses Act, 1897 leaves a lot to be desired. While it is true that the statement of the addressee that the notice was not served on him by the post may not in every case be enough to rebut the presumption, but it must be established that where any Central Act or Regulation made after the commencement of the General Clauses Act, 1897 authorises or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The act of giving a notice is not complete on mere dispatch of the notice and further that the word 'issued' is also used in the same sense as 'served'. All this has been emphasised by the Hon'ble Supreme Court in several decisions and for illustration, we refer to Judgments of the Hon'ble Supreme Court in the cases of *K. Narasimhiah* v. *H. C. Singri Gowds* AIR 1966 SC 330, *R. K. Upadhyaya* v. *Shanabhai P. Patel* [1987] 166 ITR 163/33 Taxman 229 (SC) and *V. Raja Kumari* v. *P. Subbarama Naidu* AIR 2005 SC 109.

33. Thus, we find that the Commission was not inclined to refuse the application or not entertain it or admit it only on this ground.

34. Once the second Respondent/Assessee has pointed out the course of events and date wise in para 7 of the affidavit in reply, to which we do not find any rejoinder, then, even qua assessment year 2011-12, the proceedings can be said to be pending. It is pointed out as to how the notice under section 148 and dated 15th March, 2013 is said to have been issued and served on the second Respondent on 18th March, 2013, but reliance is placed on the word 'issued' and thereafter to construe it as 'served'. There is a considerable debate about this and once the dissenting Member also has found that the application for settlement is partially admissible, then, all the more we are not inclined to interfere with the majority view. The majority view as is found to be recorded and accepting the Assessee's version (para 5 of the majority view at page 62), does not require any further debate nor we are deciding any wider controversy.

35. The thrust of the arguments is that the Assessee did not make a full and true disclosure of his income and therefore sub-section (1) of section 245C of the IT Act is not complied with.

36. The Commission has in the majority view found that there were certain bank accounts which have not been disclosed by the Assessee to the Assessing Officer. The resultant income worked out on the basis of the entries in these accounts have been accepted by the second Respondent and he has set out the manner of earning as well as made true and full disclosure of income. In paragraph 11 of the order of the majority at page 65 of the paper book this is what is held:—

> "11. We have carefully considered the application as well as submissions made by the AR. We find that the conditions regarding threshold limit for the quantum of tax on additional income, payment of tax and interest thereupon and pendency of proceedings all are fulfilled. The applicant has also paid the requisite fees of Rs.500/- under section 245C(2) and the receipt for the same is also enclosed with the application. Fling of this application has also been intimated to the AO on the same day. As regards the issue of true and full disclosure of income and the manner in which such income has been derived, we are of the opinion that the disclosure of additional income at this stage appears to be prima facie full and true and at present there is no material to reject the contention of the applicant company. This aspect would require detailed examination in the subsequent proceedings before us and, therefore, is left open."

37. However, we do not find that the dissenting member has specifically made any comment on the above

in his first note dated 26th March, 2013 (see page 66 and 67)

38. Mr. Chhotaray would submit that there is no disclosure much less true and full. In the oral arguments as also in his detailed note Mr. Chhotaray has urged that the second Respondent has not made a full and true disclosure of its income and the manner of earning such income. Mr. Chhotaray's emphasis is that one very important aspect of the investigation carried out by the Department was bogus purchases made by the second Respondent from parties who have been identified by the Sales Tax Department as suspicious. Their names have been published on the website of the Sales Tax Department and one of the alleged vendor stated that he had not sold any material to the second Respondent but lent only his name for the commission. Mr. Chhotaray heavily relied upon the Assessing Officer's observations and findings in the assessment order. Though the Assessee/Respondent No. 2 before us has made a statement to the contrary, yet, Mr. Chhotaray submits that the Settlement Commission was apprised of bogus purchases by two communications of the Commissioner and in that regard he relies upon Annexures 'G' and 'I' of the paper book. The Settlement Commission has completely ignored, according to Mr. Chhotaray, the reports and these communications. If it was so aware, then, the view recorded and reproduced as above is perverse. Mr. Chhotaray relies upon the opinion of the dissenting Member and which is to be found at pages 82 to 88 of the paper book. Thus, two dissenting opinions are relied upon. When we referred as above and concluded that there is no opinion contrary to the majority recorded, we were referring to the dissenting note at pages 66 and 67 of the paper book.

39. At annexure 'J' is a copy of the order dated 10th May, 2013. This order is passed after the settlement application was allowed to be proceeded with and a report was called for under section 245D (2B) of the IT Act. Thus, it is a post admission order and traceable to section 245(2C) of the IT Act. However, from pages 82 and 83, we find that there is a reference made to the arguments of one Pradeep Sharma, Commissioner of Income Tax-15, Mumbai. These arguments continue up to page 85 and thereafter, the submissions to the contrary of the Assessee's representative have been recorded. In para 7, the dissenting Member states that in the application, the second Respondent has not enclosed copy of bank statements of the alleged benami bank accounts, which were the very basis on which he had made disclosure of its additional income. The Member went on and hold further that in the absence of these two bank accounts, it is not possible for the Commission to quantify the additional income. Then, he refers to the source of generation of cash which was the core issue for making declaration of additional income before the Commission. The Assessee has allegedly not confirmed the manner in which the additional income was earned. It is in these circumstances that the requirement of full and true disclosure is held to be not satisfied and for all three years. We do not find how this could be said to be a common conclusion for all the three years, inasmuch as, there is assessment order made for only one assessment year. It is in that order there is a reference to the bank accounts. It is in that order there is a reference to a communication addressed to the third party and that third party Mahendra S. Vora appearing before the Assessing Officer and having his statement recorded. In such circumstances, it could not have been held by the dissenting member that the requirement of full and true disclosure and in regard to the income and the manner in which it is generated is not satisfied or fulfilled by the Assessee. How that finding can be common for all three assessment years. More so, when for one assessment year the findings are that there is already an assessment order made and duly served, and secondly, there is a notice under section 148 of the IT Act issued and which must be construed as served for the assessment year 2011-12. Hence, this contradiction in the opinion of the Technical Member is enough to reject the submissions of Mr. Chhotaray.

40. We are not concerned in this case with the merits of the disclosures. We find that once the majority holds that the conditions regarding threshold limits for the quantum of tax for additional income, payment of tax and interest thereupon and pendency of proceedings all are fulfilled, then, the application was not liable to be rejected on any technical ground. The majority has taken care while observing that the disclosure of additional income at the stage at which the application was brought before it appears to be

prima facie full and true. However, this aspect would require detailed examination in the subsequent proceedings and is left open. Thus, the Commission was not required to give a definite and conclusive finding at the threshold. Suffice it to hold that once it has come to the above conclusion, then, we are not required to go any further. We clarify that all observations by the majority, the dissenting Member and equally by us are tentative and *prima facie*. That would not prevent the Commission from dealing with the application in accordance with law. Suffice it to further hold that the view taken by the majority cannot be termed as perverse or based on no material. It cannot be said to be arbitrary as well. In these circumstances, just because an alternate or other view is possible is not enough for us to interfere in the Writ Jurisdiction.

41. Mr. Chhotaray has made an attempt to hand over a compilation. One compilation contains the application and the Annexures, and the second is the confidential part. He terms the first part as open part and the second as confidential part. A scrutiny of the open part reveals how the Assessing Officer having probed the matter(page 169), there is a reference to the bank account in the name of Mahendra Shantilal Vora in Dena Bank, Gulalwadi, Mumbai. The date of opening and how the account was operated by Mahendra Vora for his personal transactions during financial year 2009-10 and when the second Respondent started utilising this bank account for its own benefits has been set out. The dates of opening and closure of bank account are indicated. The period during which it was operated is revealed and in what manner as well. There is a categoric statement that all transactions undertaken from this account are admitted to be actually belonging to the second Respondent and are subject matter of offer of additional income before the Settlement Commission. The detailed *modus operendi* including the manner in which the Assessee has not disclosed the income before the Assessing Officer is set out in the confidential portion. It is on this basis and such material that the majority concluded that the requirement of full and true disclosure is satisfied. We are satisfied that the Settlement Commission performed its function and upon scrutiny of the relevant materials rightly concluded that *prima facie* the disclosure as made is true and complete, it pertains to the income not disclosed before the Assessing Officer, the manner in which it is derived. The duty and obligation on the Settlement Commission regarding recording a preliminary jurisdictional conclusion is duly discharged. Any further probe and inquiry is unwarranted and unnecessary.

42. It is not for us to go into the adequacy or sufficiency of these findings and at the threshold merely because Mr. Chhotaray wants us to go into the reports of the Commissioner. We are of the view that any exercise of this nature would prejudice the case of both sides and it is even otherwise impermissible in our limited jurisdiction. We do not decide disputed questions of fact nor we substitute ourselves as the Settlement Commission. For, both courses are not permissible in law and to be carried out in our limited jurisdiction. In these circumstances, we have no hesitation in rejecting the contentions of Mr. Chhotaray on the third aspect of the matter.

43. The case law relied upon by Mr. Chhotaray now needs to be noticed. Mr. Chhotaray's heavy reliance is on the judgment of a Division Bench of this Court. In the case of *Income Tax Settlement Commission (ITSC)* (*supra*). There, the second Respondent filed an application on 17th September, 2011 before the Settlement Commission for five assessment years and disclosed an additional income of Rs.21.27 crores. The Commission passed an initial order on 27th September, 2012 under section 245D(1) of the IT Act allowing the application to be proceeded with and thereafter the Commissioner was called upon to furnish a report, *inter alia*, on the validity of the application filed for the relevant years, the correctness and adequacy of additional taxes and interest paid by the Applicant and on compliance by the Applicant. That report was submitted on 15th October, 2012 and the Commission passed an order under section 245D(2C) on 9th November, 2012.

44. The argument was that a full and true disclosure of income was not made and the manner in which the same was earned. Hence, the jurisdictional requirement has not been fulfilled by the Assessee. The

Revenue relied upon the material in its possession and with regard to purchases etc. by the Assessee. The Commission concluded that it is not in a position to hold a view that additional income offered in the statement is not a full and true disclosure. In such circumstances, the Division Bench concluded that the jurisdictional requirements have to be satisfied, else the Commission cannot proceed and in accordance with law. The object of setting up the Commission and the provisions has therefore been extensively referred in paras 10 and 11. The Division Bench concluded that for the application to be maintainable, the disclosure must be full and true. Till para 19, the provisions of law have been referred and analysed. In para 20, the conclusion of the Commission has been referred. The Commission did not note the difference between the disclosure being true and full and whether the explanation offered in the statement of facts on the income is not a true and full disclosure. The Commission took a view that it cannot take a view that the income offered in the statement of facts is not true and full disclosure and in the same vein it took a view that the subject of true and full disclosure is open in the proceedings under sub-section (4) of section 245D of the IT Act. Thus, para 20 is heavily relied upon by Mr. Chhotaray.

45. However, the distinction lies in the fact that in the present case, the Commission has recorded by a majority that disclosure of additional income at this stage appears to be *prima facie* full and true and at present there is no material to reject the contentions of the second Respondent. However, this would require detailed examination in the subsequent proceedings and therefore, it is left open. We also find that the majority has made separate orders and for assessment years 2010-11 to 2012-13. In paras 8 and 9 of its order dated 26th March, 2013, the Commission has recorded distinct conclusions on this aspect. It noted that there is a difference in perception on the requirement of true and full disclosure of income. It does not wish to express a final opinion on the adequacy of disclosure. Thus, the disclosure is not termed to be untrue and incomplete. What is held is whether the disclosure as made is adequate and complete would require detailed examination. A disclosure is termed as true and full but a difference in the perception of the Assessee and the Revenue has been noted. Equally, the Commission did not ignore the reports of the Commissioner as complained. There is a reference to it and the contentions of the Revenue qua them in the order dated 10th May, 2013. Thus, all statutory requirements and conditions are complied with. The admission of the Assessee's application for settlement causes no prejudice to the Revenue nor does it conclude the matter in favour of Respondent No. 2. The dissenting Member, however, concludes that the application is not maintainable for all three assessment years, but at the same time, finds force in the argument of the Commissioner that without the statement of the two bank accounts, it is not possible for the Commission to quantify the additional income as it has a direct bearing on the cash deposits made by the Assessee in the bank accounts. His contrary reasoning in para 7 of the order at pages 86 and 87 has been noted by us above. It is in these circumstances that we do not find the reliance placed by Mr. Chhotaray on the Judgment of the Division Bench to be well placed.

46. We have not deviated in any manner from the principles laid down in the Judgment of the Hon'ble Supreme Court in the case of *Anjum M. H. Ghaswala* (*supra*). Equally we have not deviated from the principles in the case of *B. N. Bhattacharjee* (*supra*) or in the case of *Express Newspapers Ltd.* (*supra*). Mr. Chhotaray submits that the case of *Rasik Ramji Kamani* (*supra*) is on all force. We are unable to agree, because, in that case, the Division Bench noted that all the disclosures were found to be incomplete and therefore not truthful. The Commission called upon the Appellant before the Division Bench to furnish particulars as set out in the notice. The Commission had directed the Appellant specifically to satisfy the requisitions given by the Commission. There was compliance with that direction, but not satisfactorily. The Commission found most of the documents to be a heap of irrelevance. Three months' time was given to furnish the details in respect of the various requirements of the Commission as had been indicated to the Appellant. The Appellant then left the precincts of the Settlement Commission, to pursue a path of confrontation and contest by other remedies. The Settlement Commission, therefore, having waited for three years, indicated the inclination to dispose of the proceedings before it in view of the non co-operation of the Appellant. Yet, it gave time to the Appellant to produce certain documents. That

direction was not complied with. That is how the Commission disposed of the entire matter and with strong comments. In the course of such determination and finally of the entire matter that the Commission made certain observations. It is this final order which was assailed in the Writ Petition and the Assessee lost. It approached the Division Bench. The Division Bench also dismissed the Appeal, but in dismissing that, it emphasised the need for the Assessee or a party approaching the Settlement Commission to be honest and truthful. We do not find how mere reliance on these observations of the Division Bench would assist Mr. Chhotaray. Equally, the Madras High Court Judgment heavily relied upon by Mr. Chhotaray in the case of *V. M. Shaik Mohammed Rowther* (*supra*) reveals that there the Assessee assailed the order of the Settlement Commission in rejecting the order of the settlement. The Assessee's failure to make full and true disclosure being patent, it was not necessary for the Commission to proceed with the further consideration of the application only to pass an order of rejection at the end of such further proceedings. This view again has been reached in the backdrop of the peculiar facts. That is how the Commission's order was upheld and the Assessee/Petitioner before the Madras High Court was termed as dishonest.

47. None of these Judgments can be of any assistance to Mr. Chhotaray. In the view that we have taken, it is not necessary to make any reference to the Judgments cited by Mr. Mistri or other Judgments outlining the ambit and scope of the powers of the Settlement Commission. Suffice it to hold that we are not inclined to interfere in the *prima facie* conclusions of the Settlement Commission as they are not vitiated by perversity, arbitrariness or malafides.

48. As a result of the above discussion, we do not find any substance in the Writ Petition. It is dismissed. Rule discharged. There would be no order as to costs. Ad-interim orders are vacated forthwith.

SUNIL

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*In favour of assessee.