

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 13572 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 13577 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 13579 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 13580 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 13581 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 13588 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 13594 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 13595 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 13596 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 13598 of 2018****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS.JUSTICE HARSHA DEVANI****and****HONOURABLE DR.JUSTICE A. P. THAKER**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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M/S AKSHAR DEVELOPERS

Versus

INCOME-TAX SETTLEMENT COMMISSION ADDITIONAL BENCH II

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Appearance:

MR JP SHAH, SENIOR ADVOCATE with MR MANISH J SHAH(1320) for the PETITIONER(s) No. 1

MR MR BHATT, SENIOR ADVOCATE with MRS MAUNA M BHATT(174) for the RESPONDENT(s) No. 2,3

UNSERVED WANT OF TIM(31) for the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**

and

HONOURABLE DR.JUSTICE A. P. THAKER

Date : 04/02/2019

COMMON ORAL JUDGMENT

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. All these petitions arise out of a common order dated 2.2.2018 passed by the Income Tax Settlement Commission (hereinafter referred to as “the Settlement Commission”) on the respective applications filed by the respective petitioners, and hence, the same were taken up for hearing and are decided by this common judgment. For the sake of convenience, reference is made to the facts as appearing in Special Civil Application No.13572 of 2018 filed by M/s Akshar Developers.

2. The facts stated briefly are that on 22.9.2015, a raid came to be carried out in the case of the petitioner under section 132 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) when some documents came to be seized. The partners were also searched. According to the petitioner,

nothing worth the name by way of unaccounted cash, jewellery or investment was found from the above raid from the petitioner or its partners. The petitioner was advised that instead of entering the channel of long drawn litigation starting with the assessment order, it would be wise to approach the Settlement Commission. Therefore, the petitioner preferred application dated 30.11.2017 under section 245(C)(1) of the Act. The form was filled by the petitioner along with which the statement of particulars of issues to be settled, as well as the statement showing full and true disclosure came to be submitted. The matter came up for the purpose of admission and by an order dated 12.12.2017 by the Settlement Commission admitted the applications under section 245(D)(1) of the Act.

2.1 Thereafter, the Principal Commissioner of Income Tax (Central), Surat (hereinafter referred to as "the Principal Commissioner") submitted a report dated 16.1.2018 under section 245D(2B) of the Act. It is the case of the petitioner that the Principal Commissioner has virtually accepted the admission of the petitioner's application as he has nowhere directly or indirectly indicated that the income disclosed by the petitioner is not full and true.

2.2 Thereafter, the petitioner filed a rejoinder dated 25.1.2018 to the above report under section 245D(2B) of the Act meeting with the objections raised by the Principal Commissioner. On 30.1.2018 the matter was heard for the purposes of decision under section 245D(2C) of the Act, whereupon the Settlement Commission passed an adverse order dated 2.2.2018 under section 245D(2C) of the Act which

is subject matter of challenge in the present petitions.

3. Mr. J. P. Shah learned counsel for the petitioners submitted that the Settlement Commission instead of passing the order on the basis of the report as clearly laid down in section 245D(2C) of the Act has passed the order on the basis of what was not in the report, which renders such order bad in law. Referring to the provisions of section 245D(2C) of the Act, it was submitted that no one is required to be heard at this stage unless the report of the Commissioner is unfavourable. According to the learned counsel when in the report, the Principal Commissioner does not tell the Settlement Commission that the applicant has not made full and true disclosure and if it is obligatory on the part of the Settlement Commission to pass an order based on the report of the Principal Commissioner, then on this report the Settlement Commission could not have passed the order rejecting the application.

3.1 Referring to Paragraph 5.1 of the impugned order, it was pointed out that the Settlement Commission has considered the objections raised by the Commissioner of Income-tax (Departmental Representative) [hereinafter referred to as the "CIT (DR)"] to the admission of the settlement applications. It was submitted that it is not open for the CIT (DR) to raise objection and that the Commissioner has gone beyond what his superior Principal Commissioner has stated in the report and that if there was any objection, it was for the Principal Commissioner to take such objection in the report. It was submitted that there was grave error on the part of the

Settlement Commission permitting the CIT (DR) to raise objections to the admission of the application and more so in permitting him to go beyond the report.

3.2 Referring to the impugned order, it was submitted that several points which were not there in the report have been taken into consideration in the order and, therefore, the petitioner's representative naturally was not ready to reply off hand without instructions from the petitioner or its accountant. It was urged that the impugned order having gone far beyond the report of the Principal Commissioner is therefore, bad in law.

3.3 It was submitted that sub-section (2C) of section 245D of the Act mandates that, the order be passed within fifteen days of the report. It was submitted that if the report said that there was no full and true disclosure, the petitioner would have been called upon. It was submitted that the provision contemplates opportunity of hearing to the assessee in case the application is to be held to be invalid, however, if the Principal Commissioner has not given a report against the petitioner assessee, hearing the petitioner could have been dispensed with. It was submitted that if the report was not against the assessee, the Settlement Commission could not have called upon the CIT (DR) as to why the report should not be accepted.

3.4 It was contended that if a new argument, that too, a factual one, which is not there in the report of the Commissioner is advanced, the rule of *audi alterem partem* would require the Settlement Commission to give time to the

representative of the other side to reply to the same because factual arguments cannot be replied off the cuff without the petitioner's representative checking the records and taking instructions from the petitioner. It was submitted that given the time line provided in the section, namely, that the order has to be passed within a period of fifteen days of the receipt of the report, it is not possible to adopt such a course of action. Therefore, it is not permissible for the Settlement Commission to consider new arguments, which are factual in nature and not contained in the report.

3.5 On the merits of the impugned order, it was submitted that the Settlement Commission has not mentioned in the impugned order as to which seized document has not been considered by the petitioner to arrive at the profit. It was submitted that in the order made under section 245D(1) of the Act, the Settlement Commission has given a clear finding that there is full and true disclosure and that between the passing of that order and the impugned order, there was no new fact or additional material which could have inspired an adverse conclusion. It was submitted that, therefore, the impugned order passed by the Settlement Commission being in breach of the provisions of section 245D(2C) of the Act deserves to be set aside.

4. Vehemently opposing the petitions, Mr. M. R. Bhatt, Senior Advocate, learned counsel for the respondents submitted that the Settlement Commission while passing the impugned order has considered the report submitted by the Principal Commissioner of Income Tax under section 245(2B) of the Act as well as the relevant documents and evidences so as

to come to the conclusion that there was no full and true disclosure. It was submitted that it is trite law that while exercising powers under Article 226 of the Constitution of India, this court would be concerned with the decision making process of the Settlement Commission and not so much with the correctness of the order as it would be in appeal. It was submitted that in the absence of any flaw having been pointed out in the decision making process, the petition deserves to be dismissed on this ground alone.

4.1 It was submitted that the contention that the Settlement Commission could not have gone beyond the report is fallacious and contrary to the scheme of Chapter XIX-A of the Act. It was contended that the Settlement Commission has to examine the full and true nature of the disclosure of income at every stage of the settlement proceedings and if at any stage it is found that such disclosure is not full and true, the Settlement Commission is required to reject the application at that stage and send the case back to the Assessing Officer.

4.2 Next it was submitted that the contention that the Settlement Commission cannot go beyond the report, if accepted, would curtail the powers of the Settlement Commission to apply its mind independently to the facts on record. Even otherwise, the Settlement Commission has not gone beyond the report and the impugned order was passed after considering the seized documents which were part of the statement of facts, the report filed under section 245(2B) of the Act and the submissions made by the parties to the case. It was submitted that though the report does not say that disclosure application should be rejected, at several places it

comments on the adequacy of the disclosure and points out several lacuna in the disclosure. It was pointed out that the report says that further exercise is required to be undertaken. It was also submitted that when report says that the assessee should make disclosure it means that the disclosure is not full and true and that the report clearly shows that the Principal Commissioner has doubted the adequacy of the additional income disclosed. It was pointed out that in response to the report, the assessee has submitted rejoinder giving its response thereto, as there were qualifying remarks, which would itself demonstrate that the Principal Commissioner's report was not clear.

4.3 Referring to paragraph 7 of the impugned order, it was submitted that before the Settlement Commission, no contention has been advanced that CIT (DR) should not be permitted to argue, which amounts to acquiescence on the part of the petitioner. Referring to sub-section 2(C) of section 245D of the Act, it was submitted that while the sub-section says that hearing be given to the assessee in case the application is required to be declared invalid and does not say that hearing is required to be given to the Commissioner, at the same time the sub-section does not have any negative covenant that CIT (DR) shall not be heard.

4.4 Reliance was placed upon the decision of the Supreme Court in the case of **Commissioner of Income Tax v. B.N. Bhattacharjee**, (1979) 1 Taxman 348 (SC), wherein the court, in the context of section 245D of the Act, had expressed the view that the applicant before the Settlement Commission is

entitled to a hearing before his application for composition is rejected. The court also held that apart from any specific provision, it is legal fair play not to hurt any party without hearing him unless the Act expressly excludes it. The court was of the view that nothing is lost by hearing the petitioner whose application for settlement is being rejected and much may be gained by such hearing in properly processing the application in the spirit of Chapter XIX-A. It was submitted that, therefore, the Supreme Court has held that even if the statute is silent, the same does not prohibit affording an opportunity of hearing.

4.5 Reliance was also placed upon the decision of the Calcutta High Court in the case of **Peerless General Finance and Investment Co. Ltd. v. Income-tax Settlement Commission**, (2009) 313 ITR 206 (Calcutta), wherein the court held that the provisions of the statute prescribed the stages in which the applicant and the departmental representative are to be heard, and in section 245D(1), there is no provision for affording an opportunity of hearing to the petitioners, which has been specifically provided at a subsequent stage under section 245D(4). Giving opportunity of hearing to the income-tax authorities at the time of consideration of the application for settlement, thus, constitutes a deviation from the procedure prescribed in the statute. The court held that mere deviation from a procedure prescribed by the statute would not *ipso facto* vitiate the order of the Settlement Commission.

4.6 It was submitted that in the facts of the present case the following facts emerge:

- The report filed under section 245D(2B) of the Act does not say that there is a full and true disclosure.
- The report says that the aspect of full and true disclosure is required to be verified on the basis of the SOF which is part of the record.
- To the report, the assessee is given opportunity to file rejoinder. The assessee, thus, filed a rejoinder knowing that it is not a clean report.
- Under section 245D(2C) since the decision is to be taken within fifteen days, hearing is kept on 30th January and both the sides are heard.
- The CIT(DR) in his oral submissions has not relied upon any alien material which is extraneous to the record of the case.

It was submitted that in the above factual background, merely because sub-section (2C) of section 245D of the Act is silent with regard to hearing the revenue, it does not mean that the CIT(DR) cannot make submissions. It was submitted that this is not a case where in the report under sub-section (2B) of section 245D, it has been stated that the applicant be permitted to proceed with and on the contrary, the Principal Commissioner has reserved the right to rely upon the record and make submissions. It was submitted that not a single document relied upon is alien to the record and prejudice is neither pleaded nor proved by the petitioner. It was submitted that the statute does not put an embargo upon affording an opportunity of hearing to the CIT(DR) and the impugned order does not suffer from any serious lacuna and, therefore, in

these circumstances, it cannot be said that the Settlement Commission has committed any error in affording an opportunity of hearing to the CIT (DR).

4.7 Insofar as the prejudice caused to the revenue in case the application is not declared invalid under sub-section (2C) is concerned, the learned counsel submitted that once an order under section 245D(2C) of the Act is passed and the application is permitted to be proceeded with, the department will have to undergo the exercise of further inquiry. If at the (2C) stage, the applicant is not ousted, the respondents have to undergo the rigmarole under the subsequent provisions.

4.8 Reference was made to the decision of this court in the case of **Manojkumar Babulal Agrawala v. Secretary**, (2017) 83 *taxmann.com* 139 (Gujarat), to point out that in the facts of the said case also, the Commission had heard the CIT(DR) and the applicant's authorised representative.

4.9 Reliance was also placed upon the decision of the Bombay High Court in the case of **Commissioner of Income-tax v. Sai Prasad Properties Ltd.**, (2015) 60 *taxmann.com* 167 (Bombay), wherein the court has observed that the application under section 245D(2C) of the Act has to be disposed of after considering the objections raised by the revenue supported by some modicum of reasons. In the absence of some consideration of the objections, the entire exercise under section 245D(2C) of the Act would render the provisions redundant.

4.10 Reliance was also placed upon the decision of the Delhi High Court in the case of **MARC Bathing Luxuries Ltd. v. Income Tax Settlement Commission**, (2013) 38 taxmann.com 308 (Delhi), to point out that in the facts of the said case also, the CIT(DR) was given an opportunity of hearing at the stage of section 245D(1) of the Act. It was submitted that the above decisions have been relied upon to point out that the CIT(DR) is invariably given an opportunity of hearing by the Settlement Commission.

4.11 It was submitted that while examining the validity of any order passed by the Settlement Commission the scope of inquiry is very limited in case and that unless the Settlement Commission has proceeded *de hors* the statutory provisions or the principles of natural justice have been violated, this court would be slow in interfering.

4.12 In conclusion, it was submitted that the decision of the Settlement Commission being based upon proper appreciation of facts as it has considered the report under section 245D(2B) of the Act as well as the relevant documents and evidences, the present case does not warrant any interference by this court.

5. In rejoinder, Mr. J.P. Shah, learned counsel for the petitioner submitted that all the decisions relied upon by the learned counsel for the respondents are in the context of pre 2007 law when the scheme of section 245D of the Act was totally different. It was submitted that the time limit for deciding the application is now eighteen months, whereas

earlier it was five years. It was submitted that certain stages under section 245D are put on fast track and whenever the parties are required to be heard, it is specifically mentioned in the statute. It was submitted that under section 245D(2C) of the Act, the party to be heard is the applicant if the report is against him and the Settlement Commission agrees with it. It was submitted that, therefore, the impugned order passed by the Settlement Commission being contrary to the statutory provisions deserves to be quashed and set aside.

6. In the backdrop of the facts and contentions noted hereinabove, it may be germane to consider the statutory scheme of section 245D of the Act prior to its amendment in 2007 and the scheme of section 245D as prevailing on date.

7. Section 245D of the Act prior to its amendment reads as under:-

“245-D. Procedure on receipt of an application under Section 245-C.— (1) On receipt of an application under Section 245-C, the Settlement Commission shall call for a report from the Commissioner and on the basis of the materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved therein, the Settlement Commission, shall, where it is possible, by order, reject the application or allow the application to be proceeded with within a period of one year from the end of the month in which such application was made under Section 245-C:

Provided that an application shall not be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:

Provided further that the Commissioner shall furnish the report within a period of forty-five days of the receipt of communication from the Settlement

Commission in case of all applications made under Section 245-C on or after the 1st day of July, 1995 and if the Commissioner fails to furnish the report within the said period, the Settlement Commission may make the order without such report.

(2) A copy of every order under sub-section (1) shall be sent to the applicant and to the Commissioner.

(2-A) Subject to the provisions of sub-section (2-B), the assessee shall, within thirty-five days of the receipt of a copy of the order under sub-section (1) allowing the application to be proceeded with, pay the additional amount of income tax payable on the income disclosed in the application and shall furnish proof of such payment to the Settlement Commission.

(2-B) If the Settlement Commission is satisfied, on an application made in this behalf by the assessee, that he is unable for good and sufficient reasons to pay the additional amount of income tax referred to in sub-section (2-A) within the time specified in that sub-section, it may extend the time for payment of the amount which remains unpaid or allow payment thereof by instalments if the assessee furnishes adequate security for the payment thereof.

(2-C) Where the additional amount of income tax is not paid within the time specified under sub-section (2-A), then, whether or not the Settlement Commission has extended the time for payment of the amount which remains unpaid or has allowed payment thereof by instalments under sub-section (2-B), the assessee shall be liable to pay simple interest at fifteen per cent per annum on the amount remaining unpaid from the date of expiry of the period of thirty-five days referred to in sub-section (2-A).

(2-D) Where the additional amount of income tax referred to in sub-section (2-A) is not paid by the assessee within the time specified under that sub-section or extended under sub-section (2-B), as the case may be, the Settlement Commission may direct that the amount of income tax remaining unpaid, together with any

interest payable thereon under sub-section (2-C), be recovered and any penalty for default in making payment of such additional amount may be imposed and recovered, in accordance with the provisions of Chapter XVII, by the Assessing Officer having jurisdiction over the assessee.

(3) Where an application is allowed to be proceeded with under sub-section (1), the Settlement Commission may call for the relevant records from the Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case.

(4) After examination of the records and the report of the Commissioner, received under sub-section (1), and the report, if any, of the Commissioner received under sub-section (3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised 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 under sub-section (1) or sub-section (3).

(4-A) In every application allowed to be proceeded with under sub-section (1), the Settlement Commission shall, where it is possible, pass an order under sub-section (4) within a period of four years from the end of the financial year in which such application was allowed to be proceeded with.

(5) Subject to the provisions of Section 245-BA, the materials brought on record before the Settlement Commission shall be considered by the Members of the Bench concerned before passing any order under sub-section (4) and, in relation to the passing of such order,

the provisions of Section 245-BD shall apply.

(6) Every order passed under sub-section (4) shall 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 and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

(6-A) Where any tax payable in pursuance of an order under sub-section (4) is not paid by the assessee within thirty-five days of the receipt of a copy of the order by him, then whether or not the Settlement Commission has extended the time for payment of such tax or has allowed payment thereof by instalments, the assessee shall be liable to pay simple interest at fifteen per cent per annum on the amount remaining unpaid from the date of expiry of the period of thirty-five days aforesaid.

(7) Where a settlement becomes void as provided under sub-section (6), the proceedings 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, may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement became void.

(8) For the removal of doubts, it is hereby declared that nothing contained in Section 153 shall apply to any 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 and nothing contained in the proviso to sub-section (1) of Section 186 shall apply to the pursuance of any such directions as aforesaid."

7.1 Thus, section 245D of the Act prior to its amendment in 2007, contemplated two stages for dealing with an application after an application under section 245C of the Act was received. In the first stage, the Settlement Commission was required to call for a report from the Commissioner and on the basis of the materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved, where it was possible, by order reject the application or allow the application to be proceeded with. In case the Settlement Commission was inclined to reject the application, it was required to provide an opportunity of hearing to the applicant. The Commissioner was required to submit the report within forty-five days of receipt of communication from the Settlement Commission.

7.2 In case where an application was allowed to be proceeded with under subsection (1), in the second stage, as provided under sub-section (3) of section 245D, the Settlement Commission could call for the relevant records from the Commissioner and after examination of such records, if the Settlement Commission was of the opinion that any further enquiry or investigation in the matter is necessary, it could direct the Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case. Thereafter in view of the provisions of sub-section (4), the Settlement Commission, after examination of the records and the report of the Commissioner, received under sub-section (1), and the report, if any, of the Commissioner received under sub-section (3), and after giving

an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, in accordance with the provisions of this Act, could pass such order as it thought 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 under sub-section (1) or sub-section (3).

7.3. Therefore, the entire process involved two stages. One stage was for admission and the other stage was for deciding the application. In the first stage where the Settlement Commission was required to call for a report from the Commissioner and after considering the report as well as the complexity of the matter etc, could either reject the application or allow it to be proceeded with; and at the second stage, the Settlement Commission would examine the record and if necessary direct investigation to be carried out by the Commissioner and after considering the report if any, received from the Commissioner and affording an opportunity of hearing to the applicant pass such order as it deemed fit. The application was required to be decided within a period of four years from the end of the assessment year in which the application was permitted to be proceeded with. Thus, an application was required to be decided within a period of five years from the date of receipt thereof.

8. Section 245D of the Act has thereafter been amended in the year 2007 and as it stands at present, reads thus:

245-D. Procedure on receipt of an application under Section 245-C.—(1) On receipt of an application under Section 245-C, the Settlement Commission shall, within seven days from the date of receipt of the application, issue a notice to the applicant requiring him to explain as to why the application made by him be allowed to be proceeded with, and on hearing the applicant, the Settlement Commission shall, within a period of fourteen days from the date of the application, by an order in writing, reject the application or allow the application to be proceeded with:

Provided that where no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

(2) A copy of every order under sub-section (1) shall be sent to the applicant and to the Principal Commissioner or Commissioner.

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

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

(2-B) The Settlement Commission shall,—

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

(ii) in respect of an application referred to in sub-section (2-A) which is deemed to have been allowed to be proceeded with under that sub-section, on or before the 7th day of August, 2007,

call for a report from the Principal Commissioner or

Commissioner, and the Principal Commissioner or Commissioner] shall furnish the report within a period of thirty days of the receipt of communication from the Settlement Commission.

(2-C) Where a report of the Principal Commissioner or Commissioner called for under sub-section (2-B) has been furnished within the period specified therein, the Settlement Commission may, on the basis of the report and within a period of fifteen days of the receipt of the report, by an order in writing, declare the application in question as invalid, and shall send the copy of such order to the applicant and the Principal Commissioner or Commissioner:

Provided that an application shall not be declared invalid unless an opportunity has been given to the applicant of being heard:

Provided further that where the Principal Commissioner or Commissioner has not furnished the report within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner or Commissioner.

(2-D) Where an application was made under sub-section (1) of Section 245-C before the 1st day of June, 2007 and an order under the provisions of sub-section (1) of this section, as they stood immediately before their amendment by the Finance Act, 2007, allowing the application to have been proceeded with, has been passed before the 1st day of June, 2007, but an order under the provisions of sub-section (4), as they stood immediately before their amendment by the Finance Act, 2007, was not passed before the 1st day of June, 2007, such application shall not be allowed to be further proceeded with unless the additional tax on the income disclosed in such application and the interest thereon, is, notwithstanding any extension of time already granted by the Settlement Commission, paid on or before the 31st day of July, 2007.]

(3) The Settlement Commission, in respect of—

(i) an application which has not been declared invalid

under sub-section (2-C); or

(ii) an application referred to in sub-section (2-D) which has been allowed to be further proceeded with under that sub-section,

may call for the records from the Principal Commissioner or Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Principal Commissioner or Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case, and the Principal Commissioner or Commissioner shall furnish the report within a period of ninety days of the receipt of communication from the Settlement Commission:

Provided that where the Principal Commissioner or Commissioner does not furnish the report within the aforesaid period, the Settlement Commission may proceed to pass an order under sub-section (4) without such report.

(4) After examination of the records and the report of the Principal Commissioner or Commissioner], if any, received under—

(i) sub-section (2-B) 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 Principal Commissioner or Commissioner to be heard, either in person or through a representative duly authorised 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 Principal Commissioner or Commissioner.

(4-A) The Settlement Commission shall pass an order under sub-section (4)—

(i) in respect of an application referred to in sub-section (2-A) or sub-section (2-D), on or before the 31st day of March, 2008;

(ii) in respect of an application made on or after the 1st day of June, 2007 but before the 1st day of June, 2010, within twelve months from the end of the month in which the application was made.

(iii) in respect of an application made on or after the 1st day of June, 2010, within eighteen months from the end of the month in which the application was made.

(5) Subject to the provisions of Section 245-BA, the materials brought on record before the Settlement Commission shall be considered by the Members of the Bench concerned before passing any order under sub-section (4) and, in relation to the passing of such order, the provisions of Section 245-BD shall apply.

(6) Every order passed under sub-section (4) shall 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 and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

(6A) Where any tax payable in pursuance of an order under sub-section (4) is not paid by the assessee within thirty-five days of the receipt of a copy of the order by him, then, whether or not the Settlement Commission has extended the time for payment of such tax or has allowed payment thereof by instalments, the assessee shall be liable to pay simple interest at one and one-fourth per cent for every month or part of a month, on the amount remaining unpaid from the date of expiry of the period of thirty-five days aforesaid.

(6-B) The Settlement Commission may, at any time within a period of six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section

(4);

Provided that an amendment which has the effect of modifying the liability of the applicant shall not be made under this sub-section unless the Settlement Commission has given notice to the applicant and the Principal Commissioner or Commissioner of its intention to do so and has allowed the applicant and the Principal Commissioner or Commissioner an opportunity of being heard.

(7) Where a settlement becomes void as provided under sub-section (6), the proceedings 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 may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement became void.

(8) For the removal of doubts, it is hereby declared that nothing contained in section 153 shall apply to any order passed under sub-section (4) or to any order of assessment, reassessment or re-computation required to be made by the Assessing Officer in pursuance of any directions contained in such order passed by the Settlement Commission and nothing contained in the proviso to sub-section (1) of section 186 shall apply to the cancellation of the registration of a firm required to be made in pursuance of any such directions as aforesaid."

8.1 After its amendment, section 245D of the Act contemplates three stages for dealing with an application made under section 245C(1) of the Act. The scheme of admission of a case has been completely altered with effect from 01.06.2007 and now there are two stages for admission of the application. The third stage is for deciding the application. In the first stage, on receipt of an application

under section 245C of the Act, the Settlement Commission is mandated to issue a notice to the applicant within seven days from the date of receipt of the application, requiring him to explain as to why the application made by him be allowed to be proceeded with, and on hearing the applicant, the Settlement Commission is further mandated to either reject the application or allow the application to be proceeded with by an order in writing, within a period of fourteen days from the date of the application. The proviso thereto provides that where no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

8.2 Thus, at the first stage, no report or communication from the department is required for the Settlement Commission to decide whether or not to allow an application to be proceeded with. In the second stage of admission of an application for settlement, sub-section (2B) of section 245D of the Act provides that in case where an application is allowed to be proceeded with in the first stage, within thirty days of filing the application, the Settlement Commission is required to call for a report from the Principal Commissioner or the Commissioner. Within a period of thirty days of receipt of communication of the Settlement Commission, the Principal Commissioner or the Commissioner is required to furnish a report. If the report under sub-section (2B) has been furnished within the specified time, then on the basis of such report, the Settlement Commission, may within fifteen days of receipt thereof, declare the application invalid under section 245D (2C). Opportunity of being heard is required to be given to the applicant if the

application is to be declared invalid. In case the Commissioner does not furnish the report within the specified time, the Settlement Commission is required to proceed further in the matter without the report of the Commissioner.

8.3 In case of an application which has not been declared invalid, in the third stage under section 245D(4) of the Act, the Settlement Commission, may call for the records from the Principal Commissioner or Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Principal Commissioner or Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case, and the Principal Commissioner or Commissioner is required to furnish a report within a period of ninety days of the receipt of communication from the Settlement Commission. In case such report is not furnished within the specified period, the Settlement Commission may proceed to pass an order under sub-section (4) without such report. Thus, it is in the third stage that the Settlement Commission is required to call for the record of the case and after examining the same may cause a further inquiry to be made through the Commissioner who would submit a report based on such investigation/inquiry.

8.4 Under sub-section (4), the Settlement Commission, after examination of the records and the report of the Principal Commissioner or Commissioner, if any, received under sub-

section (2-B) or sub-section (3), and after examining such further evidence as may be placed before it or obtained by it, and after giving an opportunity to the applicant and to the Principal Commissioner or Commissioner to be heard, either in person or through a representative duly authorised in this behalf, may, in accordance with the provisions of the 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 Principal Commissioner or Commissioner. Thus, the time lines provided under section 245D of the Act have become more rigorous after its amendment and the total period within which an application is required to be decided is eighteen months.

9. It is in the light of the above statutory scheme that the controversy involved in the present case is required to be examined.

10. A perusal of the report of the Principal Commissioner shows that under the heading “Adequacy of Additional taxes” she has stated that so far as adequacy of additional taxes is concerned, it is not possible to comment at this stage as the office has just received the copies of documents submitted by the assessee before the Settlement Commission which needs verification with reference to the seized/impounded material. It is also stated therein that the comments on the adequacy of the unaccounted income require exhaustive verification of the seized/impounded material and as to whether all the relevant contents appearing in the material have been incorporated or not in the disclosure made by the assessee. Also the cash flow

furnished by the assessee needs to be checked thoroughly, entry-wise, with regard to unaccounted receipts and payments contained in the seized/impounded material. Moreover, in various assessment years under consideration, while calculating the unaccounted income, the assessee has disclosed N.P. at the rate of 15% of unaccounted receipts from project Akshar Vatika. Also, in addition, N.P. at the rate of 1% of gross receipts as per books of accounts (actual) has been offered before the Settlement Commission, but the basis of these calculations is not clear. In paragraph 2.7 of the report, it has been stated thus:

"Therefore, at this stage, no further comments can be offered on the adequacy of additional income disclosed.

In view of the above, we reserve our right to comment at later stage on the application on the basis of the material seized/impounded/found."

11. Thus, the Principal Commissioner of Income-tax has not stated in the report that there is no full and true disclosure by the assessee, but has raised certain doubts about the adequacy of the disclosure and has reserved the right to comment at a later stage of the application on the basis of the material seized.

12. From the language contained in the report and more particularly considering the fact that the Principal Commissioner has reserved the right to comment at a later stage of the application, it does not appear as if she had intended that the Commissioner should supplement the report on the basis of the material seized. If any further arguments

were to be made on the basis of the available material, the Principal Commissioner would have relied upon such material at the time of preparation of the report. According to the Principal Commissioner, the comments on the adequacy of the unaccounted income require exhaustive verification of the seized material. Evidently, therefore, such exercise was to be conducted at a later stage of the proceedings which would mean at the stage of section 245D(4) of the Act and not by way of supplemental arguments by the Commissioner at the stage of section 245D(2C) of the Act. Under the scheme of section 245D of the Act, it is subsequent to the sub-section (2C) stage that under sub-section (3) the Settlement Commission may call for the records from the Principal Commissioner and after examination of the same, if necessary cause an enquiry or investigation to be made by the Principal Commissioner or Commissioner. It is thereafter, that at the stage of sub-section (4) of section 245D of the Act, that the Settlement Commission examines the records and the report if any (provided it is received within the stipulated time) and after affording an opportunity to the applicant and the Principal Commissioner or Commissioner and considering any further evidence that may be placed before it or obtained by it passes the final order.

13. The Settlement Commission in the impugned order has recorded that the CIT (DR) has objected to the admission of the settlement applications for the reason that the applicants have not made full and true disclosure in the petitions. In the opinion of this court, sub-section (2C) of section 245D of the Act does not contemplate any such objection being raised by

the CIT (DR). Section 245D(2C) of the Act contemplates hearing to the applicant only in case the Settlement Commission is inclined to declare the application invalid. In case the report does not say that there is no full and true disclosure and the Settlement Commission is inclined to accept such report, it is not even required to hear the applicant. Therefore, when the sub-section which requires an opportunity of being heard to be given to the applicant only if the application is to be declared invalid, the question of Principal Commissioner or Commissioner raising any objection to the application at this stage, does not arise.

14. A perusal of the impugned order reveals that the Settlement Commission has first heard the objections raised by CIT (DR) to the admission of the applications based on material other than the report, and thereafter has afforded an opportunity of hearing to the applicants to deal with the objections raised by the CIT (DR) and has thereafter proceeded to declare the application invalid based on the material pointed out by the CIT(DR) from the seized material. On a plain reading of sub-section (2C) of section 245D of the Act it is evident that it contemplates passing of order by the Settlement Commission on the basis of the report of the Principal Commissioner or Commissioner. Therefore, the scope of hearing would be limited to the contents of the report. The applicant would therefore, at this stage be prepared to deal with the contents of the report and if any submission is made outside the report, it may not be possible for the applicant to deal with the same. On behalf of the respondents it has been contended that the CIT (DR) has not relied upon any

extraneous material and that the arguments are made on the basis of the seized material and the evidence on record. In the opinion of this court, insofar as the record of the case and other material on record is concerned, consideration of the same is contemplated at the third stage of the proceedings under section 245D(4) of the Act and not at the stage of sub-section (2C).

15. Sub-section (2C) of section 245D of the Act contemplates a report by the Principal Commissioner/Commissioner and consideration of such report by the Settlement Commission and affording an opportunity of hearing to the applicant before declaring the application to be invalid. The sub-section does not contemplate an incomplete report which can be supplemented at the time of hearing. While the sub-section does not contemplate hearing the Principal Commissioner or Commissioner at the stage of section 245D (2C), at best, requirement of such hearing can be read into the said sub-section for the purpose of giving an opportunity to the CIT (DR) to deal with the submissions of the applicant in case the Settlement Commission hears the applicant. But the sub-section does not contemplate giving an opportunity to the CIT (DR) to raise any objection to the admission of the application and hearing him to supplement the contents of the report. The report has to be considered as it is and it is on the basis of the report that the Settlement Commission is required to pass an order one way or the other at the stage of section 245D(2C) of the Act. Going beyond the report at a stage when the order is to be passed on the basis of the report, would also amount to a breach of the principles of natural justice. Moreover, no grave

prejudice is caused to the revenue if the application is admitted and permitted to be proceeded with inasmuch as in the third stage, the entire record and all material including any additional report of investigation or enquiry if called for by the Settlement Commission would be considered and the Principal Commissioner or Commissioner would be granted an opportunity of hearing.

16. In ***Commissioner of Income Tax v. B.N. Bhattacharjee*** (supra), on which reliance has been placed by the learned counsel for the respondents, the court was considering a case where the applicant was not afforded an opportunity of hearing before his application was rejected under section 245D(1) of the Act. On an application for review made by the applicant, the Settlement Commission reversed its earlier order and permitted the application to be proceeded with. The Supreme Court upheld the order by holding that nothing is lost by hearing the petitioner whose application for settlement is being rejected. Thus, since the applicant was being adversely affected by the order rejecting his application under section 245D(1) of the Act that the Supreme Court had held that there was nothing wrong in hearing him. The said decision would have no applicability to the facts of the present case. In the opinion of this court, by permitting an application to be proceeded with under section 245D(2C) of the Act, the revenue is not adversely affected as in the third stage under section 245D(4) of the Act it has ample opportunity to object to the application being allowed.

17. Examining the issue from another angle, reference may

be made to sub-section (2-C) and sub-section (4) of section 245D of the Act, which read as under:

“(2-C) Where a report of the Principal Commissioner or Commissioner called for under sub-section (2-B) has been furnished within the period specified therein, the Settlement Commission may, on the basis of the report and within a period of fifteen days of the receipt of the report, by an order in writing, declare the application in question as invalid, and shall send the copy of such order to the applicant and the Principal Commissioner or Commissioner:

Provided that an application shall not be declared invalid unless an opportunity has been given to the applicant of being heard:

Provided further that where the Principal Commissioner or Commissioner has not furnished the report within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner or Commissioner.”

“(4) After examination of the records and the report of the Principal Commissioner or Commissioner, if any, received under -

(i) sub-section (2-B) 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 Principal Commissioner or Commissioner to be heard, either in person or through a representative duly authorised 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 Principal Commissioner or Commissioner.”

18. Thus, in the very same section, that is, section 245D, there are two sub-sections, one which contemplates affording of opportunity of hearing only to the applicant in case the Settlement Commission wants to declare the application invalid, and another which expressly provides for granting an opportunity of hearing to the applicant and to the Principal Commissioner or Commissioner. Thus, where opportunity of hearing to the Commissioner is required to be given, the legislature has expressly provided for the same. If the legislature had intended to provide an opportunity of hearing to the Commissioner at the stage of section 245D(2C), it would have expressly provided for the same. Therefore, it can be safely concluded that the legislature intentionality omitted granting of opportunity of hearing to the Principal Commissioner/Commissioner at the stage of section 245D(2C) of the Act. The contention that section 245D(2C) does not prohibit oral submissions by the CIT(DR) as the statute is silent about not providing opportunity of hearing, therefore, does not merit acceptance. This view is fortified by the view taken by the Supreme Court in **Sree Balaji Nagar Residential Assn. v. State of T.N., (2015) 3 SCC 353**, wherein it has been held thus:

***"10.** There is no dispute that the writ petitions were filed even before the making of award and interim orders have operated against the State of Tamil Nadu and, therefore, the State was not at fault in not taking physical possession of the lands concerned under acquisition. But the intention of the legislature in enacting Section 24(2) of the 2013 Act will have to be culled out from its wordings and on the basis of other relevant provisions of this Act and the relevant case law for deciding whether the period of stay/injunction is required to be excluded in computing the five years' period or not.*

11. *From a plain reading of Section 24 of the 2013 Act it is clear that Section 24(2) of the 2013 Act does not exclude any period during which the land acquisition proceeding might have remained stayed on account of stay or injunction granted by any court. In the same Act, the proviso to Section 19(7) in the context of limitation for publication of declaration under Section 19(1) and the Explanation to Section 69(2) for working out the market value of the land in the context of delay between preliminary notification under Section 11 and the date of the award, specifically provide that the period or periods during which the acquisition proceedings were held up on account of any stay or injunction by the order of any court be excluded in computing the relevant period. In that view of the matter it can be safely concluded that the legislature has consciously omitted to extend the period of five years indicated in Section 24(2) even if the proceedings had been delayed on account of an order of stay or injunction granted by a court of law or for any reason. Such casus omissus cannot be supplied by the court in view of law on the subject elaborately discussed by this Court in Padma Sundara Rao v. State of T.N., (2002) 3 SCC 533."*

19. Having regard to the fact that the report under section 245D(2C) of the Act is required to be furnished within a period of thirty days from the date of receipt of the communication from the Settlement Commission and the report under sub-section (3) thereof is required to be furnished within a period of ninety days of receipt of the communication from the Settlement Commission, it is evident that insofar as the report under sub-section (2C) of section 245D is concerned, the same is in the nature of a preliminary report based on prima-facie findings recorded by the Principal Commissioner or Commissioner. Therefore, what the Principal Commissioner was required to do was to record on the basis of the inquiry made by her as to whether or not the disclosure was full and true. In the absence of any such opinion having been

expressed that there was no full and true disclosure, it was not permissible for the CIT(DR) to make supplementary submissions to contend that there was no full and true disclosure. Since the Principal Commissioner had found that it was not possible at this stage to comment on the adequacy of the additional taxes as well as other facts as recorded hereinabove, it is evident that all these facts could have been brought on record either by way of submission by the CIT(DR) at the stage to section 245D(4) or in the nature of the report as contemplated under sub-section (3) of section 245D of the Act, if so called for by the Settlement Commission. However, on the basis of such comments made by the Principal Commissioner in the report under sub-section (2C) of section 245D of the Act, the revenue could not have been permitted to object against the admission of the application by way of supplementary arguments made by the CIT(DR) with reference to the record as well as other evidence of the case.

20. The Settlement Commission was, therefore, not justified in permitting the Principal Commissioner to supplement the report submitted by the Commissioner by way of oral submissions which were beyond the contents of the report. At best, if the applicant had made submissions in respect of the report, the Commissioner may have been permitted to deal with the same, but under no circumstances could the Commissioner be permitted to raise objection to the admission of the application and be heard before the assessee and that too, to supplement an incomplete report on the basis of the material and evidences on record. As already discussed hereinabove, any hearing based upon the material and evidences on record is contemplated at the stage of 245D(4) of

the Act and insofar as sub-section (2C) of section 245D of the Act is concerned, the same contemplates a decision solely on the basis of the report of the Commissioner.

21. Insofar as the decisions on which reliance has been placed by the learned counsel for the respondent to point out that it is settled procedure of the Settlement Commission to provide an opportunity of hearing to the CIT (DR) is concerned, as discussed hereinabove, section 245D(2C) does not contemplate affording an opportunity of hearing to the CIT (DR) and at best, the CIT(DR) may be heard to deal with any submissions made by the assessee, if called upon by the Settlement Commission. However, under no circumstances can the CIT (DR) be permitted to raise objections against the admission of the application at the threshold and to make submissions on the basis of material on record to supplement the report submitted by the Principal Commissioner in the manner as had been done in this case.

22. It has been contended on behalf of the respondents that in exercise of powers under Article 226 of the Constitution, the court is concerned with the decision-making process of the Settlement Commission and not so much with the correctness of the order. In the light of what is discussed hereinabove, it is apparent that there is a flaw in the decision-making process adopted by the Settlement Commission, inasmuch as, the provisions of section 245D(2C) of the Act have been clearly violated by the Settlement Commission by providing an opportunity of hearing to the CIT(DR) to object to the admission of the application and to supplement the report submitted by the Principal Commissioner with reference to the

record and other evidence, instead of rendering a decision on the basis of the report of the Principal Commissioner as contemplated under the said sub-section.

23. Insofar as the contention raised on behalf of the respondents that no extraneous material has been relied upon is concerned, the question is not as to what material has been considered but the scope of inquiry that was to be made by the Settlement Commission at this stage. As noticed earlier, insofar as the record of the case and other evidence is concerned, the same is required to be taken into consideration at the stage of section 245D(4) of the Act whereas insofar as the order under section 245D(2C) of the Act is concerned, the same is required to be made on the basis of the report.

24. In the light of the above discussion, the impugned order passed by the Settlement Commission being in breach of the provisions of section 245D(2C) of the Act and also being in breach of the principles of natural justice inasmuch as at the stage of section 245D(2C) of the Act, the Settlement Commission has placed reliance upon material other than the report, cannot be sustained.

25. The petitions, therefore, succeed and are accordingly, allowed. The impugned order dated 6.2.2018 passed by the Settlement Commission (Annexure-F to the SCA No.13598 of 2018) as well as the impugned orders dated 2.2.2018 passed by the Settlement Commission (Annexure-F to the rest of the petitions) are hereby quashed and set aside. The applications are hereby restored before the Settlement Commission at the stage of section 245D(2C) of the Act. The Commission shall

proceed further at that stage in accordance with law and pass an order under section 245D(2C) of the Act within a period of fifteen days from the date of receipt of a copy of this order. It is clarified that while deciding the applications, the Settlement Commission shall in no manner be influenced by the findings recorded in the impugned orders and shall decide the same in the spirit of section 245D(2C) of the Act. Rule is made absolute accordingly with no order as to costs.

26. At this stage, Mr. M. R. Bhatt, learned counsel for the respondents has requested that the operation of this order be stayed for a period of four weeks so as to enable the respondents to approach the higher forum. Such request appears to be reasonable. Accordingly, the operation of this judgment is stayed for a period of four weeks from the date of receipt of a copy thereof.

(HARSHA DEVANI, J)

Z.G. SHAIKH

(A. P. THAKER, J)

THE HIGH COURT
OF GUJARAT

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