IT : Settlement Commission is empowered to pass orders on matters covered by application as well as on matter relating to case referred to in report of Commissioner

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HIGH COURT OF BOMBAY

Major Metals Ltd.

v.

Union of India*

DR. D.Y. CHANDRACHUD AND M.S. SANKLECHA, JJ.
WRIT PETITION NO. 397 OF 2011†
FEBRUARY 22, 2012

Section 245D, read with section 245C, of the Income-tax Act, 1961 - Settlement Commission - Procedure on receipt of application under section 245C - Assessment years 2008-09 and 2009-10 - Whether when Settlement Commission calls for a report from Commissioner under sub-sections (2B) and (3) of section 245D and Commissioner does not furnish his report to Commission within prescribed period, that does not bring an end to proceeding before Commission and it is empowered to proceed further even in such a situation - Held, yes - Whether once Settlement Commission has allowed an application filed under section 245C(1) to be proceeded with under section 245D(1), it is empowered to pass orders (i) on matters covered by application, and (ii) on any other matter relating to case not covered by application but referred to in report of Commissioner furnished in pursuance of directions of Settlement Commission - Held, yes - Whether an assessee cannot seek for unqualified right that Settlement Commission should either accept what he discloses or leave him to another round of assessment before Assessing Officer - Held, yes [In favour of revenue]

Section 68, read with sections 245D and 245C, of the Income-tax Act, 1961 - Cash credits - Assessment years 2008-09 and 2009-10 - Assessee an unlisted company was given huge loan of Rs. 6 crores by two companies - Later on these companies were allotted 30,000 shares each of face value 10 at huge premium of Rs. 990 - Settlement Commission fund that neither these two companies had financial standing for giving such huge loan nor past performance of assessee would justify payment; hence addition was made under section 68 in assessee's hand - Assessee submitted that Commissioner's had identified two companies being income-tax assessees, recourse to section 68 was not in order - Whether since view taken by Settlement Commission was borne out on basis of material record, same could not be interfered with - Held, yes [In favour of revenue]

Section 245D, read with sections 245C, 245H, 271(1)(c) and 274, of the Income-tax Act, 1961 - Settlement Commission - Procedure on receipt of application under section 245C - Assessment years 2008-09 and 2009-10 - Pending proceedings before Assessing Officer, assessee sought for settlement of case by Commission and had offered an amount of Rs. 10 lakhs in each of assessment years, being income which had not been disclosed before Assessing Officer - Assessee expressly sought a direction in regard to grant of a waiver of penalty payable otherwise under provisions of Act - Commission held that

assessee had not come clean before it and offer of assessee disclosing income was based on a story of having earned income for which no records were available, and real issues for which assessee was being pursued by department, was not touched upon and there was merely an attempt to create a smokescreen to shut out further investigation - Commission held that assessee would not be entitled to waiver of penalty under section 271(1)(c) - Assessee submitted that no notice to show-cause was issued to it before Commission proceeded to impose a penalty and, hence, there was a violation of principles of natural justice - Whether since assessee was cognizant of fact of seeking waiver of imposition of a penalty and assessee was heard specifically on issue of penalty, there was no merit in challenge to order of Commission on aspect of penalty - Held, yes [In favour of revenue]

FACTS

The assessee filed an application before the Settlement Commission seeking settlement of cases for the assessment years 2008-09 and 2009-2010, which were pending before the Assessing Officer. It had offered an amount of Rs. 10 lakhs in each of the assessment years, being income which had not been disclosed before the Assessing Officer. It stated before the Settlement Commission (*i*) that during the relevant previous years it was engaged in transactions in which it would locate sellers in the grey market who would sell goods to prospective buyers, (*ii*) that the goods would be delivered directly by the sellers to the buyers and the payment would be routed through it who in turn would effect payment to the sellers after deducting its share, (*iii*) that the said activity was undertaken in respect of items which did not form part of its inventory, (*iv*) that the difference was earned in cash and was not accounted in the regular books of account, and (*v*) that the said activity was since discontinued, but in order to buy peace of mind it was willing to offer the income earned. The assessee proposed for waiver of interest and immunity from the levy of penalty and prosecution. The Commissioner submitted report. The Settlement Commission having noticed (*i*) that during the assessment year 2008-09 the assessee had unsecured loans of Rs. 3.73 crores, the genuineness of which needed to be verified, bearing in mind the *modus operandi* adopted by the group, (*ii*) that during the assessment year 2008-09 the assessee claimed to have received two loans of Rs. 2 crores from two companies, (*iii*) that during the assessment year 2009-10 the assessee received amounts of each of Rs. 90 lakhs from the two companies, and (*iv*) that during the assessment year 2009-10 the assessee allotted 30,000 shares each to the two companies of a face value of Rs. 10 at a premium of Rs. 990 per share, which resulted in share capital of Rs. 3 lakhs and share premium of Rs. 2.97 crores being realized from each of the two companies, opined that it was difficult to understand the loan transactions, which resulted in the conversion of loans into share capital and share premium particularly when the assessee was not a listed company. The Commissioner was directed to submit a factual report verifying the genuineness of loans and creditworthiness of the two companies who were said to have given loans and inquiring into the genuineness of conversion of the loans to share capital and share premium by issue of shares. The Commissioner, in the report submitted to the Commission, stated (*i*) that the two companies had confirmed having advanced the loans, (*ii*) that the said companies were income tax assessees whose identity was established, (*iii*) that the assessee had disclosed an income each of Rs. 10 lakhs for the two assessment years which was stated to be commission income earned out of the transactions involving purchase and sale of non-ferrous metals, (*iv*) that the assessee had not furnished any details of the said income, (*v*) that if the history of the assessee was to be taken into account, the income disclosed was rather meagre inasmuch as for the assessment year 2007-08, the assessee had introduced its own money of Rs. 2 crores in the form of share application money, and (*vi*) that, therefore, the extent of the undisclosed income of the assessee could be much more than the income which was disclosed. The Commission came to the conclusion that the purported transactions were not genuine. It held that the claim of having received such high premium on shares was fictitious and an attempt by the assessee to launder its own unaccounted funds in the guise of such receipts. It, therefore, held that the amount shown in the books of account of the

assessee as share capital/premium was liable to tax in accordance with the provision of section 68. It, therefore, made an addition of Rs. 6.18 crores to the income of the assessee under the provisions of section 68. On the aspect of the imposition of penalty, the Commission came to the conclusion that the offer of the assessee of Rs. 10 lakhs for each of the assessment years, based on a story of having earned income for which no records were available and without touching upon the real issues for which the assessee was being pursued by the department, was merely an attempt to create a smokescreen to shut out further investigation. Consequently, it held that the assessee would not be entitled to a waiver of penalty under section 271(1)(*c*). It further imposed a penalty of Rs. 2.75 crores upon the assessee under section 271(1)(*c*).

On writ :

HELD

Scope and power of settlement Commission

The provisions of Chapter XIX-A emphasis that the object underlying the constitution of the Settlement Commission is the settlement of cases under the chapter. The expression 'case' is defined in clause (b) of section 245A to mean any proceeding for assessment under the Act which is pending before the Assessing Officer on the date when the application for settlement is made under section 245C(1). The assessment is the subject of the case which is to be settled. An applicant who moves the Settlement Commission under section 245C(1) has to do so on the basis of a true and full disclosure of his income, which has not been disclosed before the Assessing Officer. Disclosure of income which has not been disclosed before the Assessing Officer is essential to the validity the application. The application is to have the case settled. Under sub-section (1B) of section 245C, where the income disclosed in the application relates to one previous year, if the applicant has furnished a return in respect of total income of that year, the tax has to 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. The Settlement Commission is empowered to call for a report of the Commissioner at two stages. The first stage arises under sub-section (2B) of section 245D where, inter alia*, an application has been allowed to be proceeded with under sub-section (1). The second stage is under sub-section (3) of section 245D where,* inter alia*, the Settlement Commission has not declared an application as invalid under sub-section (2C). In both the cases, the report of the Commissioner is not a condition precedent for the Settlement Commission to proceed further with the settlement of the case. If the Commissioner does not submit his report to the Commission, that does not bring an end to the proceeding before the Commission. The Settlement Commission is empowered to proceed further even in a situation where the Commissioner does not furnish a report within the prescribed period. Once the Settlement Commission is seized of the proceedings and an application filed under section 245C(1) has been allowed to be proceeded with under section 245D(1), the Settlement Commission has exclusive jurisdiction to exercise the powers and to perform the functions of an income tax authority under the Act in relation to the case. When the Settlement Commission decides to proceed with a case under section 245D(1), it assumes exclusive jurisdiction in regard to the assessment. That is because the Settlement Commission is then seized of the case in respect of which a settlement is sought and the expression 'case' itself is defined to mean any proceeding for assessment under the Act which is pending before the Assessing Officer. The Act does not contemplate a parallel proceeding before the Settlement Commission and before the Assessing Officer, once the Settlement Commission has decided to proceed with the application under section 245D(1). So long as the proceedings remain before the Settlement Commission, it is that authority alone which has jurisdiction in all matters pertaining to assessment. The jurisdiction of the Settlement Commission is to pass orders (*i *) on matters covered by the application, and (*ii*) on any other matter relating to the case not covered by the application but referred to in the report of the Commissioner. [Para 15]*

In the instant case, the assessee had, within the meaning of section 245C, moved the Commission for settlement of the cases for the assessment years 2008-09 and 2009-10, which were pending before the

*Assessing Officer. The Settlement Commission directed the Commissioner initially in exercise of its powers under section 245D(2B) to submit a report. No report was submitted to the Settlement Commission by the Commissioner. Thereafter once again the Settlement Commission called upon the Commissioner to cause an investigation to be made and to furnish a report under section 245D(3). The Settlement Commission was justifiably anguished at the absence of cooperation on the part of the Commissioner in the second instance. Be that as it may, the Commission had the entire assessment proceedings before it and of which it was seized upon the passing of an order under section 245D(1). The Commission assumed in accordance with law the exclusive jurisdiction over the assessment proceedings having decided to proceed with the application under section 245D(1). Under sub-section (4) of section 245D the Settlement Commission was entitled to act on the basis of (*i*) an examination of the records, (*ii*) the report of the Commissioner, if any, received under sub-section (2B) or sub-section (3), and (iii) such further evidence as may be placed before it or obtained by it. On the basis of this material the Settlement Commission was empowered, in accordance with the provisions of the Act, 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. [Para 17]*

*The submission of the assessee is that since it had moved the Settlement Commission only with an offer of a disclosure of income amounting to Rs. 10 lakhs each in the two assessment years and since the Commissioner was not in a position to determine either the genuineness or the authenticity of the alleged transaction entered into by it with the two companies, the Settlement Commission acted outside its jurisdiction in entering upon the genuineness of the transactions. It is impossible to accept the submission. The jurisdiction of the Settlement Commission having been invoked under section 245C, the Commission, when it passed its order dated 18-10-2010 under section 245D(3), specifically called upon the Commissioner to verify the genuineness of the loans and the creditworthiness of the two companies who had allegedly given loans of Rs. 3 crores each during the financial years 2007-08 and 2008-09 and also to enquire into the genuineness of the conversion of loans to share capital and share premium by the issue of shares. The Commissioner in his report dated 22-11-2010 adverted to the directions of the Commission and stated that a shortage of time had prevented the Assessing Officer from enquiring into the creditworthiness of the two companies, who had advanced moneys to the assessee in the form of loans and share applications. The Commissioner, however, stated (*i *) that the two companies had confirmed having advanced loans to the assessee, and (*ii *) that said companies were income tax assessees whose identity was established. The genuineness of the loan transactions, the creditworthiness of the companies who had allegedly advanced the loans, and the genuineness of the conversion of the loans into share capital and share premium against the issuance of shares, specifically formed a subject matter of the reference made to the Commissioner under section 245D(3). The Commissioner dealt with a part of his mandate leaving the rest not analyzed for reasons of time. These were all matters relating to the case not covered by the application but nonetheless referred to in the report of the Commissioner. The Commissioner, by the terms of reference, had to verify the genuineness of the transactions and creditworthiness of the parties. If the Commissioner was to hold that the transactions were genuine and parties were creditworthy, that would be an input before the Commission, but would not conclude the issue. If the Commissioner was to hold that the transactions were sham and fictitious, it would still be for the Settlement Commission to arrive at its determination when it settled the case. The nature of the determination by the Commissioner does not determine the jurisdiction of the Commission. The expression relating to the case is an expression of width and amplitude. The report of the Commissioner furnished in pursuance of the directions of the Settlement Commission under section 245D(3) cannot be read in a sense disjointed from the terms of reference made by the Commission to him. The report refers to the matters upon which he was called upon to investigate. All those matters would fall within the jurisdiction of the Commission as matters relating to the case and referred to in the report of the Commissioner. Consequently even on a literal and textual construction of section 245D(4), the Court is satisfied that the Settlement Commission acted within the parameters of its jurisdiction in the instant case. The position which emerges on a plain*

and literal construction of the language of the statute is supported by even a contextual construction. Parliament intended that the entire assessment is before the Settlement Commission. The Commission completes the process of assessment as part of the settlement of the case. Comprehensiveness, finality and conclusiveness are the three attributes of the function assigned to the Commission. That object is achieved when the entire assessment is completed, as part of the jurisdiction to settle a case. Once an assessee moves the Settlement Commission, the statute expressly mandates that the application cannot be withdrawn. Unless the Commission in a given case decides to reject the application, it is entitled to resolve the case by settlement. An assessee who moves the Settlement Commission cannot be allowed to be anything other than fair and candid. Nor can he assert an unqualified right that the Settlement Commission should either accept what he discloses or leave him to another round of assessment before the Assessing Officer. [Para 18]

Addition of Rs. 6.18 crores made to the income of the assessee under the provisions of section 68.

*The Settlement Commission has noted in its order that in order to scrutinize the genuineness of the transactions entered into by the assessee with the two companies it had directed the assessee to produce relevant records, such as, minute books, attendance registers of AGMs, dispatch registers, share certificates and authorization of proxy forms amongst other documentary material. The order of the Settlement Commission indicates at least fourteen reasons on the basis of which it has arrived at considered findings of facts (*i *) that the transactions of the two companies were not genuine transactions, (*ii*) that the two companies lacked a credit standing which would have enabled them to pay large amounts towards share premium of Rs. 990 on a face value of Rs. 10 per share, and (*iii*) that neither the past performance or the financial standing of the assessee itself would justify the payment of such a large premium. The Settlement Commission has relied upon the law laid down by the Supreme Court in the case of* Sumati Dayal *v.* CIT *[1995]* 214 ITR 801 */* 80 Taxman 89 *(SC) in applying the test of human probabilities. [Paras 22 and 23]*

It has been urged by the assessee that an addition within the meaning of section 68 would not be justified in law in its hands even if the share application money was received from bogus shareholders. It further submitted that in the instant case the report submitted by the Commissioner under section 245D(3) showed that the two companies were duly identified being income tax assessees whose PANs were also furnished. Consequently, recourse to the provisions of section 68 was not in order. [Para 24]

In the instant case, it needs to be emphasized that the Settlement Commission has considered all the material on record including the material which had a bearing on the creditworthiness and financial standing of the alleged subscribing companies to the share capital of the assessee. None of the companies was held to have a financial standing or creditworthiness which would justify making of such a large investment of Rs. 6 crores at a premium of Rs. 990 per share. The allotment of shares, it must be noted, has taken place in pursuance of a private placement. The principles which have been applied in relation to the public subscription of shares of a public limited company can obviously have no application to the facts of a case such as the instant one. The view which has been taken by the Settlement Commission is consequently borne out on the basis of the material on record. This is not a case where the Commission has proceeded contrary to law or on the basis of no evidence. There is no perversity in the findings of the Settlement Commission. [Para 26]

In the exercise of the power of judicial review particularly against the findings of the Settlement Commission the Court would not be justified in reappreciating the findings of facts, which, in any event, are based on the material on record. [Para 29]

Penalty imposed upon assessee

The submission of the assessee is that no notice to show cause was issued to it before the Settlement Commission proceeded to impose the penalty and, hence, there was a violation of the principles of natural justice. [Para 30]

The first aspect of the matter which merits emphasis is that the assessee 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. 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 cooperated 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 assessee, 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 armed with such a request. Secondly, the order passed by the Settlement Commission indicates that the assessee was heard specifically on the issue of penalty. The contention of the assessee which has been recorded by the Settlement Commission was that it had fully cooperated 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 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 it was being pursued by the revenue. The Commission has with justification come to the conclusion that the attempt on the part of the assessee was merely to create a smokescreen 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 assessee 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. 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. Therefore, there was no merit in the challenge to the order of the Settlement Commission on the aspect of penalty. [Para 31]*

Therefore, the petition being devoid of merits was liable to be dismissed. [Para 32]

CASE REVIEW

CIT v. *Express Newspaper Ltd.* [1994] 206 ITR 443 / 72 Taxman 438 (SC) (para 16), *followed; Brij Lal* v. *CIT* [2011] 1 SCC 1 (para 16) *followed; Jyotendrasinhji* v. *S.I. Tripathi* [1993] 201 ITR 611/ 68 Taxman 59 (SC) (para 19) - *followed; Union of India* v. *Ind-Swift Laboratories Ltd.* [2011] 4 SCC 635 (para 20) - *followed; Sumati Dayal* v. *CIT* [1995] 214 ITR 801 / 80 Taxman 89 (SC0 (para 23) - *followed; CIT* v. *Lovely Exports* [2008] 299 ITR 268 /[2007] 158 Taxman 440 (Delhi) (para 24) - *Distinguished; CIT* v. *Lovely Exports Pvt. Ltd.* [2008] 6 DTR 308 (SC) (para 25) - *Distinguished; CIT* v. *P. Mohanakala* [2007] 161 Taxman 169 / 291 ITR 278 (SC) (para 27) - *followed; CIT* v. *Orissa Corpn.(P.) Ltd.* [1986] 159 ITR 78 /25 Taxman 80 (SC) (para 27) - *followed; Vijay Kumar Talwar* v. *CIT* [2011] 330 ITR 1 / 196 Taxman 136 /[2010] 8 taxmann.com 264 (SC) *followed.*

CASES REFERRED TO

CIT v. *Express Newspaper Ltd.* [1994] 206 ITR 443 / 72 Taxman 438 (SC) (para 16), *Brij Lal* v. CIT [2011] 1 SCC 1 (para 16), *Jyotendrasinhji* v. *S.I. Tripathi* [1993] 201 ITR 611 / 68 Taxman 59 (SC) (para 19), *Union of India* v. *Ind-Swift Laboratories Ltd.* [2011] 4 SCC 635 (para 20), *N. Krishnan* v. *Settlement Commission* [1989] 47 Taxmann 294/ 180 ITR 585 (Ker.) (para 21), *Sumati Dayal* v. *CIT* [1995] 214 ITR 801 / 80 Taxman 89 (SC) (para 23), *CIT* v. *Lovely Exports (P.) Ltd.* [2008] 299 ITR 268 /[2007] 158 Taxman 440 (Delhi) (para 24), *CIT* v. *Lovely Exports (P.) Ltd.* [2008] 6 DTR 308 (SC) (para 25), *CIT* v. *Value Capital Services (P.) Ltd.* [2008] 307 ITR 334 (Delhi) (para 25), *CIT* v. *Oasis Hospitalities (P.) Ltd.* [2011] 331 ITR 119/ 198 Taxman 247/ 9 taxmann.com 179 (Delhi) (para 25), *CIT* v. *Creative World Telefilms Ltd.* [2011] 203 Taxman 36 (Mag.)/ 333 ITR 100 / 15 taxmann.com 183 (Bom.) (para 25), *CIT* v. *Mohanakala* [2007] 161 Taxman 169/ 291 ITR 278 (SC) (para 27), *CIT* v. *Orissa Corpn. (P.) Ltd.* [1986] 159 ITR 78/95 Taxman 80 (SC) (para 27) and *Vijaykumar Talwar* v. *CIT* [2011] 330 ITR 1 / 196 Taxman 136/[2010] 8 taxmann.com 264 (SC) (para 28).

Vikas Singh, Sashi Tulsiyan, Ms. Nandadevi Deka and **Prakash Mahadik** *for the Petitioner.* **Darius J. Khambata, Beni Chatterji, Vikramaditya Deshmukh, Smt. Padma Divakar** and **Ms. Deepali Dwivedi** *for the Respondent.*

JUDGMENT

Dr. D.Y. Chandrachud, J. - The challenge in these proceedings under Article 226 of the Constitution is to the legality of an order dated 30 December 2010 passed by the Settlement Commission under Section 245D(4) of the Income Tax Act, 1961.

2. On 16 December 2009 the petitioner filed an application before the Settlement Commission under Section 245C(1) seeking a settlement of a "case" as defined in Section 245A(b) for Assessment Years 2008-2009 and 2009-2010 which was pending before the Assessing Officer, no assessment having been made under Section 143(3). The petitioner made a disclosure of income to the extent of Rs. 10 lacs each for the two Assessment Years in question, being income which had not been disclosed before the Assessing Officer. The basis on which the Settlement Commission was moved was that during the course of Assessment Years 2008-09 and 2009-10 the petitioner was engaged in transactions in which the petitioner would locate sellers in the grey market who would sell goods to prospective buyers. According to the petitioner, the goods would be delivered directly by the seller to the buyer; and payment would be routed through the petitioner who in turn would effect payment to the seller after deducting its share. This activity, it was stated, was undertaken in respect of items which did not form part of the inventory of the petitioner. The difference, it is stated, was earned in cash and was not accounted in the regular books of account. The petitioner stated that the activity was since discontinued, but in order to "buy peace of mind" the petitioner was willing to offer the income earned from the activity during Assessment Years 2008-09 and 2009-10, each in the amount of Rs. 10 lacs to tax. The terms of settlement which the petitioner proposed were that (i) the total income of the petitioner be determined at the amount disclosed in the petition; (ii) a waiver of interest be granted under the provisions of the Income Tax Act, 1961 as may be permissible; (iii) Immunity be granted to the petitioner from the levy of penalty and prosecution under the Act; and (iv) such other relief as the Settlement Commission may deem fit in the circumstances of the case be granted.

3. On 24 December 2009 the Settlement commission passed an order under the provisions of Section 245D(1) directing that the application be proceeded with. On 30 December 2009 the Settlement Commission sought a report from the Commissioner of Income Tax under Section 245D(2B). In terms of the provisions of Section 245D(2B) the report of the Commissioner was required to be submitted within a period of thirty days from the order of the Settlement commission. The period stipulated in the provision expired on 29 January 2010 in spite of which no report was received. By an order dated 23 February 2010 the Commission directed that further proceedings shall take place in the matter and that the application

could not be regarded as invalid. On 21 September 2010 a report was submitted by the CIT under Rule 9 of the Income Tax Settlement Commission (Procedure) Rules, 1997. Under Section 245D(1), as it stood prior to amendment, the Settlement Commission was under a mandate to call for a report from the Commissioner on receipt of an application under Section 245C. This procedure was modified when Parliament substituted the provisions of Sub-section (1) as they now stand by the Finance Act, 2007 with effect from 1 June 2007. As it now stands, the earlier requirement of a report from the Commissioner on the receipt of an application under Section 245C and before the Commission decides whether to proceed with the matter, has been dispensed with. Rule 9 of the Income Tax Settlement Commission (Procedure) Rules, 1997 required, under the provisions of the earlier version of Section 245D(1) that the report of the Commissioner had to be furnished within a period of ninety days.

4. The Settlement Commission by an order dated 18 October 2010 directed the Commissioner of Income Tax to conduct a further inquiry and investigation and to submit his report under Section 245D(3) on or before 22 November 2010. The time limit for the disposal of the proceedings before the Settlement Commission was to end on 31 December 2010 and after that the proceedings would abate. In its order dated 18 October 2010 the Settlement Commission noted that during the course of Assessment Year 2008-09 the petitioner had unsecured loans of Rs. 3.73 Crores, the genuineness of which needed to be verified, bearing in mind the modus operandi adopted by the group. During A.Y. 2008-09 the petitioner claimed to have received two loans of Rs. 2.0 crores from two companies by the name of Oleander Manufacturing Credit Pvt. Ltd. and Tristar Agency Pvt. Ltd. During the course of AY 2009-10 further amounts of each of Rs. 90 lacs were received from the two companies. During AY 2009-10, the petitioner allotted 30,000 shares each to the two companies on 13 March 2009 of a face value of Rs. 10 at a premium of Rs. 990 per share. This resulted in share capital of Rs. 3 lacs and share premium of Rs. 2.97 crores being realized from each of the two companies. The Settlement Commission noted from the sketchy details that were available on record, it was difficult to understand the loan transactions which resulted in the conversion of loans into share capital and share premium particularly since the petitioner is not a listed company. The CIT was accordingly directed to submit a factual report under Section 245D(3) on several aspects including, inter alia, the following:

> "(*b*) To verify the genuineness of loans and credit worthiness of the entities who are said to have given loans of Rs. 3 crores each i.e. M/s. Tristar Agencies Pvt. Ltd. and M/s. Oleander Mfg. & Credit Pvt. Ltd. during FY 2007-08 and FY 2008-09, and also to inquire into the genuineness of conversion of the loans to share capital and share premium by issue of shares."

5. The Commissioner of Income Tax by his letter dated 22 November 2010 adverted to the order of the Settlement Commission and stated that the Assessing Officer (DCIT, CC-20, Mumbai) had carried out an investigation but that due to a shortage of time a complete inquiry could not be made. The report stated that the Assessing Officer was prevented by shortage of time from inquiring into the creditworthiness of the persons who had advanced moneys to the petitioner in the form of loans and share applications. However, he noted that all the parties had confirmed having advanced the loans; that all persons were income tax assessees whose identity was established. The Commissioner also noted in his report that the petitioner had disclosed an income each of Rs. 10 lacs for the two Assessment Years which was stated to be commission income earned out of the transactions involving purchase and sale of non ferrous metals. It was stated that the petitioner had not furnished any details of this income and the names of the parties from whom it had earned commission, rate of commission and the mode of receipt had not been disclosed. Reference was made to the fact that if the history of the assessee was to be taken into account, the income disclosed was rather meager; for AY 2007-08 the petitioner had introduced its own money of Rs. 2 crores in the form of share application money. This, it was stated, was evident from the statement of one Giriraj Vijayavargiya who was supposed to have given the share application money but who had stated subsequently that he had only given an accommodation entry. The Commissioner, therefore, stated that the extent of the undisclosed income of the petitioner could be much more than the income which was

disclosed.

6. The Settlement Commission heard the parties and passed its order dated 30 December 2010. The Commission has come to the conclusion that a total amount of Rs. 6.18 Crores represents the additional income which is to be taxed in hands of the petitioner of which an amount of Rs. 4.26 crores relates to Assessment Year 2008-09 and Rs. 1.92 Crores for Assessment Year 2009-10. The Commission has, in the course of its order, noted that "the adequacy of the income from the commodity trading is like an inconsequential sub plot in the bigger saga of the genuineness of funds credited as loans, share application and share premium moneys." The Settlement Commission has adverted to the fact that the Department failed to carry out any meaningful investigation on the specious ground of a paucity of time. However, during the course of the proceedings the petitioner was called upon to produce relevant documentary evidence in order to enable the Commission to examine the genuineness of the transactions alleged to have been entered into by the petitioner. After duly considering the material which has been produced by the petitioner, the Settlement Commission has, on the basis of nearly fourteen grounds and after considering the evidence in its totality, come to the conclusion that the purported transactions were not genuine. The Settlement commission held that the claim of having received such high premium on shares is fictitious and an attempt by the petitioner to launder its own unaccounted funds in the guise of such receipts. The Commission has, therefore, come to the conclusion that the amount shown in the books of account of the petitioner as share capital / premium has to be brought to tax in accordance with the provision of Section 68. In certain areas the Commission has accepted the contention of the petitioner. As a consequence a total amount of Rs. 6.18 crores has been added to the income of the petitioner for Assessment Years 2008-09 and 2009-10. On the aspect of the imposition of penalty the Commission has furnished reasons for rejecting the contention of the petitioner and has come to the conclusion that the offer of the petitioner of Rs. 10 lacs for each of the Assessment Years, based on a story of having earned income for which no records are available and without touching upon the real issues for which the petitioner was being pursued by the Department, is merely an attempt to create a smoke screen to shut out further investigation. Consequently the Commission has come to the conclusion that the petitioner would not be entitled to a waiver of penalty under Section 271(1)(c) and a penalty of Rs. 2.75 crores has been imposed on the petitioner. The petitioner has, however, been granted an immunity under Section 245H from prosecution for offences punishable under the Income Tax Act, 1961. The taxes due and consequent upon the order have been directed to be paid within a period of thirty five days.

7. Learned Counsel appearing on behalf of the petitioner has assailed the order of the Settlement Commission on the basis of the following submissions:

(1) The Settlement Commission had no jurisdiction, while passing its order under Section 245D(4) to deal with the issues which were not either raised in the application by the petitioner or in the report of the Commissioner submitted under Section 245D(3);

(2) The Settlement Commission under Chapter XIX-A of the Act discharges an adjudicatory function and its jurisdiction is confined to pass an order on matters covered by the application and on any other matter relating to the case not covered by the application but referred to in the report of the Commissioner;

(3) The application filed by the petitioner offered two amounts of Rs. 10 lacs each for the two Assessment Years AY 2008-9 and AY 2009-10. The Commissioner did not submit any report to the Settlement Commission in pursuance of the initial direction under Section 245D(2B). Moreover in the subsequent report that was submitted in pursuance of the direction under Section 245D(3) the Commissioner stated that due to paucity of time he had no occasion to investigate into the genuineness of the transactions. In this view of the matter, the Settlement Commission would have no jurisdiction to travel beyond the subject matter of the application and the report of the Commissioner which found, as a matter of fact that the parties which had advanced the loans to the petitioner were income tax assessees and had been sufficiently identified;

(4) An addition under the provisions of Section 68 of the Income Tax Act could not be made by the Settlement Commission since it is a well settled position of law that share application moneys received even from bogus share holders would have to be assessed in the hands of the share holders themselves. In the present case the identities of the shareholders were established duly as found in the report of the Commissioner submitted under Section 245D(3). In any event, the Settlement Commission has not been able to deduce that the funds of the petitioner have in fact flowed back through the conduit of the two companies which had advanced moneys initially as a loan and subsequently converted into share application money. In the absence of any proof of a flow back of funds, the addition under the provisions of Section 68 cannot be justified;

(5) The imposition of a penalty under Section 271(1)(c) is contrary to law since the Settlement Commission did not furnish a notice to show cause to the petitioner before the penalty was imposed. It is a settled principle of law that assessment proceedings are distinct from proceedings for the imposition of penalty. Consequently there has been a violation of the principles of natural justice on the part of the Settlement Commission in imposing a penalty upon the petitioner.

8. On the other hand, it has been urged on behalf of the Union of India by the learned Additional Solicitor General that:

(1) Following the law laid down by the Supreme Court, it is an established position in law that the Settlement Commission has the jurisdiction to render a complete assessment and the entire assessment is transferred to the Settlement Commission upon which the Commission exercises exclusive jurisdiction;

(2) An application under Section 245C(1) is to have the case settled. The expression "case" is defined in clause (b) of Section 245A to mean any proceeding for assessment under the Act in respect of any assessment year which may be pending before the Assessing Officer on the date on which an application is made. Once a proceeding is pending before the Settlement Commission, no parallel assessment proceeding is contemplated under the provisions of the Act. An application before the Commission is to have a case settled and the case is nothing but the assessment proceeding. Consequently the Settlement Commission was within its jurisdiction in determining as to whether the genuineness of the alleged transactions with the two companies was established;

(3) Both on a literal as well as a contextual construction of the provisions of Section 245D(4), the entire assessment proceeding will be before the Settlement Commission for a settlement. The Settlement Commission has all the powers of an Assessing Officer under the provisions of the Income Tax Act, 1961. Consequently, the Settlement Commission was entitled to determine upon the legitimacy and the genuineness of the alleged transactions between the petitioner and the two companies;

(4) The extent of judicial review under Article 226 of the Constitution in respect of an order passed by the Settlement Commission is restricted. The jurisdiction of the Court is only to determine as to whether the order of the Commission is contrary to the provisions of the Act and in absence of such a case, the Court would not be justified in substituting its own view for the view of the Settlement Commission. In the present case the Settlement Commission has extensively considered the material which was produced by the petitioner and even when applying the provisions of Section 68, it has justifiably relied on the test of human probabilities. The Court would not be within its jurisdiction in interfering with the order of the Commission unless it is found to be perverse or founded on no evidence at all;

(5) In the present case the moneys which were realized by the petitioner allegedly by way of share application moneys were not in the context of a public issue of share capital but essentially in the nature of a private placement. The distinction between the two cases has been accepted in the decisions of several High Courts. The Settlement Commission has relied upon nearly fifteen circumstances on the basis of which it concluded that the transactions in the present case were not

genuine and constituted an attempt on the part of the petitioner to route its own funds in the form of share application money;

(6) There has been no violation of the principles of natural justice in the imposition of a penalty under Section 271(1) (c). The petitioner invoked the jurisdiction of the Settlement Commission, seeking a waiver of the penalty otherwise liable to be imposed under the diverse provisions of the Act. The Settlement Commission heard the petitioner before it proceeded to impose a penalty under Section 271(1)(c). Having regard to the parameters which have been set out in the statutory provisions in question, the quantum of the penalty is not in any event disproportionate. Alternatively no prejudice has been shown by the petitioner as a result of the non issuance of a separate show cause notice before a penalty came to be imposed.

9. The rival submissions fall for consideration.

10. Chapter XIX-A of the Income Tax Act, 1961 provides for a settlement of cases. The expression "case" is defined in clause (b) of Section 245A to mean any proceeding for assessment under the 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 definition of the expression "case" in its present form was substituted with effect from 1 June 2007 by the Finance Act, 2007. Prior to the amendment the expression was defined to mean any proceeding for assessment or reassessment of any person in respect of any year or years, or by way of appeal or revision in connection with such assessment or reassessment, which may be pending before an income tax authority on the date of making an application to the Settlement Commission. As a result of the amendment the reference to proceedings pending in appeal or revision has been deleted, consequent upon which a case means a proceeding for assessment which is pending before an Assessing Officer on the date of the application to the Commission. Consequently the object and purpose of establishing a Settlement Commission is to ensure settlement of cases defined, as we have noted, to mean a proceeding for assessment which is pending before the Assessing Officer.

11. Under sub-section (1) of Section 245C an assessee may at any stage of a case relating to him make an application to the Settlement Commission to have the case settled. The main requirements of Section 245C are that the application must contain (i) a full and true disclosure of the income of the assessee which has not been disclosed before the Assessing Officer; (ii) a full and true disclosure of the manner in which such income has been derived and; (iii) the additional amount of income tax payable on such income together with such other particulars as may be prescribed. The proviso to sub-section (1) of Section 245C lays down certain monetary thresholds in regards to the additional amount of income tax payable on the income disclosed in the application. Under clause (ii) of the proviso, the additional amount of income tax payable on the income disclosed in the application must exceed ten lakh rupees.

12. Section 245D provides for the procedure to be followed on the receipt of an application under Section 245C. Under sub-section (1) of Section 245D the Settlement Commission on receipt of an application has to issue a notice to the applicant requiring him to explain as to why the application made by him should be allowed to be proceeded with. Upon hearing the application the Settlement Commission is required, within a period of fourteen days from the date of the application, to pass an order in writing either rejecting the application or allowing the application to be proceeded with. If the Settlement Commission passes no such order within the aforesaid period, the proviso creates a deeming fiction that the application shall be deemed to have been allowed to be proceeded with. Prior to its substitution by the Finance Act 2007, Section 245D as it originally stood provided that upon receipt of an application under Section 245C the Settlement Commission shall call for a report from the Commissioner and on the basis of the materials contained in the report and having regard to the nature and circumstances of the case and of the complexity of the investigation involved, either reject the application or allow it to proceed. The requirement of calling for a report from the Commissioner at the stage of the initial consideration of the application under Section 245D(1) has now been dispensed with as a result of the amended provision. Under sub-section

(2B) of Section 245D, it has been stipulated, inter alia, that in respect of an application which is allowed to be proceeded with under sub-section (1), the Settlement Commission shall, within a period of thirty days from the date on which the application was made, call for a report from the Commissioner and the Commissioner shall furnish the report within a period of thirty days of the receipt of communication from the Settlement Commission. Where a report has been furnished, the Commission is empowered by sub-section (2C) to declare the application as invalid on the basis of the report submitted by the Commissioner, and after furnishing to the applicant an opportunity of being heard. Where the Commissioner has not furnished the report within the stipulated period, the Settlement Commission is empowered to proceed further in the matter without the report of the Commissioner. Under sub-section (3) of Section 245D the Settlement Commission is empowered, inter alia, where it does not declare an application as invalid under subsection (2C), to call for the records from the Commissioner and after examination of the records, if it is of the opinion that any further inquiry or investigation in the matter is necessary, to direct the Commissioner to make or cause to be made such further inquiry or investigation and to furnish a report on the matters covered by the application and any other material relating to the case. The Commissioner thereupon has to furnish the report within ninety days of the receipt of the communication from the Settlement Commission. Once again the proviso stipulates that the Settlement Commission may proceed to pass an order under sub-section (4) even without such a report of the Commissioner where the Commissioner has not furnished his report within the period stated.

13. Sub-section (4) of Section 245D upon which the controversy in the present case turns provides as follows:

> "(4) After examination of the records and the report of the Commissioner, if any received under-
>
> (*i*) sub-section (2B) or sub-section (3), or
>
> (*ii*) the provisions of sub-section (1) as they stood immediately before their amendment by the Finance Act, 2007,
>
> and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorized in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner."

Simply put, under sub-section (4) the Settlement Commission is empowered to pass orders in accordance with the provisions of the Act after examining the records and the report of the Commissioner, if any and upon examining such further evidence as may be placed before it or obtained by it. The Settlement Commission is upon the plain language of the provision not confined merely to examining the report of the Commissioner. As seen earlier, the Commission is not constricted from proceeding further where the Commissioner does not submit a report at all. The evidence which the Commission examines is that which is placed before it or obtained by it. Evidence which is obtained by the Commission is that which emerges on the initiative or directions of the Commission. The Commission is in other words not designed to act as a passive spectator - confined to what the assessee discloses. The Commission can act proactively in gathering or obtaining evidence. The statute confers upon it the power to settle a case, which is nothing but an assessment. The settlement is intended to be final, comprehensive and conclusive. The orders which the Settlement Commission passes are on matters covered by the application and on any other matter relating to the case not covered by the application but referred to in the report of the Commissioner. The Settlement Commission, therefore, can pass orders on matters covered by the application and on any other matter relating to the case which is referred to in the report of the Commissioner, though not covered by the application. Under sub-section (6) of Section 245D every order passed under sub-section (4) must provide for the terms of settlement including any demand by way of tax, penalty or interest, the manner in

which any sum due under the settlement shall be paid and all other matters to make the settlement effective. The order of the Settlement Commission must provide that the settlement shall be void if it is subsequently found to have been obtained by fraud or by misrepresentation of facts. Where a settlement becomes void as provided under sub-section (6), the proceeding with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the Income Tax authority concerned is permitted, notwithstanding anything contained in the Act, to complete the proceedings within two years from the end of the financial year in which the settlement became void. The assessment proceedings are revived where the settlement becomes void. Sub-section (8) of Section 245D provides that nothing contained in Section 153 shall apply to an order passed under sub-section (4) or to any order of assessment, reassessment or recomputation required to be made by the Assessing Officer in pursuance of any directions contained in such order passed by the Settlement Commission. Explanation 1(v) to Section 153 stipulates that in computing the period of limitation for the purpose of the section, in a case where an application made before the Settlement Commission under Section 245C is rejected or is not allowed to be proceeded with, the period commencing from the date on which such application was made and ending with the date on which the order under sub-section (1) of Section 245D is received by the Commissioner shall be excluded.

14. Section 245F stipulates that in addition to the powers conferred on the Settlement Commission by the Chapter, it shall have all the powers which are vested in an income tax authority under the Act. Under sub-section (2) of Section 245F, where an application made under Section 245C has been allowed to be proceeded with under Section 245D, the Settlement Commission shall, until an order is passed under sub-section (4) of the Section 245, have, subject to the provisions of sub-section (3) of that Section, exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act in relation to the case. Under Section 245H the Settlement Commission is empowered to grant immunity from prosecution under the Penal Code or under any other Central Act to any person who has made an application for settlement under Section 245C. The grant of immunity is, however, conditional upon the requirement that the applicant has cooperated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and of the manner in which such income has been derived. Section 245HA provides for the abatement of proceedings before the Settlement Commission in certain eventualities on a specified date. Those eventualities include a situation where an application under Section 245C has been rejected under sub-section (1) of Section 245D; or where an application under Section 245C has not been allowed to be proceeded with under sub-section (2A) or further proceeded with under sub-section (2D) of Section 245D; or where an application under Section 245C has been declared as invalid under sub-section (2C) of Section 245D; or where an order under sub-section (4) of Section 245D has not been passed within the stipulated period of time. Upon the abatement of the proceedings, Sub-section (2) of Section 245HA provides that the Assessing Officer or the Income Tax Authority before whom the proceeding at the time of making of the application was pending shall dispose of the case in accordance with the provisions of the Act as if no such application had been made. In such a situation an extension of time is provided for in sub-section (4) of Section 245HA.

15. The provisions of Chapter XIX-A emphasise that the object underlying the constitution of the Settlement Commission is the settlement of cases under the chapter. A case, as noted earlier is defined to mean any proceeding for assessment under the Act which is pending before the Assessing Officer on the date when an application for settlement is made under Section 245C. The assessment is the subject of the case which is to be settled. An applicant who moves the Settlement Commission under Section 245C has to do so on the basis of a true and full disclosure of his income which has not been disclosed before the Assessing Officer. Disclosure of income which has not been disclosed before the Assessing Officer is essential to the validity of the application. The application is to have the case settled. Under sub-section (1B) of Section 245C, where the income disclosed in the application relates to one previous year, if the applicant has furnished a return in respect of total income of that year, the tax has to 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. The Settlement Commission is empowered to call for a report of the Commissioner at two stages. The first stage arises under sub-section (2B) of Section 245D where, *inter alia,* an application has been allowed to be proceeded with under sub-section (1). There, the Settlement Commission shall call for a report. The second stage is under sub-section (3) of Section 245D where, *inter alia,* the Settlement Commission has not declared an application as invalid under sub-section (2C). In both the cases the report of the Commissioner is not a condition precedent for the Settlement Commission to proceed further with the settlement of the case. If the Commissioner does not submit his report to the Commission, that does not bring an end to the proceeding before the Commission. On the contrary, both the second proviso to sub-section (2C) and the proviso to sub-section (3), make it abundantly clear that the Settlement Commission is empowered to proceed further even in a situation where the Commissioner does not furnish a report within the prescribed period. Once the Settlement Commission is seized of the proceedings and an application under Section 245C has been allowed to be proceeded with under Section 245D, the Settlement Commission has exclusive jurisdiction to exercise the powers and to perform the functions of an income tax authority under the Act in relation to the case. When the Settlement Commission decides to proceed with a case under Section 245D(1), it assumes exclusive jurisdiction in regard to the assessment. That is because the Settlement Commission is then seized of the case in respect of which a settlement is sought and the expression "case" itself is defined to mean any proceeding for assessment under the Act which is pending before the Assessing Officer. The Act does not contemplate a parallel proceeding before the Settlement Commission and before the Assessing Officer, once the Settlement Commission has decided to proceed with the application under Section 245D(1). So long as the proceedings remain before the Settlement Commission, it is that authority alone which has jurisdiction in all matters pertaining to assessment. The jurisdiction of the Settlement Commission is to pass orders (i) on matters covered by the application; and (ii) on any other matter relating to the case, not covered by the application but referred to in the report of the Commissioner.

16. This position in law which emerges from a reading of the statutory provisions as a whole is now a matter of judicial pronouncement. In *CIT* v. *Express Newspaper Ltd.* [1994] 206 ITR 443/ 72 Taxman 438 the Supreme Court emphasised firstly that an assessee cannot approach the Commission for the settlement of his case with respect to income already disclosed before the Assessing Officer. The second principle which emerges from the decision is that proceedings before the Commission are not confined to the income disclosed before it alone. The Supreme Court held that once an application is allowed to be proceeded with by the Commission, the proceedings pending before any authority under the Act relating to that Assessment Year have to be transferred to the Commission and the entire case for that Assessment Year will be dealt with by the Commission itself. The Supreme Court also emphasised that while filing of an application by the assessee is a unilateral act, the Commission is not prevented from looking into material collected by the income tax authorities even subsequent to the submission of the report by the Commissioner if such a course is called for in the interest of justice. In the subsequent decision of the Constitution Bench in *Brij Lal* v. *CIT* [2011] 1 SCC 1 the Supreme Court considered whether the provisions of Section 234-B apply to the proceedings before the Settlement Commission under Chapter XIX-A, whether interest should be computed upto the stage of Section 245D(1) or upto the date of order of Commission under Section 245D(4) and whether the Commission could reopen its concluded proceedings by invoking Section 153 so as to levy interest under Section 234B, though interest was not levied in the original proceedings. The Constitution Bench of the Supreme Court held that (i) Sections 234-A, 234-B and 234-C are applicable to the proceedings before the Settlement Commission under Chapter XIX-A; (ii) The terminal point for the levy of interest was held to be the date of the order under Section 245D(1); and (iii) The Settlement Commission could not reopen concluded proceedings by invoking Section 154, particularly in view of Section 245(1). In the course of the discussion, the Supreme Court held that Chapter XIX-A is a self contained Code and the procedure to be followed by the Settlement Commission under Section 245C and Section 245D in the matter of computing undisclosed income, the additional

income tax payable on such income with interest and the filing of a settlement application indicating the amount of income returned in the return of income and additional income tax payable on the undisclosed income. The Supreme Court held that Chapter XIX-A has an in-built mechanism of computing the total income which is nothing but assessment or computation of total income. When Parliament used the words "as if such aggregate would constitute total income", it presupposes that under the special procedure the aggregation of the returned income plus income disclosed would result in the computation of total income which is the basis for the levy of the tax on the undisclosed income which is nothing but an assessment. Ordinarily making of an order of assessment is an integral part of the process of assessment. However, no such steps are required to be followed in the case of proceedings under Chapter XIX-A. The Chapter, ruled the Supreme Court, contemplates taxability determined with respect to the undisclosed income only by the process of settlement / arbitration. In that sense, the proceedings before the Settlement Commission were treated as being similar to arbitration proceedings. Those proceedings contemplate an assessment by settlement and not by way of regular assessment or assessment under Section 143(1), 143(3) or Section 144 of the Act.

17. Now if the challenge to the jurisdiction of the Settlement Commission is considered in this background, it is evident that the petitioner had, within the meaning of Section 245C, moved the Commission for a settlement of the case. The case which was sought to be settled was the pending assessment proceedings for AYs 2008-09 and 2009-10. The Settlement Commission directed the Commissioner initially in exercise of its powers under Section 245D(2B) to submit a report. No report was submitted to the Settlement Commission by the Commissioner. Thereafter once again the Settlement Commission called upon the Commissioner to cause an investigation to be made and to furnish a report under Section 245D(3). The Settlement Commission was justifiably anguished at the absence of co-operation on the part of the Commissioner, in the second instance on what the Commission considered was a specious explanation that there was a paucity of time. Be that as it may, the Commission had the entire assessment proceedings before it and of which it was seized upon the passing of an order under Section 245D(1). The Commission assumed in accordance with law the exclusive jurisdiction over the assessment proceedings having decided to proceed with the application under Section 245D(1). Under sub-section (4) of Section 245 D the Settlement Commission was entitled to act on the basis of (i) an examination of the records; (ii) the report of the Commissioner, if any, received under sub-section (2B) or sub-section (3); (iii) such further evidence as may be placed before it or obtained by it. On the basis of this material the Settlement Commission was empowered, in accordance with the provisions of the Act, 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.

18. The submission which has been urged on behalf of the petitioner is that since the petitioner had moved the Settlement Commission only with an offer of a disclosure of income amounting to Rs.10 lacs each in the two Assessment Years and since the Commissioner was not in a position to determine either the genuineness or the authenticity of the alleged transaction entered into by the petitioner with the two companies, the Settlement Commission acted outside its jurisdiction in entering upon the genuineness of the transactions. It is impossible to accept the submission. The jurisdiction of the Settlement Commission having been invoked under Section 245C, the Commission, when it passed its order dated 18 October 2010 under Section 245D(3), specifically called upon the Commissioner to verify the genuineness of the loans and the credit worthiness of the entities who had allegedly given loans of Rs.3 lacs each (M/s. Oleander Manufacturing Credit Pvt. Ltd. and M/s. Tristar Agency Pvt. Ltd.) during FY 2007-08 and 2008-09 and to enquire into the genuineness of the conversion of loans to share capital and share premium by the issue of shares. The Commissioner in his report dated 22 November 2010 adverted to the directions of the Commission and stated that a shortage of time had prevented the Assessing Officer from enquiring into the creditworthiness of the persons who had advanced moneys to the petitioner in the form of loans and share applications. The Commissioner, however, stated that all the parties concerned had confirmed

having advanced loans to the petitioner; that all persons were income tax assessees and, therefore, the identity of the persons who had advanced the loans was established. The genuineness of the loan transactions, the credit worthiness of the entities who had allegedly advanced the loans and the genuineness of the conversion of the loans into share capital and share premium against the issuance of shares specifically formed a subject matter of the reference made to the Commissioner under Section 245D(3). The Commissioner dealt with a part of his mandate leaving the rest not analyzed, for reasons of time. These were all matters relating to the case - not covered by the application - but nonetheless referred to in the report of the Commissioner. The Commissioner, by the terms of reference, had to verify the genuineness of the transactions and credit worthiness of the parties. If the Commissioner were to hold that the transactions were genuine and parties were credit worthy, that would be an input before the Commission, but would not conclude the issue. Contrariwise, if the Commissioner were to hold that the transactions were sham and fictitious, it would still be for the Settlement Commission to arrive at its determination when it settled the case. The nature of the determination by the Commissioner does not determine the jurisdiction of the Commission. The expression relating to the case is an expression of width and amplitude. The report of the Commissioner furnished in pursuance of the directions of the Settlement Commission under Section 245D(3) cannot be read in a sense disjointed from the terms of reference made by the Commission to him. The report refers to the matters upon which he was called upon to investigate. All those matters would fall within the jurisdiction of the Commission as matters relating to the case and referred to in the report of the Commissioner. Consequently even on a literal and textual construction of Section 245D(4), we are satisfied that the Settlement Commission acted within the parameters of its jurisdiction in the present case. The position which emerges on a plain and literal construction of the language of the statute is supported by even a contextual construction. Parliament intended that the entire assessment is before the Settlement Commission. The Commission completes the process of assessment - as the decision in *Brij Lal* (*supra*) holds - as part of the settlement of the case. Until the Settlement Commission is seized of the proceedings, there is no parallel assessment contemplated in law. Comprehensiveness, finality and conclusiveness are the three attributes of the function assigned to the Commission. That object is achieved when the entire assessment is completed, as part of the jurisdiction to settle a case. To dilute this position would defeat the object which Parliament intended to achieve. Once an assessee moves the Settlement Commission, the statute expressly mandates that the application cannot be withdrawn. Unless the Commission in a given case decides to reject the application, it is entitled to resolve the case by settlement. An assessee who moves the Settlement Commission cannot be allowed to be anything other than fair and candid. Nor can he assert an unqualified right that the Settlement Commission should either accept what he discloses or leave him to another round of assessment before the Assessing Officer.

19. The next aspect of the order of the Settlement Commission which needs to be looked into relates to the computation of the additional income of Rs.6.18 crores in the hands of the assessee. Before we deal with the merits of the challenge, it must be noted at the outset that the extent of judicial review in a determination made by the Settlement Commission must fall with the parameters settled by decided cases. In *Jyotendrasinhji* v. *S.I. Tripathi* [1993] 201 ITR 611 / 68 Taxman 59 (SC) the Supreme Court emphasised that the only ground upon which an order passed by the Settlement Commission can be interfered with is that the order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. This would be apart from grounds of bias, fraud or malice which would constitute a separate category. The Supreme Court held as follows:

> "16. ...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 : (AIR

1989 SC 1038), 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." Reliance was placed upon the decision of the House of Lords in Chief Constable of the *N.W. Police* v. *Evans* [1982] 1 WLR 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..."

20. The same principle has since been reiterated in a more recent judgment rendered in relation to the powers of the Settlement Commission constituted under the Central Excise Act in *Union of India* v. *Ind-Swift Laboratories Ltd.* [2011] 4 SCC 635 by the Supreme Court:

"22. 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..."

21. In an earlier judgment of a Division Bench of the Karnataka High Court in *N. Krishnan* v. *Settlement Commission* [1989] 47 Taxman 294/ 180 ITR 585 (Kar.) it was held that a decision of the Settlement Commission may be interfered with only, (i) if there is a grave procedural defect such as a violation of the mandatory procedural requirements of the provisions of Chapter XIX-A and/or violation of the principle of natural justice; and (ii) there is no nexus between the reasons given and the decision taken by the Settlement Commission. In other words, the Court under Article 226 would not interfere with an error of fact alleged to have been committed by the Settlement Commission.

22. Now, it is in this background that the merits of the challenge will fall for determination. The Settlement Commission has noted in its order that in order to scrutinise the genuineness of the transactions it had directed the petitioner to produce relevant records such as minute books, attendance registers of AGMs, dispatch registers, share certificates and authorization of proxy forms amongst other documentary material. The order of the Settlement Commission indicates at least fourteen reasons on the basis of which the Commission formed its view in regard to the genuineness of the transactions. These may be now briefly summarized: (i) A premium of Rs. 990 per share on a face value of Rs. 10 was alleged to have been paid in the case of an unlisted company with a level of assets and earnings per share as displayed by the petitioner. No dividends have ever been declared by the company. For 2008-09 the company had a profit of Rs. 1.59 lacs and an earning per share of Rs. 14.48 as against which share premium of Rs. 18.84 crores was collected. For 2009-10 as against a profit of Rs. 70.19 lacs and earning per share of Rs. 6.06 the share premium collected was Rs. 24.78 crores. Neither the past performance of the company nor its present earnings justify the amount of premium which had been charged; (ii) Even the most reputed companies in this line of business such as Hindalco and Sterlite Industries do not command such a high premium on their share value which would be about 1/5th of the applicant company; (iii) During the course of a statement under Section 131 the Executive Director of the petitioner stated that the value of the premium was worked out on the basis of the advice of financial consultants and advisors but he could not remember their names; (iv) During the course of proceedings under Section 245D(4) when the same question was put to the Executive Director, he was unable to furnish any details of the persons or institutions on whose advice the share premium amount was fixed; (v) The net worth as disclosed by the balance sheet, the potential earnings as disclosed by earnings per share or even the vague protestations of future prospects would not justify a high premium of Rs. 990/- per share. If such a high figure was fixed in consultation with experts or financial institutions, it is inconceivable as to why petitioner was unable to provide even the barest of details of such consultation; (vi) The only inference that could be drawn was that no such

consultation took place, the rate of premium was fixed unilaterally by the petitioner without any reference point to past records, present earnings or future prospects. The object was not to attract genuine investors by pegging the premium at a realistic level but to bring in large amounts of unaccounted funds in the guise of share premium; (vii) The Central Government had notified the Unlisted Public Companies (Preferential Allotment) Rules, 2003 which apply to issue of shares on preferential basis and/or through private placement by a company in pursuance of a resolution passed under sub-section (1A) of Section 81 of the Companies Act, 1956 and to the issue of shares to promoters and their relatives either in public issue or otherwise; (viii) It did not appear, in compliance with the provisions of the Rules, that an explanatory statement was placed before the shareholders at the AGM held on 17 March 2009. There were no indicators as to the basis or the date on the basis of which the pricing was arrived at; (ix) The alleged Minutes of Meeting of the Board of Directors held on 30 March 2009 reflected that the Board had decided to initiate meetings with Merchant Bankers for an Initial Public Offer. A premium of Rs. 990/- per share as against a lot of 60,000 shares was recorded as a fair premium considering the future potential and expected growth of non ferrous metals business in times to come. The fact that the Board had decided to initiate meetings with Merchant Bankers (in future) indicated that at the time when the price was fixed, no such meeting had taken place. Hence the claim that the experts had been consulted in fixing the price of the issue was not borne out by facts; (x) The Resolution authorizing the issuance of shares under Section 81(1A) of the Companies Act, 1956 was passed on 17 March 2009 and was intimated to the Registrar of Companies on 16 April 2009. However, the execution of the share application forms by the two companies was much before the date on which the issue was approved by the passing of a Special Resolution at the AGM on 17 March 2009. In other words it not clear as to how the two buyer companies could have applied for allotment of shares at premium even before such an issue was proposed and authorized. For that matter the company could not also have issued share application forms before the authorization of the issue took place; (xi) Both the Resolutions of Oleander Manufacturers and Credit Pvt. Ltd. and Tristar Agencies Pvt Ltd. were passed on 3 and 4 April 2008 respectively. Both the Resolutions were in the same format and couched in identical language including the same grammatical mistakes; (xii) Although share applications made by Oleander Manufacturers were filled up by hand, the ones that were typed had the same type face as those in the application of Tristar Agencies. Some of the printed forms which were used were of the year 2000. It was surprising that the company was still using eight year old forms when its networth was such that it commanded a premium of Rs. 990/- per share of Rs. 10/-; (xiii) The attendance register for the AGM held on 25 September 2009 contained over writings. One of the Directors who attended on behalf of Oleander Manufacturers was actually not a Director of the company. The relevant proxy authorisation forms were not produced nor was any proof of communication to the share holders in regard to the convening of the AGM or even for the despatch of the share certificates produced; (xiv) Both Oleander and Tristar are companies being run from a single room as mentioned in their addresses. Initially the promoters of Oleander Manufactures were two brothers and in the case of Tristar Agencies, spouses who were no longer associated with the companies. The Bank accounts, copies of which were furnished, revealed that although huge sums were deposited and withdrawn, a major portion of the income was from sale of shares of which there were no details. The net income is meager in both cases and is not commensurate with companies who could have afforded to make such huge investments in shares of an unknown and unlisted company by payment of such a high premium.

23. Now, it is in this background that the Settlement Commission has arrived at a considered finding of fact that the transactions of the two companies were not genuine transactions; that the two companies lacked a credit standing which would have enabled them to pay large amounts towards share premium of Rs. 990/- on a face value of Rs. 10/- per share and that neither the past performance or the financials of the petitioner itself would justify the payment of such a large premium. The Settlement Commission has relied upon the law laid down by the Supreme Court in *Sumati Dayal* v. *CIT* [1995] 214 ITR 801 / 80 Taxman 89 (SC) in applying the test of human probabilities. Section 68 of the Income Tax Act provides that where any sum is found credited in the books of an assessee maintained for any previous year, and the

assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. The Supreme Court held as follows:

> "It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is not taxable because it falls within exemption provided by the Act lies upon the assessee. [*See : Parimisetti Seetharamamma* [1965] 57 ITR 532 at page 536). But, in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income-tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the Assessing Officer, not satisfactory. In such a case there is, prima facie, evidence against the assessee, *viz.*, the receipt of money, and if he fails to rebut it, the said evidence being unrebutted, can be used against him by holding that it was a receipt of an income nature. While considering the explanation of the assessee the Department cannot, however, act unreasonably."

24. But, it has been urged on behalf of the petitioner that an addition within the meaning of Section 68 would not be justified in law in its hands even if the share application money was received from bogus share holders. Counsel appearing on behalf of the petitioner submitted that in the present case the report submitted by the Commissioner under Section 245D(3) showed that the two companies were duly identified being income tax assessees whose PANs were also furnished. Consequently, relying on the decision of the Delhi High Court in the case of *CIT* v. *Lovely Exports (P.) Ltd.* [2008] 299 ITR 268/[2007] 158 Taxman 440 (Delhi) and the order rendered by the Supreme Court in a Special Leave Petition arising therefrom, it was urged that recourse to the provisions of Section 68 was not in order. Now, in order to appreciate the submission it would be necessary to consider the Judgment of the Delhi High Court in *Lovely Exports (P.) Ltd.* (*supra*). The Division Bench of the Delhi High Court dealt with a batch of appeals relating to three assessees. In the case of *Lovely Exports (P.) Ltd.* (*supra*) the Assessing Officer had proceeded to make an addition on the ground that the share applicants in question did not exist. The assessee had furnished necessary details such as the PAN of the share applicants. The share money had been received through banking channels. The Assessing Officer made an addition only on the ground that some of the summons which were issued to the applicants were returned unserved, whereas in the case of others the summons though served, had not been complied with. Now it is in this background that the Division Bench of the Delhi High Court noted that the Assessing Officer did not carry out any enquiry into the income tax record of the persons who had furnished the details in order to ascertain the status of the share applicants. Significantly, the judgment of the Delhi High Court makes a distinction between a case where shares are allotted in the course of a large scale subscription to the shares of a public company on the one hand and a case of private placement on the other. In the case of allotment of shares of a public company, the company may have no material other than the application forms and the bank transaction details to furnish some indication of the identity of the subscribers. This distinction between a public issue of share capital and private placement has been made out in the following observations of the Delhi High Court:

> "15. There cannot be two opinions on the aspect that the pernicious practice of conversion of unaccounted money through the masquerade or channel of investment in the share capital of a company must be firmly excoriated by the Revenue. Equally, where the preponderance of evidence indicates absence of culpability and complexity (sic) of the assessee it should not be harassed by the Revenue's insistence that it should prove the negative. *In the case of a public issue, the Company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The Company must, however, maintain and make available to the Assessing Officer for his perusal, all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same.* A delicate

balance must be maintained while walking the tightrope of Sections 68 and 69 of the Income Tax Act. The burden of proof can seldom be discharged to the hilt by the assessee; if the Assessing Officer harbours doubts of the legitimacy of any subscription he is empowered, nay duty-bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the Company." (Emphasis supplied).

25. Now, it is this decision of the Delhi High Court against which a Special Leave Petition before the Supreme Court came to be dismissed on 11 January 2008. In *CIT* v. *Lovely Exports (P.) Ltd.* [2008] 6 DTR 308 (SC) while dismissing the Special Leave Petition the Supreme Court observed that if the share application money was received by the assessee from allegedly bogus share holders whose names were given to the Assessing Officer, the department was free to proceed to reopen their individual assessments in accordance with law. On this ground, the Supreme Court while dismissing the Special Leave Petition found no infirmity in the judgment of the Delhi High Court. The principle which was emphasised by the Delhi High Court in the case of Lovely Exports was followed by another Division Bench in *CIT* v. *Value Capital Services (P.) Ltd.* [2008] 307 ITR 334 (Delhi). In *CIT* v. *Oasis Hospitalities (P.) Ltd.* [2011] 331 ITR 119/ 198 Taxman 247/ 9 taxmann.com 179 (Delhi), a Division Bench of the Delhi High Court observed that the initial burden must be upon the assessee to explain the nature and source of the share application money received. In order to discharge this burden, the assessee is required to prove: (a) Identity of shareholder; (b) Genuineness of transaction; and (c) Credit worthiness of shareholders. As far as the creditworthiness of the subscriber is concerned, that can be proved by producing a bank statement of the subscriber showing that it has sufficient balance in its account to enable it to subscribe to the share capital. The Delhi High Court held that once the initial burden has been discharged, the observations of the Supreme Court in the case of *Lovely Exports (P.) Ltd.* (*supra*) would suggest that the Department is free to proceed to reopen the individual assessments in the case of alleged bogus shareholders in accordance with law and is not remediless. This would be more so when the assessee is a public limited company and has issued share capital to the public at large as in such cases the company cannot be expected to know every detail pertaining to the identity and financial worth of the subscriber. However, the initial burden on the assessee would be some what heavy in case the assessee is a private limited company where the shareholders are closely related because in such a case the assessee cannot feign ignorance about the status of the parties. The judgment of a Division Bench of this Court in *CIT* v. *Creative World Telefilms Ltd.* [2011] 203 Taxman 36 (Mag.)/ 333 ITR 100 / 15 taxmann.com 183 (Bom.) is along the same lines.

26. In the present case it needs to be emphasised that the Settlement Commission has considered all the material on record including the material which had a bearing on the credit worthiness and financial standing of the alleged subscribing companies to the share capital of the petitioner. None of the companies was held to have a financial standing or credit worthiness which would justify making of such a large investment of Rs. 6 crores at a premium of Rs. 990/- per share. The allotment of shares, it must be noted, has taken place in pursuance of a private placement. The principles which have been applied in relation particularly to the public subscription of shares of a public limited company can obviously have no application to the facts of a case such as the present. The view which has been taken by the Settlement Commission is consequently borne out on the basis of the material on record. This is not a case where the Commission has proceeded contrary to law or on the basis of no evidence. There is no perversity in the findings of the Settlement Commission.

27. Before leaving this aspect of the matter, it would be necessary to advert to two decisions of the Supreme Court, the first being in *CIT* v. *P. Mohanakala* [2007] 161 Taxman 169 / 291 ITR 278 (SC). While considering the scope of Section 68, the Supreme Court observed as follows:

"15. ...When and in what circumstances Section 68 of the Act would come into play? That a bare reading of Section 68 suggests that there has to be credit of amounts in the books maintained by an assessee; such credit has to be of a sum during the previous year; and the assessees offer no

explanation about the nature and source of such credit found in the books; or the explanation offered by the assessees in the opinion of the Assessing Officer is not satisfactory. It is only then the sum so credited may be charged to income-tax as the income of the assessees of that previous year. The expression "the assessees offer no explanation" means where the assessees offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessees. It is true the opinion of the Assessing Officer for not accepting the explanation offered by the assessees as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the *sine qua non* for forming the opinion."

The Supreme Court noted, following the earlier decision in *CIT* v. *Orissa Corpn. (P.) Ltd.* [1986] 159 ITR 78/25 Taxman 80 (SC) that where the conclusion of the Tribunal was not unreasonable or perverse or based on no evidence, no question of law as such would arise for consideration. The Court further observed thus:

"25. ...The doubtful nature of the transaction and the manner in which the sums were found credited in the books of accounts maintained by the assessee have been duly taken into consideration by the authorities below. The transactions though apparent were held to be not real one. May be the money came by way of bank cheques and paid through the process of banking transaction but that itself is of no consequence."

28. In a more recent judgment of the Supreme Court in *Vijay Kumar Talwar* v. *CIT* [2011] 330 ITR 1/ 196 Taxman 136 /[2010] 8 taxmann.com 264 (SC) the same principle was applied in the following observations:

"24. ...All the authorities below, in particular the Tribunal, have observed in unison that the assessee did not produce any evidence to rebut the presumption drawn against him under Section 68 of the Act, by producing the parties in whose name the amounts in question had been credited by the assessee in his books of account. In the absence of any cogent evidence, a bald explanation furnished by the assessee about the source of the credits in question *viz.*, realisation from the debtors of the erstwhile firm, in the opinion of the assessing officer, was not satisfactory. It is well settled that in view of Section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, the same may be charged to income tax as the income of the assessee of that previous year, if the explanation offered by the assessee about the nature and source thereof is, in the opinion of the assessing officer, not satisfactory."

29. In the exercise of the power of judicial review particularly against the findings of the Settlement Commission this Court would not be justified in re-appreciating the findings of fact which, in any event, are based on the material on record. The view taken is consistent with the law laid down by the Supreme Court.

30. Finally that leaves the Court to deal with the penalty which has been imposed upon the petitioner. The submission which has been urged on behalf of the petitioner is that no notice to show cause was issued to the petitioner before the Settlement Commission proceeded to impose a penalty and there was hence a violation of the principles of natural justice.

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 lacs 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 lacs 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 lacs 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.

32. For these reasons, having heard the counsel, we are of the view that there is no merit in the petition. The petition shall accordingly stand dismissed. There shall be no order as to costs. All interim orders shall stand vacated.

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*In favour of revenue.

†Writ petition arising out of order of Settlement Commission dated 30-12-2010.