

IT: Where Settlement Commission made addition over and above amount offered, as one partner's statement did not tally with records submitted, order could not be interfered with

■ ■ ■

[2013] 37 taxmann.com 317 (Gujarat)

HIGH COURT OF GUJARAT

Arpan Associates

v.

Income-tax Settlement Commission*

**AKIL KURESHI AND MS. SONIA GOKANI, JJ.
SPECIAL CIVIL APPLICATION NO. 11830 OF 2003
FEBRUARY 28, 2013**

Section 245F, read with sections 245C and 245D, of the Income-tax Act, 1961 - Settlement Commission - Power and procedure [Judicial review] - Assessment years 1994-95 to 1996-97 - Consequent to search and seizure operations, assessee-firm, a booking agent for a real estate scheme, made an application before Settlement Commission, offering additional income on account of on-money receipts on bookings - Settlement Commission concluded that there was no true disclosure and made further addition of Rs. 30 lakhs - Whether, order of Settlement Commission can be interfered with only if it is contrary to provisions which prejudices applicant - Held, yes - Whether, therefore, where Settlement Commission made further addition over and above amount offered by assessee, as on-money collection on individual flats did not tally with one partner's statement in respect of total rate, on-money received and expenditure made, Commission's order could not be interfered with - Held, yes [Para 16] [In favour revenue]

FACTS

- The assessee-partnership firm was engaged in the business of Project Consultancy and was also acting as a Booking Agent and Co-ordinator in a real estate scheme. Consequent to search and seizure operations under section 132, the assessee-firm made an application before the Settlement Commission for the assessment years 1994-95; 1995-96 and 1996-97 offering additional income of Rs. 76 lakhs for settling the tax liabilities for the entire period. Pursuant to direction of Settlement Commission, the assessee filed working of on-money receipts. The Settlement Commission passed the order, determining the undisclosed income of the assessee at Rs. 1 crore against Rs. 76 lakhs offered by the assessee under the settlement application.
- Present application is filed by assessee against the addition of Rs. 30 lakhs, alleging that the method adopted by the Settlement Commission for making such addition was completely arbitrary and irrational.

HELD

- The Apex Court in case of *Jyotendrasinhji v. S.I. Tripathi* [\[1993\] 201 ITR 611/68 Taxman 59](#), clearly opined that the only ground upon which interference can be made

in the order of the Settlement Commission is if the order is contrary to the provisions and such contravention prejudices the appellant, apart from the ground of bias and overall malice, which would constitute a separate and independent category. [Para 6.1]

- The Apex Court, in the case of *C.A. Abraham v. Asstt. CIT* [\[2002\] 255 ITR 540/\[2000\] 109 Taxman 16 \(Mad.\)](#), held that the Court's power of judicial review on the decision of the Settlement Commission was very restricted. While exercising jurisdiction under Article 226 of the Constitution, the High Court is not expected to go into facts. [Para 8]
- It is relevant to note that as far as on-money receipt on flat bookings were concerned, the Settlement Commission noted from the entire gamut of evidences that the petitioner-firm collected as per their own version, an amount to the tune of Rs. 87 lakhs concerning assessment year 1995-96 and the balance amount was for the earlier year, *i.e.*, assessment year 1994-95. The Settlement Commission, after noting the details given by one of the partners as also by comparing different rates charged for individual flats and shops, found certain discrepancies emerging from the record. It also held that the disclosure made by the petitioner-firm could not be held to be full and true, and therefore, it added a sum of Rs. 30 lakhs by holding the said additional amount as fair and equitable. Thus, the Settlement Commission concluded that there was no true disclosure. [Para 11.3]
- This Court is alive to the fact that core challenge essentially in this petition is to the exercise of powers and not to the amount *per se*. The Court is also conscious that wide powers are given to the Settlement Commission, and with the powers go unfailing duty of their exercise in accordance with provisions of law and settled legal principles. At the same time, one cannot be oblivious of the intent of inclusion of provisions of Settlement Commission under the Act and entire package that comes with it. It is also not to indicate that any unfettered powers are given to the Settlement Commission without any substantial check nor is this an intent to suggest that under no circumstances, decision of the Settlement Commission can be reviewed judicially. When process of decision making is unimpeachable in nature, decisions are not to be reviewed in exercise of powers of judicial review. One must realize that the proceedings before the Settlement Commission are not equivalent or parallel to assessment proceedings. Special provisions made under the Act give certain finality to the orders passed by the Settlement Commission. Every order of the Settlement Commission cannot be questioned as if it were an assessment order nor can the Court examine such a challenge as if it were acting as an appellate authority. However, allegations concerning bias, malice or fraud would permit forming of a completely separate and independent category of challenge. [Para 13]
- As could be noted from the order of the Commission, it took note of the total declared amount of Rs. 70.60 lakhs under section 132(4). It also noted that the on-money collection on individual flats did not tally with the statement given by one of the partners in respect of the total rate, the on-money received and the expenditure made. The Commissioner after regarding explanation of the partner of the petitioner-firm, that the rates would change from location to location as also from basement to the upper floors and taking note of the fact that in the seized materials, only upto October 1994, notings were made, therefore, for the post October 1994 period, the petitioner declared on-money receipt of Rs. 200 per sq. ft. and also at Rs. 500 per sq. ft. respectively for different locations of shops and also for the category of shops and flats. Not being satisfied by the discrepancies emerging in connection with the on-money collections, such sum of Rs. 30 lakhs had been added considering the same

to be the fair and equitable sum. [Para 14]

- In case of *Jyotendrasinghi (supra)*, the Apex Court noted that what would weigh with the Commission for making a particular order is difficult to be predicted, unless the Commission chose to give reasons for its order and whenever such reasons are given, the scope of inquiry would be - whether such order is contrary to the provisions of the Act and whether that had prejudiced the petitioner. [Para 15]
- Applying such principles to the instant case, it will not be possible for this Court to uphold the contentions raised by the petitioner-firm that it is an act of arbitrary exercise of powers which has had to any serious bias to the case of the petitioner, warranting interference by this court. Settlement Commission gave sufficiently cogent reasons based on contemporaneous record and that too, after giving sufficient opportunity of hearing to the parties. For a sufficiently long period, the material seized during search and details of booking and on-money receipt was available. For the period for which no data was available, Settlement Commission had not brought the figure out of nothing nor based its conclusion on surmise or conjecture. It is also not his whims or fancy getting reflected in the final figure of Rs. 30 lakhs, causing alleged serious prejudice to the petitioner. It was made out from the material on record, for filling the void of remaining period, alongwith other contemporaneous record statement of the partner who spoke of different rates for different categories of construction and also amongst those categories, importance of location in determining the amount of consideration of such shops and flats. Neither in the process of decision making nor otherwise, petitioner was able to make out a case of any breach of provisions, nor the decision appears to have led to cause any serious prejudice on account of faulty decision making process, necessitating invocation of powers of judicial review. [Para 16]
- Petition resultantly is dismissed. [Para 17]

CASES REFERRED TO

Major Metals Ltd. v. Union of India [2012] 207 Taxman 185/19 taxmann.com 176 (Bom.) (para 4.1), *Mahavir Rolling Mills (P.) Ltd. v. Income Tax Settlement Commission* [2012] 344 ITR 669/[2010] 191 Taxman 358 (Guj.) (para 4.1), *Jyotendrasinghi v. S.I. Tripathi* [1993] 201 ITR 611/68 Taxman 59 (SC) (para 4.1), *Union of India v. Ind-Swift Laboratories Ltd.* [2011] 4 SCC 635 (para 7), *C.A. Abraham v. Asstt. CIT* [2002] 255 ITR 540/[2000] 109 Taxman 16 (Mad.) (para 8), *CIT v. Damani Brothers* [2003] 259 ITR 475 (SC) (para 9), *N.R. Paper & Board Ltd. v. Dy. CIT* [1998] 234 ITR 733/101 Taxman 525 (Guj.) (para 10), *CIT v. Anjum MH Ghaswala* [2001] 252 ITR 1/119 Taxman 352 (SC) (para 11.4) and *CIT v. Hindustan Bulk Carriers* [2003] 259 ITR 449/126 Taxman 321 (SC) (para 11.4).

Saurabh Soparkar and Mrs. Swati Soparkar for the Petitioner. K.M. Parikh for the Respondent.

JUDGMENT

Ms. Sonia Gokani, J. - This petition preferred under Article 226 of the Constitution of India challenges the order of the Income Tax Settlement Commission, Mumbai- respondent No.1, dated 24th April 2003 on the ground of the same being illegal, contrary to law with the following prayers :—

- "(a) to quash and set-aside the impugned order dated 24th April 2003 passed by the Respondent No.1 and to restore the matter back to the file of the Settlement Commission to decide the same in accordance with law;

- (b) pending the admission, hearing and final disposal of this petition, to stay the implementation and operation of the impugned order at Annexure-A to this petition;
- (c) any other and further relief deemed just and proper be granted in the interest of justice;
- (d) to provide for the cost of this petition."

2. In the following factual background, this petition has arisen.

2.1 The petitioner-partnership firm is engaged in the business of Project Consultancy and also acting as a Booking Agent & Co-ordinator in real estate scheme known as "Arpan Complex" at Vadodara developed by Messrs. Anay Developers Private Limited.

2.2 On 23rd March 1995, the Income-tax Department carried out search and seizure operations under section 132 of the Income-tax Act, 1961 ["Act" for short] and it found on-money receipts on bookings made by the petitioner.

2.3 The petitioner-firm made an application dated 12th November 1997 before the Settlement Commission for the Assessment Years 1994-95; 1995-96 & 1996-97 offering additional income of Rs. 76,30,325/= for settling the tax liabilities for this entire period. The case of the petitioner was admitted under section 245D[1] of the Act on 17th November 1998 and hearing was fixed under section 245D[4] of the Act on 5th March 2003.

2.4 It is the case of the petitioner that the hearing took place before the Settlement Commission and petitioner was directed to prepare a detailed working of on-money receipts on 4th February 2003. Pursuant to such direction, the petitioner filed such working of on-money receipts on 12th March 2003 and also filed further submissions on 13th March 2003. The Settlement Commission passed the order impugned allegedly without referring to the written submissions of the petitioner and it determined the undisclosed income of the petitioner at Rs. 1,06,30,325/= against Rs. 76,30,325/= offered by the petitioner under the settlement application and thereby Rs. 30 lakhs had been added in the AYs 1994-95 and 1995-96 on estimate basis.

2.5 What is essentially challenged in this petition, over and above such addition of Rs. 30 lakhs, is absence of the reasons for arriving at such estimate by the Settlement Commission. According to the petitioner, the method adopted by the Settlement Commission for such addition is completely arbitrary and this being the act totally irrational and wholly perverse, requires to be viewed adversely. It is also averred that such additional estimate has no plausible basis and the petitioner-firm, which is already closed, would not be in a position to financially bear such a burden. It is further averred that the Commissioner of Income-tax [D.R.] had informed the Secretary of the Income-tax Settlement Commission *vide* its communication dated 20th March 2003 to fix one more hearing for finalizing the entire terms of settlement. Since no such opportunity was given, according to the petitioner, no specific request with reference to section 245H for waiver/reduction of interest under sections 220(2), 234A, 234B and 234C of the Act could be made. It is urged by the petitioner further that the CBDT has issued circulars which authorizes the Director Generals and Chief Commissioners of Income-tax to reduce or waive penalty and interest under the aforementioned provisions, under certain circumstances, one of which is also the seizure of the documents by the department during the course of search and seizure operation.

2.6 In the above factual background, the aforementioned prayers have been sought for.

3. On issuance of notice, learned counsel Mr. K. M. Parikh appeared for the Revenue.

4. Both the sides have been heard at length.

4.1 Learned Senior Counsel Shri Saurabh Soparkar appearing for the petitioner has fervently urged that the order impugned has been passed in a completely arbitrary manner and without any definite verifiable reference point enhancement of additional income of Rs. 30 lakhs has no rationale basis particularly added on estimate basis. It is also urged by the learned advocate that in gross violation of principles of natural justice, the order impugned has been passed where no proper opportunity is made available. He urged the Court that the Settlement Commission has acted contrary to the scheme of the act and he has not dealt with particular contention of on-money receipts put forth before him at all. It is further urged that he has not given any reason while making such additions and the powers of settlement commission are too wide and if not checked, the same can create unimaginable issues for the assesseees who would have no recourse when such exaggerated additions are made arbitrarily as is done in the instant case. It is further urged that the unfettered powers of the Commissioners if not checked are bound to be misused and in the instant case, when such misuse is apparent from the record, the Court needs to intervene. Learned Counsel has sought to rely upon the following authorities to substantiate his fervent submissions :

- (1) *Major Metals Ltd. v. Union of India* [\[2012\] 207 Taxman 185/19 taxmann.com 176 \(Bom.\)](#).
- (2) *Mahavir Rolling Mills (P.) Ltd. v. Income Tax Settlement Commission* [\[2012\] 344 ITR 669/\[2010\] 191 Taxman 358 \(Guj.\)](#)
- (3) *Jyotendrasinghi v. S.I. Tripathi* [\[1993\] 201 ITR 611/68 Taxman 59 \(SC\)](#)

4.2 Per contra, learned advocate Shri K.M. Parikh contended that when an application is made to the Settlement Commission under section 245D of the Act, the person also gets immunity from any prosecution and entire package needs to be regarded and not only the addition of a particular amount. Again, in the instant case, the Settlement Commissioner has acted in accordance with law by availing the fullest opportunities of hearing to the parties and considering the scope of Settlement Commission and the object with which it was incorporated in the Act, there is a narrow scope for interference and this Court must not intervene to correct any such addition because it is perceived by other side to be on higher side. He urged this Court that the law is well settled in case of *Jyotendrasinghi (supra)*. He contended that every quasi-judicial authority needs to give brief reasonings and mere reading of the order impugned would indicate that a valid basis had been made before such additions of Rs. 30 lakhs by the Settlement Commissioner. He has sought to rely upon the decision rendered in case of *Mahavir Rolling Mills (P.) Ltd. (supra)*.

5. Upon thus hearing both the sides and on thorough examination of the materials on record with the assistance of the learned advocates, at the outset, the scope of powers of the Settlement Commission shall need to be recorded.

5.1 It would be profitable to refer to section 245C of the Income-tax Act, 1961, which reads thus :

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

Provided that no such application shall be made unless,—

(i) 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,

(*ia*) in a case where—

(A) the applicant is related to the person referred to in clause (i) who has filed an application (hereafter in this sub-section referred to as "specified person"); and

(B) the proceedings for assessment or re-assessment 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 the applicant, being 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 ten lakh rupees,

(*ii*) in any other case, the additional amount of income-tax payable on the income disclosed in the application exceeds ten lakh rupees, and such tax and the interest thereon, which would have been paid under the provisions of this Act had the income disclosed in the application been declared in the return of income before the Assessing Officer on the date of application, has been paid on or before the date of making the application and the proof of such payment is attached with the application.

Explanation.—For the purposes of clause (*ia*),—

(*a*) the applicant, in relation to the specified person referred to in clause (*ia*), means,—

(*i*) where the specified person is an individual, any relative of the specified person;

(*ii*) where the specified person is a company, firm, association of persons or Hindu undivided family, any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member;

(*iii*) any individual who has a substantial interest in the business or profession of the specified person, or any relative of such individual;

(*iv*) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the specified person or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member;

(*v*) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the specified person; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member;

(*vi*) any person who carries on a business or profession,—

(A) where the specified person being an individual, or any relative of such specified person, has a substantial interest in the business or profession of that person; or

(B) where the specified person being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person;

(b) a person shall be deemed to have a substantial interest in a business or profession, if—

(A) in a case where the business or profession is carried on by a company, such person is, on the date of search], the beneficial owner of shares (not being shares entitled to a fixed rate of dividend, whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power; and

(B) in any other case, such person is, on the date of search, beneficially entitled to not less than twenty per cent of the profits of such business or profession.

(1A) For the purposes of sub-section (1) of this section, the additional amount of income-tax payable in respect of the income disclosed in an application made under sub-section (1) of this section shall be the amount calculated in accordance with the provisions of sub-sections (1B) to (1D).

(1B) Where the income disclosed in the application relates to only one previous year,—

- (i) if the applicant has not furnished a return in respect of the total income of that year, then, tax shall be calculated on the income disclosed in the application as if such income were the total income;
- (ii) if the applicant has furnished a return in respect of the total income of that year, tax shall be calculated on the aggregate of the total income returned and the income disclosed in the application as if such aggregate were the total income.

(1C) The additional amount of income-tax payable in respect of the income disclosed in the application relating to the previous year referred to in sub-section (1B) shall be,—

- (a) in a case referred to in clause (i) of that sub-section, the amount of tax calculated under that clause;
- (b) in a case referred to in clause (ii) of that sub-section, the amount of tax calculated under that clause as reduced by the amount of tax calculated on the total income returned for that year;

(c)** ** **

(1D) Where the income disclosed in the application relates to more than one previous year, the additional amount of income-tax payable in respect of the income disclosed for each of the years shall first be calculated in accordance with the provisions of sub-sections (1B) and (1C) and the aggregate of the amount so arrived at in respect of each of the years for which the application has been made under sub-section (1) shall be the additional amount of income-tax payable in respect of the income disclosed in the application.

(1E)** ** **

(2) Every application made under sub-section (1) shall be accompanied by such fees as may be prescribed.

(3) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

(4) An assessee shall, on the date on which he makes an application under sub-section (1) to the Settlement Commission, also intimate the Assessing Officer in the prescribed manner of having made such application to the said Commission."

5.2 Any assessee can make an application in a prescribed form by disclosing fully his income which had not been disclosed before the Assessing Officer. Assessee also needs to disclose the manner in which the income had been derived and additional amount of income-tax possible on such income as well as other

such particulars alongwith fees to the Settlement Commission. On receipt of such application under section 245C, the report of the Commissioner would be called for by the Settlement Commission and on the basis of such report and the material contained in such report as well as on viewing overall circumstances and the complexity of the investigation involved, the Settlement Commission can either admit such application or reject the same after availing opportunity to the petitioner even at the threshold. The Settlement Commission is also empowered to call for relevant records from the Commissioner and he can also direct further inquiry or investigation; if so needed.

Section 245D[4] authorizes the Settlement Commissioner to pass an order, after examining the records and reports of the Commissioner, after bipartite hearing. On due and careful examination of these materials as well as further evidence that may have been placed before it, the Settlement Commissioner in accordance with these provisions, may pass such order as he thinks fit in the matters covered by the application and in other matter relating to the case, not covered by the application but referred to in the report of the Commissioner under sub-section (1) or sub-section (3).

6. The scope of judicial review under Articles 32 & 136 of the Constitution of India by the Apex Court and under Article 226 of the Constitution before the High Court came up for consideration in cases of *Jyotendrasinhji (supra)*. The question was whether all the questions of fact and law as may have been decided by the Commission were open for review. The Apex Court has held thus —

"16. It is true that the finality clause contained in section 245-I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this court under Article 32 or under Article 136, as the case may be. But that does not mean that the jurisdiction of this Court in the appeal preferred directly in this court is any different than what it would be if the assessee had first approached the High Court under Article 226 and then come up in appeal to this court under Article 136. A party does not and cannot gain any advantage by approaching this Court directly under Article 136, instead of approaching the High Court under Article 226. This is not a limitation inherent in Article 136; it is a limitation which this court imposes on itself having regard to the nature of the function performed by the Commission and keeping in view the principles of judicial review. May be, there is also some force in what Dr. Gauri Shankar says *viz.* that the order of commission is in the nature of a package deal and that it may not be possible, ordinarily speaking, to dissect its order and that the assessee should not be permitted to accept what is favourable to him and reject what is not. According to learned counsel, the Commission is not even required or obligated to pass a reasoned order. Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the commission to make a particular order, unless of course the commission itself chooses to, give reasons for its order. Even if it gives reasons in a given case, the scope of enquiry in the appeal remains the same as indicated above *viz.*, whether it is, contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (*audi alterant partem*) has been incorporated in section 245D itself. The sole overall limitation upon the Commission thus appears, to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same whether the order of the Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in *Sri Ram Durga Prasad v. Settlement Commission* [176 ITR 169](#), which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji J., speaking for the Bench comprising himself and S.R. Pandian, J. observed that *in such a case this Court is*

"concerned with the legality of procedure followed and not with the validity of the order." The learned Judge added 'judicial review is concerned not with the decision but with the decision-making process.' (Emphasis supplied) Reliance was placed upon the decision of the House of Lords in *Chief Constable of the N.W. Police v. Evans* [1982] 1 W.L.R.1155. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders' of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. The main controversy in these appeals relates to the interpretation of the settlement deeds though it is true, some contentions of law are also raised. The Commission has interpreted the trust deeds in a particular manner, even if the interpretation placed by the Commission the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be said to be a violation of the provisions of the Income-tax Act. It is equally clear that the interpretation placed upon the said deeds by the Commission does not bind the authorities under the Act in proceedings relating to other assessment years."

6.1 The Apex Court clearly opined that the only ground upon which interference can be made in the order of the Commission is if the order is contrary to the provisions of the Act and such contravention prejudices the appellant, apart from the ground of bias and overall malice which would constitute a separate and independent category.

7. The Bombay High Court in case of *Major Metals Ltd. (supra)* was considering the jurisdiction of the Settlement Commission, wherein the Court held that the Settlement Commission has jurisdiction to render a complete assessment and the entire assessment is transferred to the Settlement Commission upon which the Commission exercises exclusive jurisdiction. It further held that under sub-section (4) of section 245D of the Act, the Settlement Commission is entitled to act on the basis of (i) an examination of the records; (ii) the report of the Commissioner; if any, received under section (2B) or sub-section (3); (iii) such further evidence as may be placed before it or obtained by it. On the basis of these materials, the Settlement Commission is empowered to pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application but referred to in the report of the Commissioner. The Bombay High Court referred to the case of *Union of India v. Ind-Swift Laboratories Ltd.* [2011] 4 SCC 635 wherein the Apex Court has held that, "...an order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provision of the Act. So far as the findings of the fact recorded by the Commission or question of facts are concerned, the same is not open for examination either by the High Court or by the Supreme Court." The Bombay High Court did not deem it justifiable to re-appreciate the findings of the fact, in exercise of the powers of judicial review against the findings of the Settlement Commission.

7.1 On allegation that the Settlement Commission imposed huge amount of penalty in complete disregard and violation of the principles of natural justice, the Bombay High Court found that the opportunities of hearing was made available and conclusion in respect of penalty of the commission were in consonance with the provision of law.

"31. The first aspect of the matter which merits emphasis is that the petitioner moved the Settlement Commission specifically with a request for the settlement of the entire case including the grant of a waiver of penalty under the applicable provisions of the Income-tax Act, 1961. The Settlement Commission is vested with the power under section 245H to grant an immunity wholly or in part from the imposition of any penalty under the Act where it is satisfied that any person who has made an application for settlement has co-operated with the Commission in the proceedings before it and has made a full and true disclosure of his income and of the manner in which the income has been derived. Under sub-section (6) of section 245D, every order passed under sub-section (4) by the

Settlement Commission is required to provide for the terms of settlement including any demand by way of tax, penalty or interest. It is in this perspective that the petitioner, when it sought settlement of the case which was pending before the Assessing Officer, expressly sought a direction in regard to the grant of a waiver of the penalty payable otherwise under the provisions of the Act. Section 274 stipulates that no order imposing a penalty under Chapter XXI shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Evidently the assessee here was cognizant of the fact that the very object and purpose of the application was, *inter alia*, to seek a waiver of the imposition of a penalty and the assessee went before the Settlement Commission in the present case armed with such a request. Secondly, as the order passed by the Settlement Commission indicates, the assessee was heard specifically on the issue of penalty. The contention of the petitioner which has been recorded in para 28 of the decision of the Settlement Commission was that it had fully co operated in the proceedings of the Commission and that it had made a full and true disclosure of the particulars of its income. The Commission considered the submission and held that looked at from the perspective of the test of human probabilities laid down by the Supreme Court and on the totality of the evidence, the contention of the assessee that it had genuinely received such high share premiums must fail. The Commission held that the assessee had not come clean before it. The assessee had offered an amount of Rs.10 lakhs in each of the Assessment Years in question based on a story of having earned income for which no records were available, without touching upon the real issues for which the applicant was being pursued by the Revenue. The Commission has, in our view, with justification come to the conclusion that the attempt on the part of the assessee was merely to create a smoke screen in order to shut out further investigation. In these circumstances, the view which has been taken by the Settlement Commission has been after complying with the principles of natural justice and after furnishing to the assessee an opportunity of being heard specifically on the issue of penalty. The Settlement Commission is bound by the mandate of the Act, which includes section 274. The Settlement Commission has to hear the applicant on the question of penalty. The proceeding before the Settlement Commission cannot be disjointed into parts, particularly having regard to the time limit set for disposal. The Commission has furnished a reasonable opportunity of hearing to the assessee and has heard him. No prejudice is shown. The Settlement Commission has imposed a penalty of Rs. 2.75 crores. Section 271(1)(c) provides for the imposition of a penalty where the assessee has concealed the particulars of his income or has furnished inaccurate particulars of such income. In such a situation the penalty shall not be less than the amount of tax sought to be evaded but shall not exceed three times the amount of tax sought to be evaded. The total income tax demand in the present case, according to the petitioner, which has been arrived at on behalf of the Revenue works out to Rs.1.96 crores for AY 2008-09 and Rs.82.40 lakhs for AY 2009-10. The total penalty of Rs.2.75 crores has been clarified by a corrigendum dated 30 December 2010 issued by the Settlement Commission to be on a *pro rata* basis as an amount of Rs.1.92 crores for AY 2008-09 and Rs.82.50 lakhs for AY 2009-10. The penalty which has been imposed is thus commensurate with the provisions of section 271(1)(c). In that view of the matter, we do not find any merit in the challenge to the order of the Settlement Commission on the aspect of penalty."

8. The Apex Court in the said decision in case of *C.A. Abraham v. Asstt. CIT* [2002] 255 ITR 540/[2000] 109 Taxman 16 (Mad.) held that the Court's power of judicial review on the decision of the Settlement Commission was very restricted. While exercising jurisdiction under Article 226 of the Constitution, the High Court is not expected to go into facts.

9. The Apex Court in case of *CIT v. Damani Brothers* [2003] 259 ITR 475 has provided that the Settlement Commission can direct waiver or reduction of interest if the respective provision for waiver or reduction are satisfied, for which it needs to examine whether a case is made out for assessee by such waiver or reduction.

10. This Court in case of *Mahavir Rolling Mills (P.) Ltd. (supra)* was considering the question of judicial review of the order of the Settlement Commission. The assessee had filed settlement application pertaining the block period and after *bi-partite* hearing, the Settlement Commission passed final order. It was challenged on the ground that the findings of the Commission were contrary to the provisions of the Act and this Court, in a given set of facts deemed it fit to set-aside the order of the Settlement Commission only on a particular issue and remanded the matter for re-examination of such issue in light of the decision in case of *N.R. Paper & Board Ltd. v. Dy. CIT* [1998] 234 ITR 733/101 Taxman 525 (Guj.).

11. In light of the discussion made hereinabove, the facts of the instant case when examined, the petitioner-Firm made an application for settlement for the Assessment Years 1994-95, 1995-96 & 1996-97. As recorded hereinbefore, such application was made on 12th November 1997 and the same came to be admitted under section 245D(1) of the Act on 17th November 1998. The petitioner-firm is engaged in the business of project consultancy and also acted as booking agent and co-ordinators in the real estate scheme known as "Arpan Complex" at Vadodara. This Scheme was developed by Anay Developers Private Limited, who incidentally were the owners and developers of the complex.

11.1 Search under section 132(1) carried out by the department on 23rd March 1995 indicated from the documents seized that on-money receipt of the bookings made by the petitioner-firm had not been recorded in the regular books of account. Scrutiny assessment was made for the A.Y. 1995-96. For A.Y. 1994-95, the assessment was reopened under section 147 of the Act. It appears from the decision of the Settlement Commission that it had called for report of the Commissioner as provided under section 245C and it also examined the investment in land and undeclared income with reference to the on-money receipts.

11.2 The issue concerns addition of Rs.30 Lakhs for the A.Ys. 1994-95 and 1995-96 on estimate basis. The amount of Rs.76,30,325/= was offered by the petitioner in the settlement application, whereas the Settlement Commission determines such income at Rs.1,06,30,325/=.

11.3 It is relevant to note that as far as on-money receipt on flat bookings were concerned, the Settlement Commission noted from the entire gamut of evidences that the petitioner-firm collected as per their own version, an amount to the tune of Rs.87,15,226/- concerning A.Y. 1995-96 and the balance amount was for the earlier year *i.e.* AY 1994-95. The Settlement Commission, after noting the details given by one of the partners as also by comparing different rates charged for individual flats and shops found certain discrepancies emerging from the record. It also held that the disclosure made by the petitioner-firm could not be held full and true, and therefore, it added a sum of Rs. 30 Lakhs by holding the said additional amount as fair and equitable. It would be worthwhile to reproduce relevant discussion which has led Settlement Commission to conclude that there was no true discloser as under :

"The next issue relates to on-money receipts on flat bookings. It is seen that the applicant-firm has accepted total on-money collections of Rs.1,28,25,626/- out of which an amount of Rs.87,15,226/- is stated to be pertaining to assessment year 1995-96 and the balance for the earlier receipts of Rs.2,33,26,331/-. During the course of hearing it was pointed out to the applicant's counsel that the details filed by them on pages 310-315 of their Paper Book as regards the collection of on-money on individual flats do not tally with the statement made by Shri Prahlad Modi in respect of total rate, on-money received as well as the expenses. Shri Dhiren Shah, counsel for the applicant explained that different rates were charged for individual flats and shops depending upon their location with respect to the main road. He stated that higher rates were charged for the front located shops as compared to the shops at the back. Similarly, according to him, the rates of the shops at the basement of the first floor were different. The applicant has filed details of covered area/constructed area in each category of basement, ground floor and first floor. It is also seen that the seized material noting are only upto October, 1994 and for the later period the applicant is declaring on money receipts @ Rs.200/- per Sq.

ft. The counsel for the applicant has tried to explain the same by arguments and presumptions but in most of the cases the discrepancies in shops, on-money collections in respect of different shops are not fully explainable."

11.4 With regard to the interest chargeable under sections 220(2), 234A, 234B & 234C of the Act, it applied the ratio laid down by the Apex Court in case of *CIT v. Anjum MH Ghaswala* [\[2001\] 252 ITR 1/119 Taxman 352](#) and *CIT v. Hindustan Bulk Carriers* [\[2003\] 259 ITR 449/126 Taxman 321](#) and the petitioner was granted immunity from levy of penalty and prosecution under the Income-tax Act and under the Indian Penal Code; subject to his paying the tax within stipulated time period and also subject to his fulfilment of other conditions under the statute.

12. It is reiteratively urged before us that the amount of Rs.30 Lakhs added by the Settlement Commissioner is completely arbitrary and there is no valid basis for such addition. It is also urged that giving such wide powers to any authority would lead to completely chaos and also would pave a way for arbitrary addition, which was never the legislative intent.

13. We are alive to the fact that core challenge essentially in this petition is to the exercise of powers and not to the amount *per se*. We are also conscious that wide powers are given to the Settlement Commission and with the powers go unfailing duty of their exercise in accordance with provisions of law and settled legal principles. At the same time, we cannot be oblivious of the intent of inclusion of Provisions of Settlement Commission under the Act and entire package that comes with it. It is also not to indicate that any unfettered powers are given to the Settlement Commission without any substantial check nor is this an intent to suggest that under no circumstances, decision of the Settlement Commission can be reviewed judicially. Of course when process of decision making is found of unimpeachable nature, decisions are not to be reviewed in exercise of powers of judicial review. We must realize that the proceedings before the Settlement Commission are not equivalent or parallel to assessment proceedings. Special provisions made under the Act give certain finality to the orders passed by the Settlement Commission. Every order of the Settlement Commission cannot be questioned as if it were an assessment order nor can the Court examine such a challenge as if it were acting as an appellate authority. Of course, allegations concerning bias, malice or fraud would permit forming of a completely separate and independent category of challenge.

14. In the instant case, the Commission has chosen to give the reasons for arriving at its findings of directing the addition of Rs. 30 lakhs. As could be noted from the Order of the Commission, it took note of the total declared amount of Rs. 70.60 lakhs under section 132(4) of the Act. It also noted that the on-money collection on individual flats did not tally with the statement given by one of the partners in respect of the total rate, the on-money received and the expenditure made. The Commissioner after regarding explanation of the partner of the petitioner-firm, that the rates would change from location to location as also from basement to the upper floors and taking note of the fact that in the seized materials, only upto October 1994, notings were made, therefore, for the post October 1994 period, the petitioner declared on-money receipt at Rs.200/- per sq. ft. and also at Rs.500/- per sq. ft. respectively for different locations of shops and also for the category of shops and flats, not being satisfied by the discrepancies emerging in connection with the on-money collections, such sum of Rs.30 lakhs had been added considering the same to be the fair and equitable sum.

15. As discussed hereinabove, in case of *Jyotendrasinghi* (*supra*), the Apex Court has noted that the Commission is required to condone the default and lapses on the part of the assessee and it may choose to waive interest, penalty or prosecution; as it may deem fit. The Court also noted that what would weigh with the Commission for making a particular Order is difficult to be predicted, unless the Commission chooses to give reasons for its order and whenever such reasons are given, the scope of inquiry would be - whether such order is contrary to the provisions of the Act and whether that had prejudiced the petitioner.

16. Applying such principles to the instant case, it will not be possible for this Court to uphold the

contentions raised by the petitioner-firm that this is an act of arbitrary exercise of powers which has led to any serious bias to the case of the petitioner, warranting interference by us.

Settlement Commission gave sufficiently cogent reasons based on contemporaneous record and that too, after availing sufficient opportunity of hearing to the parties. For a sufficiently long period in the material seized during search details of booking and on-money receipt were available. For the period for which, no data was available, Settlement Commission has not brought the figure out of nothing nor based its conclusion on surmise or conjecture. It is also not his whims or fancy getting reflected in the final figure of Rs.30 lakhs, causing alleged serious prejudice to the petitioner. It is made out from the material on record, for filling the void of remaining period, alongwith other contemporaneous record statement of the partner is made the basis who has spoken of different rates for different categories of construction and also amongst those categories, importance of location in determining the amount of consideration of such shops and flats.

Neither in the process of decision making nor otherwise, petitioner is able to make out a case of any breach of provisions nor the decision appears to have led to cause any serious prejudice on account of faulty decision making process, necessitating invocation of powers of judicial review.

17. Petition resultantly is dismissed with no order as to costs.

P. SEN

*In favour of revenue.