IT : Where there was no material with department to justify a demand of further amount from assessee and a sum was offered by assessee to put a quietus to matter, order passed by Settlement Commission to grant immunity from penalty and presecution in terms of section 245H could not be interfered with

[2015] 58 taxmann.com 315 (Kerala)

HIGH COURT OF KERALA

Commissioner of Income-tax

v.

K.T.P. Mohammed Mazhar*

A.K. JAYASANKARAN NAMBIAR, J.
WRIT PETITION NO. 30797 OF 2008
NOVEMBER 10, 2014

Section 245H, read with section 245D, of the Income-tax Act, 1961 - Settlement Commission - Immunity from Prosecution/Penalty (Additional amount) - During pendency of block assessment proceedings, assessee filed an application before Settlement Commission - While passing final order under section 245D(4), Settlement Commission took into account additional amounts that were offered by assessee and added same to total sum that had to be paid by assessee for purpose of settlement - Settlement Commission considering co-operation by assessee granted immunity from penalty and presecution in terms of section 245H - Department contended that by offering additional amounts, original declaration by assessee became one that was not full and true for purposes of settlement - Whether since there was no material with department to justify a demand of further amount from assessee and additional amounts were offered by assessee to put a quietus to matter, order passed by Settlement Commission could not be interfered with - Held, yes [Para 13] [In favour of assessee]

CASE REVIEW

DIT(International taxation) v. *ITSC* [2014] 365 ITR 108 (Bom.) (para 13) *followed.*

CASES REFERRED TO

Ajmera Housing Corpn. v. *CIT* [2010] 326 ITR 642/193 Taxman 193 (SC) (para 5) and *CIT* v. *Settlement Commission (IT & WT)* [2014] 51 taxmann.com 351/[2015] 228 Taxman 215 (Mag.)/[2014] 369 ITR 606 (Ker.) (para 7).

P.K.R. Menon and **Jose Joseph** *for the Petitioner.* **T.N. Seetharaman** and **S. Arun Raj** *for the Respondent.*

JUDGMENT

1. This is a writ petition preferred by the CIT, challenging Ext. P3 order dt. 14th March, 2008 of the ITSC, passed under s. 245D(4) of the FT Act, 1961.

2. The brief facts necessary for disposal of this writ petition are as follows :

Pursuant to a search initiated under s. 132 of the IT Act, 1961, hereinafter referred to as the 'IT Act', in the premises of the respondent on 29th March, 2000, notices were issued to the respondent under s. 158BC of the IT Act. In response to the said notice, the respondent filed a return of income on 12th July, 2000, showing a total income of Rs. 78,210 for the block period. After considering the cash blow statement furnished by the respondent, the assessment was completed against the respondent, by an assessment order dt. 21st March, 2002, by working out the tax and interest payable at Rs. 99,84,516. A demand notice was also issued to the respondent pursuant to the said assessment. During the pendency of the block assessment proceedings, however, the respondent-assessee had filed an application before the Settlement Commission, Chennai. The Settlement Commission proceeded with the application in terms of the Chapter XIX-A of the IT Act and finally passed its order, under s. 245D(4) of the Act. While passing final orders in the matter, the Settlement Commission took into account additional amounts that were offered by the assessee at the instance of the Settlement Commission and added this amount to the total amount that had to be paid by the assessee for the purposes of settlement. The Settlement Commission also took into account the co-operation by the assessee during the proceedings before the Settlement Commission and granted immunity from penalty and prosecution in terms of s. 245H of the IT Act. It is this order of the Settlement Commission that is impugned by the Department in the instant writ petition.

3. A counter-affidavit has been filed by the respondent wherein it is pointed out that the additional amount, over and in addition to the amounts of undisclosed income declared by the assessee along with the settlement application filed before the Commission, were all amounts that were offered pursuant to the suggestion of the Settlement Commission and with a view to put a finality to the litigation. It is explained that the said amounts were amounts in respect of which the Department did not have any material to proceed against the assessee and these were offered by way of effecting minor adjustments to the declaration already made before the Settlement Commission, but without conceding that there were further amounts that remained to be offered towards undisclosed income by the assessee. It is also pointed out that the final order passed by the Settlement Commission is conclusive as to the matters stated therein in terms of s. 245-1 of the IT Act, and that the legislature contemplated a finality in the scheme of settlement which could not be ignored by this Court while exercising its powers under Art. 226 of the Constitution of India.

4. I have heard Sri P.K. Ravindranath Menon, the learned senior standing counsel appearing on behalf of the petitioner, as also Sri T.N. Seetharaman, the learned senior counsel appearing on behalf of the respondent.

5. The learned senior counsel for the petitioner would vehemently contend that, by accepting additional amounts, over and above the amounts declared by the respondent-assessee towards undisclosed income in its settlement application, the respondent assessee had demonstrated that the original application submitted by it, did not contain a full and true disclosure of the undisclosed income for the purposes of settlement. It is the specific case of counsel for the petitioner that by offering additional amounts and thereby rendering the original declaration as one that was not full and true for the purposes of proceedings under Chapter XIX-A of the IT Act, the Settlement Commission was virtually denuded of its jurisdiction to proceed with the matter. Reliance is placed by the learned senior counsel on the decision of the Supreme Court in *Ajmera Housing Corpn.* v. *CIT* [2010] 326 ITR 642/193 Taxman 193. It is further contended by senior counsel for the petitioner that the Settlement Commission did not enter a finding with regard to the existence of a declaration containing a true and full disclosure of undisclosed income of the assessee, as also the manner in which such income was derived and the additional amount of income-tax payable on such income, for the purposes of settlement. It is also pointed out that, as regards the grant of immunity from penalty and prosecution under the IT Act, there was no finding entered into by the Settlement Commission regarding the compliance by the assessee of the requisite preconditions/namely, the 'full and

true disclosure' of income and the manner of deriving such income and the co-operation by the assessee during the proceedings before the Settlement Commission, for the purposes of grant of immunity from penalty and prosecution.

6. *Per contra*, the learned senior counsel appearing for the respondent would point out that order of the Settlement Commission had been conferred with a statutory finality under the IT Act and this Court would not normally interfere with the final orders passed by the Settlement Commission in exercise of its powers under Art. 226 of the Constitution of India. As regards the contention of the learned senior counsel for the petitioner, with reference to the *Ajmem Housing Corpn*'s. case (*supra*), it is pointed out that the said decision of the Supreme Court applied on the peculiar facts of that case and it would not apply across the board to all cases where there were additional offers of undisclosed income effected by the applicant before the Settlement Commission. It is his specific case that the assessee has co-operated throughout the proceedings before the Settlement Commission and hence the decision of the Settlement Commission to grant immunity from penalty and prosecution could not be found fault with.

7. I have considered the submissions made by the learned senior counsel appearing on both sides. On a consideration of the facts and circumstances of the case as also the submissions made across the Bar, I find that this is a case where a final order of the Settlement Commission has been impugned in proceeding under Art. 226 of the Constitution of India. While dealing with the nature of the jurisdiction exercised by this Court while entertaining writ petitions against the orders passed by the Settlement Commission under the IT Act, 1961, I have in a judgment rendered in Writ Petn. No. 2637 of 2014 and connected cases [*CIT* v. *Settlement Commission (IT & WT)* [2014] 51 taxmann.com 351/[2015] 228 Taxman 215 (Mag.)/[2014] 369 ITR 606 (Ker.)] held as follows.

> "It is trite that this Court, in exercise of its jurisdiction under Art. 226 of the Constitution of India, does not assume the role of an appellate authority to conduct a merit review of orders passed by the Settlement Commission. Its role is confined to one of judicial review, of the orders of the Settlement Commission, by applying the well-settled principles that inform the exercise of such a jurisdiction. Accordingly, this Court would be concerned with the decision making process, adopted by the Commission, and not the decision itself. It would be apposite to notice some of the judgments that clearly indicate that the scope of enquiry of this Court, in matters involving a challenge to orders passed by the Settlement Commission, is only to see whether the order of the Commission complies with the statutory provisions of Chapter XIX-A of the IT Act. The Supreme Court in the case of *Jyotendrasinhaji* v. *S.I. Tripathi & Ors*. [1993] 111 CTR (SC) 370 : [1993] 201 ITR 611 (SC), observed as follows at p. 623 :
>
> '.....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 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 alteram partem) has been incorporated in s. 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 the High Court under Art. 226 or by this Court under Art. 136, is also the same-whether the order of the Commission is contrary to any of the provisions of the Act and, if so, apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category, has it prejudiced the petitioner/appellant.....'

The Karnataka High Court in *N. Krishnan* v. *Settlement Commission & Ors.* [1989] 80 CTR (Kar) 15 : [1989] 180 ITR 585 (Kar) observed as follows at p. 597 :

> The provision for settlement would show that it is in the nature of statutory arbitration to which a person may submit himself voluntarily. Hence, many of the grounds on which an arbitration award could be set aside would not be available in view of the nature and jurisdiction of the Settlement Commission. A decision of the Settlement Commission could be interfered with only (i) if grave procedural defects such as violation of the mandatory procedural requirements of the provisions in Chapter XIX-A of the IT Act, 1961, and/or violation of the rules of natural justice are made out; or (ii) if it is found that there is no nexus between the reasons given and the decision taken by the Settlement Commission. The Court cannot interfere either with an error of fact or error of law alleged to have been committed by the Settlement Commission.'

More recently, the Supreme Court in *Union of India & Ors.* v. *Ind-Swift Laboratories Ltd.* [2011] 4 SCC 635 observed as follows at p. 643 :

> 'An order passed by the Settlement Commission could be interfered with only if the said order is found to be contrary to any provisions of the Act. So far as the findings of 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. In the present case the order of the Settlement Commission clearly indicates that the said order, particularly, with regard to imposition of simple interest @ 10 per cent per annum was passed in accordance with the provisions of r 14 but the High Court wrongly interpreted the said rule and thereby arrived at an erroneous finding. So far as the second issue with respect to interest on Rs. 50 lakhs is concerned, the same being a factual issue should not have been gone into by the High Court exercising the writ jurisdiction and the High Court should not have substituted its own opinion against the opinion of the Settlement Commission when the same was not challenged on merits."

Hence, it is well-settled that the power of judicial review is not to be exercised to decide the issue on facts or on an interpretation of the documents available before the Court. It would follow therefore, that in the instant case, the enquiry by this Court will only be with regard to whether or not the Settlement Commission exercised a jurisdiction that it did not have or, alternatively, if it did have the jurisdiction, whether it erred in the exercise of that jurisdiction. In the latter event, this Court would also have to bear in mind the nature of the jurisdiction exercised by the Settlement Commission, which is akin to a statutory arbitration.'

8. The primary contention of the learned senior counsel for the petitioner is that the very fact, that additional amounts were offered by the respondent-assessee before the Settlement Commission, would indicate that the original declaration made by the respondent-assessee, along with the application filed before the Settlement Commission, did not contain a full and true disclosure of the undisclosed income or the manner in which such income was derived. While considering a similar contention, raised in the other batch of cases that I had decided namely, in Writ Petn. No. 2637 of 2014 and connected cases, I had examined the scheme of the Chapter XIX-A of the IT Act and found as follows :

> "It is apparent from a perusal of the scheme of Chapter XIX-A of the IT Act that the jurisdictional fact that confers the Settlement Commission with the jurisdiction to proceed with an application is the filing by an applicant, of an application that contains a full and true disclosure of his income which has not been disclosed before the AO, the manner in which such income had been derived and the additional amount of income-tax payable on such income. If, at any stage of the proceedings before the Settlement Commission, it finds that the disclosure made by the applicant is not a full and true disclosure, then the said authority cannot proceed further with the application. It gets denuded of its

jurisdiction to proceed with the matter. It is in the backdrop of this fact that I must analyse the decision of the Supreme Court in the case of *Ajmera Housing Corporation* (*supra*) that has been relied upon by the petitioner. It must, at once be noted that the provisions of Chapter XIX-A that were analysed by the Supreme Court in that case were slightly different from those under consideration in the instant case in that, it was the provisions, as they stood prior to the amendments introduced by the Finance Act, 2007, that were considered by the Supreme Court. Moreover, the Supreme Court was considering the case of an assessee who had suo motu revised his declaration, by making offers of additional amounts by way of disclosure of income at various stages of the proceedings before the Settlement Commission. Under those circumstances, the Court found that, judging by the assessee's own conduct, his original application could not be seen as containing a full and true disclosure of his income for the purposes of settlement under the Act. The relevant observations in the judgment of the Supreme Court are to be found in paras 27, 31, 36 and 39 and are extracted hereunder :

'27. It is clear that disclosure of 'full and true' particulars of undisclosed income and 'the manner' in which such income had been derived are the prerequisites for a valid application under s. 245C(1) of the Act. Additionally, the amount of income-tax payable on such undisclosed income is to be computed and mentioned in the application. It needs little emphasis that s. 245C(1) of the Act mandates 'full and true' disclosure of the particulars of undisclosed income and 'the manner' in which such income was derived and, therefore, unless the Settlement Commission records its satisfaction on this aspect, it will not have the jurisdiction to pass any order on the matter covered by the application.

31. It is plain from the language of sub-s. (4) of s. 245D of the Act that the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to in the report of the CIT under sub-s. (1) or sub-s. (3) of the said section. A 'full and true' disclosure of income, which had not been previously disclosed by the assessee, being a precondition for a valid application under s. 245(1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No. 11 of the form. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. In this regard, s. 245(3) of the Act which prohibits the withdrawal of an application once made under sub-s. (1) of the said section is instructive inasmuch as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Therefore, by revising the application, the applicant would be achieving something indirectly what he cannot otherwise achieve directly and in the process rendering the provision of sub-s. (3) of s. 245C of the Act otiose and meaningless. In our opinion, the scheme of the said Chapter is clear and admits of no ambiguity.

36. We are convinced that, in the instant case, the disclosure of Rs. 11.41 crores as additional undisclosed income in the revised annexure, filed on 19th Sept., 1994 alone was sufficient to establish that the application made by the assessee on 30th Sept. 1993 under s. 245C(1) of the Act could not be entertained as it did not contain a 'true and full' disclosure of their undisclosed income and 'the manner' in which such income had been derived. However, we say nothing more on this aspect of the matter as the CIT, for reasons best known to him, has chosen not to challenge this part of the impugned order.

39. Apart from the fact, as explained above, not contemplated in the scheme, withholding of the information regarding filing of the revised annexure, disclosing undisclosed income of Rs. 11.41 crores as against the income of Rs. 1.94 crore, disclosed in the annexure forming part of the application, deprived the CIT of his right to object to the maintainability of the assessee's application on the ground that the assessee had not made true and full disclosure of its income in the previous

application, the foundational requirement of a valid application under s. 245C(1) of the Act. Accordingly, we have no hesitation in rejecting the argument.'

13. The issue to be considered here is whether, the observations of the Supreme Court in the aforementioned judgment are to be taken to mean that in every case where an applicant makes an offer of additional amounts, even at the instance or suggestion of the Settlement Commission, it would follow that the original declaration made by the applicant did not contain a full and true disclosure of his income and thereby rendering it invalid and, consequently, denuding the Settlement Commission of its jurisdiction to proceed further in the matter ? In my view, such an interpretation would render meaningless the scheme of settlement that is envisaged under the IT Act. One cannot discount the possibility of the Settlement Commission finding the disclosure of income made by an assessee as being full and true and yet requiring minor adjustments to include even those amounts, which though disputed by the assessee, would nevertheless be offered by the assessee in the interests of putting an end to litigation and in the spirit of settlement. These could be amounts, in respect of which, neither the Department nor the assessee have sufficient material to substantiate their contentions, but the assessee is nevertheless willing to give up his claim in the interests of finality to litigation. The consent by an assessee to forgo such amounts, at the suggestion of the Settlement Commission, cannot have the effect of rendering his original disclosure dubious for the purposes of settlement under the Act. In my opinion, it is only in those cases where an assessee resiles from his original declaration of undisclosed income, by sua motu effecting revisions thereto, that he renders his application invalid for the purposes of settlement. In cases where additional amounts are offered by an assessee, pursuant to a relinquishment of his claims with regard to the non-taxability of such income, it would not be a case where the assessee is resiling from his original stand as regards undisclosed income. In the latter type of cases, the Settlement Commission would be well within its jurisdiction to include such amounts in the final amount for which the case before it is settled with the assessee. In taking the said view, I am fortified by the decision of the Bombay High Court in *Director of IT (International Taxation)* v. *ITSC* [2014] 267 CTR (Bom) 18 : [2014] 101 DTR (Bom) 108 : [2014] 365 ITR 108 (Bom)."

In the instant case, I find on a perusal of the order of the Settlement Commission that the Commission found that there was no material with the Department to justify a demand of further amount from the assessee. Notwithstanding this, additional amounts were offered by the assessee to put a quietus to the matter. In that view of the matter, I am unable to accept the contention of the Department that merely by offering additional amounts, the original declaration by the assessee became one that was not full and true for the purposes of settlement. For the same reasons, I also do not find any force in the contention of the Department that the Settlement Commission erred in granting immunity from penalty and prosecution to the respondent-assessee who was found to have co-operated with the Settlement Commission during the proceedings before it. Thus, in any view of the matter, I do not see any reason to. interfere with the order passed by the Settlement Commission under s. 245D(4) of the IT Act. Resultantly, the writ petition fails, and is accordingly dismissed.

RAHUL

*In favour of assessee.