

**W.P. No. 126 of 2017
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side**

**ABC Dubash Mining & Anr.
Vs.
The Income Tax Settlement Commission & Ors.**

For the Petitioners : Mr. Samaraditya Pal, Sr. Advocate
Mrs. Manju Manot, Advocate
Mr. Bajrang Manot, Advocate
Mr. Deepan Kr. Sarkar, Advocate
Mr. Ram Chandra Agarwal, Advocate

For the Income Tax : Md. Nizamuddin, Advocate
Department Mr. Soumitra Mukherjee, Advocate

Hearing concluded on : May 18, 2017

Judgment on : June 14, 2017

DEBANGSU BASAK, J.:-

The petitioners have assailed an order of the Settlement Commission dated January 24, 2017.

Learned Senior Advocate for the petitioners has submitted that, the Settlement Commission did not adhere to the scheme laid down under Chapter XIXA of the Income Tax Act, 1961 in dealing with and disposing of the application for settlement made by the assessee. He has submitted that, an assessee is entitled to approach the Settlement Commission only once. The purpose of a settlement is to ensure that the revenue receives its due share of the taxes without an elaborate process

of adjudication and at the same time an assessee is granted some relief in the assessment and other defaults. When an assessee volunteers to approach the Settlement Commission, he does so to his prejudice. The Settlement Commission, therefore, should make every effort to have the matter settled before it. Adverting to the present case he has submitted that, the Settlement Commission did not undertake a process of settlement contemplated under the various provisions of Chapter XIXA of the Income Tax Act, 1961. The impugned order of the Settlement Commission does not return a finding as to the quantum of tax which the assessee is liable to pay. Not having arrived at the quantum of tax liability of an assessee and not having asked the assessee to pay the same, according to him, the Settlement Commission had failed to exercise jurisdiction vested in it by law. According to him, the Settlement Commission ought to have arrived at the tax liability of the assessee and ought to have called upon the assessee to pay the same. In the event, the assessee did not accept the assessment and did not offer to pay the same, the Settlement Commission could have proceeded to pass such order as deemed necessary under Chapter XIXA of the Income Tax Act, 1961.

Referring to **2004 Volume 4 Supreme Court Cases page 714** (**State of U.P. & Anr. v. Johri Mal**) learned Senior Advocate for the

petitioners has submitted that, the Writ Court is concerned more with the decision making process rather than the decision itself. In the present case, according to him, the decision making process of the Settlement Commission stands vitiated as the Settlement Commission did not adhere to the provisions of Chapter XIXA of the Income Tax Act, 1961. He has referred to the four orders passed by the Settlement Commission in the settlement proceedings. Referring to the first order dated September 15, 2015 of the Settlement Commission, learned Senior Advocate for the petitioners has submitted that, the Settlement Commission had proceeded not to reject the application under Section 245C. The Settlement Commission by such order wanted to proceed with the application for settlement. Having done so, it was incumbent on the Settlement Commission to proceed in accordance with law on the application for settlement. Referring to the second order of the Settlement Commission dated October 28, 2015, learned Senior Advocate for the petitioners has submitted that, the petitioners were not given a copy of the report noted in such order. Referring to the third order dated September 2, 2016 of the Settlement Commission, learned Senior Advocate for the petitioners has submitted that, the Settlement Commission did not adhere to the provisions of Section 245D(3) of the Act of 1961. It did not call for the records from the Principal

Commissioner or the Commissioner. The records do not show that the Settlement Commission had examined such records. It did not undertake any further enquiry or investigation. It ought to have done so. The Settlement Commission, therefore, could not form a valid opinion as to whether or not to proceed further with the settlement. Any proceedings undertaken by the Settlement Commission, without the requisite formation of opinion under Section 245D(3) of the Act of 1961, is bad. Referring to the fourth order dated January 24, 2017, which has been impugned in the present writ petition, learned Senior Advocate for the petitioners has submitted that, the Settlement Commission did not adhere to Section 245D(4) or Section 245D(5) of the Act of 1961 in passing the impugned order. Firstly, the Settlement Commission did not examine the records and the reports of the Commissioner. Not having done so, it could not pass an order either rejecting or accepting the settlement. It ought to have called for the records and report from the Principal Commissioner. Relying upon **2011 Volume 1 Supreme Court Cases page 1 (Brij Lal & Ors. v. Commissioner of Income Tax, Jalandhar)** learned Senior Advocate for the petitioners has submitted that, the Supreme Court had noted the various provisions of the of the Income Tax Act, 1961 including the provisions relating to Chapter XIXA of the Act of 1961. He has submitted that, the Supreme Court has noted

that, Section 245D has two distinct stages. He has submitted that, assessment in law is different from assessment by way of settlement. The procedure under Sections 245C and 245D in Chapter XIXA of the Act of 1961 is a special procedure. It requires a special type of computation of total income. The Settlement Commission is empowered to do so.

Learned Senior Advocate for the petitioners has referred to the various provisions of Chapter XIXA of the Income Tax Act, 1961 particularly to the Sections 245D(2C) and 245D(3) of the Income Tax Act, 1961. He has submitted, in reference to the various sections of Chapter XIXA that, the Settlement Commission is required to conduct the proceedings as prescribed by statute and the failure of the Settlement Commission to do so, in the settlement proceedings resulting in the impugned order. On the failure of the Settlement Commission to adhere to the scheme of Chapter XIXA of the Act of 1961, learned Senior Advocate for the petitioners has submitted that, once the Settlement Commission had declared the application for settlement to be valid in terms of Section 245D(2C) of the Act of 1961, the Settlement Commission is required to call for the records from the department. In the present case, the Settlement Commission did not call for such records as required under Section 245D(3). The Settlement Commission

is required to examine such records produced by the department. Since the Settlement Commission did call for the records, the question of examination of such records did not arise. The Settlement Commission is required to examine the records and to form an opinion whether or not further enquiry or investigation in the matter is necessary. As the records were not called for, the Settlement Commission could not form such opinion. The Settlement Commission is required to direct the Principal Commissioner or Commissioner, as the case may be, to make or cause to be made further enquiry or investigation after formation of the opinion. In the present case, since no opinion was formed, such direction was not given by the Settlement Commission. None of the orders of the Settlement Commission can be construed in a manner to have given such a direction. The order dated September 2, 2016 does not give such direction. It refers to a letter dated November 25, 2016 which was not disclosed to the petitioners at the material point of time. Since the Settlement Commission is required to form an opinion as envisaged in the Act and the Settlement Commission not having done so, the Settlement Commission has failed to exercise jurisdiction vested upon it in law. The Settlement Commission, therefore, misconducted the proceedings subsequent to its failure to form an opinion as envisaged under Section 245D. Learned Senior Advocate for the petitioners has

submitted that, after the Principal Commissioner or the Commissioner, as the case may be, submits its report on further enquiry or investigation, the Settlement Commission has to proceed to pass an order under Section 245D(4). He has referred to the order of the Settlement Commission passed under Section 245D(3) and has submitted that, such order does not say that, the records were called for. Such order refers to a letter dated November 26, 2015 by which the Principal Commissioner was requested to submit a report under Rule 9. Moreover, such letter was not disclosed to the petitioners at the relevant point of time. The report under Rule 9 called for is not the same as envisaged under Section 245D(3) of the Act of 1961. He has referred to the sequence of events happening before the Settlement Commission and has submitted that, the report under Rule 9 was also not furnished within the time stipulated by the statute. In any event, it cannot be construed to be one under Section 245D(3). Adverting to the facts of the present case, learned Senior Advocate for the petitioners has submitted that, the Settlement Commission has found that, the petitioners allegedly have come with unclean hands and did not make true and full disclosure of its income. The Settlement Commission had identified three transactions in the impugned order. He has referred to three transactions individually and has submitted that, the Settlement

Commission could have undertaken further inquiry or investigation into those three transactions, if it was not satisfied with the explanations given. The Settlement Commission could have quantified the tax liability of the petitioners in each of the three accounts. On such tax liability being found it was for the petitioners to accept or to reject the same. The Settlement Commission is empowered to undertake such an exercise. He has submitted that, the petitioners are not guilty of suppression of any income before the Settlement Commission.

With regard to the first issue noted in the impugned order, learned Senior Advocate for the petitioners had submitted that, a partner of the firm had brought in capital to the partnership firm. Such partner is a non-resident Indian. The Income Tax authority including the Settlement Commission has no business to look into the source of fund of the NRI partner. The Settlement Commission ought to have taken note of such fact. It should have proceeded on the basis of the fund being brought into the firm for the purpose of computation of the income of the firm. Moreover, the Settlement Commission is sufficiently empowered under the provisions of Chapter XIXA of the Income Tax Act, 1961 to make further investigation into the affairs of the firm, in the event, the Settlement Commission is of the view that, it requires further investigation as to the source of fund. It ought not to have decided such

issue on the basis that, the Settlement Commission was not in a position to decide the genuineness and sources of the fund brought into the firm by the partner, as returned in the impugned order. Referring to the second issue, learned Senior Advocate for the petitioners has submitted that, the Settlement Commission again could have entered into the genuineness of the claim made by the assessee with regard to the transactions concerned. So far as the third issue is concerned, he has submitted that, the transaction with the Bharat Heavy Electricals Limited (BHEL) is not disputed. Again the Settlement Commission could have entered into the details of the transactions, if necessary, rather than returning a finding that, the assessee did not come with clean hands. The purpose of going to the Settlement Commission was to have the issues settled rather than have the Settlement Commission return the findings as noted in the impugned order.

Learned Senior Advocate for the petitioners has submitted that, on the three issues the Settlement Commission could have adjudicated the tax liability of the assessee and could have called upon the assessee to pay such tax in the manner as directed rather than coming to a finding that the transactions cannot be adjudicated upon. In such view, he has submitted that, the impugned order of the Settlement Commission

should be set aside. The matter may be remanded to the Settlement Commission for a decision afresh.

Learned Advocate appearing for the department has submitted that, an assessee approaching the Settlement Commission is required to make a true and full disclosure of his income. In the present case, the assessee did not do so. According to him, every reference to the Settlement Commission need not result in an order of settlement being passed. It is open to the Settlement Commission to accept the proposal for settlement, give orders on such settlement or to reject the application for settlement. In the present case, the Settlement Commission on appreciation of the facts and materials made available to it, has come to a finding that, the assessee did not make true and full disclosure of its income, therefore, preventing the settlement process and an order of settlement to be passed. Consequently, the impugned order of the Settlement Commission cannot be faulted. The impugned order is reasoned. It goes into the proposal for settlement in details. It gives reasons as to why the proposal for settlement as mooted by the assessee cannot be accepted. The findings arrived at by the Settlement Commission cannot be said to be perverse. It is a plausible view of the facts. It is not for the Writ Court to reappraise the evidence before the Settlement Commission as an appellate authority to come to a different

finding. On the scope of interference of a Writ Court in respect of orders passed by the Settlement Commission, learned Advocate for the department has relied upon **1993 (201) Income Tax Reports page 611 (SC) (Jyotendrasinhji v. S.I. Tripathi & Ors.), 2017 (78) taxmann.com page 85 (Bombay) (Rashmi Infrastructure Developers Ltd. v. Income tax Settlement Commission), All India Reporter 1993 Supreme Court page 2212 (Shriyans Prasad Jain v. Income-tax Officer), 1999 (236) Income Tax Reports page 581 (Madras) (V.M. Shaik Mohammed Rowther v. Settlement Commissioner (IT & WT) & Ors.), 1999 (235) Income Tax Reports page 118 (SC) (Appropriate Authority & Anr. v. Smt. Sudha Patil & Anr.) and 2011 Volume 4 Supreme Court Cases page 635 (Union of India & Ors. v. M/s. Ind-Swift Laboratories Ltd.).**

On the aspect of procedural violation learned Advocate for the department has submitted that, in the event the so-called procedural violations do not go to the root of the matter an interference by way of a Writ Court is not called for. Moreover, in the facts of the present case, he has submitted that, the assessee has allowed the settlement proceedings to continue without pointing out the so-called procedural infractions. The assessee has accepted the procedural infractions, if any, alleged to be committed by the Settlement Commission unconditionally. It cannot

be allowed to challenge such procedural infractions, if any, in the impugned order. The assessee is deemed to have waived the infractions, if any. In support of such contentions he has relied upon **2002 Volume 4 Supreme Court Cases page 316 (Commissioner of Customs, Mumbai v. Virgo Steels, Bombay & Anr.)**. He has sought dismissal of the writ petition.

The following issues have arisen for consideration in the present writ petition:-

- (i) Is the impugned order of the Settlement Commission dated January 24, 2017 vitiated due to jurisdictional errors in conduct of the proceedings before the Settlement Commission?
- (ii) To what relief or reliefs, if any, are the parties entitled to?

A partnership firm, being the first petitioner herein, had made an application for settlement before the Settlement Commission for the assessment years 2013-2014, 2014-2015 and 2015-2016 on September 9, 2015. The same was taken up for consideration by the Settlement Commission on September 15, 2015. By an Order dated September 15, 2015, the Settlement Commission had found the requirements of the provisions of Section 245C to be fulfilled. The application for settlement

was allowed to be proceeded with under Section 245D(1) of the Act for the three assessment years concerned. The Principal Commissioner was required to submit a report under Section 245D(2B) to the Settlement Commission. The Principal Commissioner had submitted a report dated October 9, 2015 under Section 245D(2B) before the Settlement Commission. In the report, various issues were raised, including the non-disclosure of the manner in which the disclosed income was derived by the assessee. The assessee through its Advocate's letter dated October 27, 2015 had dealt with such report. Another report was also placed before the Settlement Commission. The petitioners have claimed not to have received a copy of this report. The Settlement Commission had, thereafter, passed an Order dated October 28, 2015 under Section 245D(2C) after considering the two reports and after hearing the parties. At such hearing, the petitioners did not raise the issue of the second report being not made available to them. By such order the Settlement Commission had discussed the issue of full and true disclosure of income by the assessee concerned. The Settlement Commission had returned a prima facie satisfaction that, the disclosures made by the assessee at that stage, to be full and true. It went on to say that, the correctness of the alleged additional income would, however, be considered in the course of Section 245D(4) proceedings. It had held

that, the application filed by the assessee was not invalid. It had called for a report under Rule 9 from the Principal Commission. The petitioners being aware of the Order dated October 28, 2015 did not challenge the same. They did not object to the Settlement Commission deciding on the correctness of the full and true disclosure of income at the Section 245D(4) stage. They did not object to the Settlement Commission asking for a report under Rule 9. They did not contend before the Settlement Commission that, a report under Rule 9 was not contemplated under the provisions of Section 245D(2B) of the Act. A report under Rule 9 of the Income Tax Settlement Commission Rules dated January 16, 2016 was submitted by the Principal Commissioner with the Settlement Commissioner. The assessee had received an opportunity to deal with the report dated January 7, 2016 under Rule 9 of the Settlement Rules. The assessee had filed a reply dated August 2, 2016 with regard thereto. The Commissioner of Income Tax had made few comments and submissions with regard to the report and the reply thereto of the assessee. The Settlement Commission, thereafter, had issued an Order dated September 2, 2016 under Section 245D(3). By such Order, the Principal Commissioner was requested to make enquiries on the issues noted therein. A month's time was allowed to complete the enquiry. The report of the enquiry was directed to reach the Settlement Commission

by October 4, 2016. The assessee had participated in the enquiry. The assessee did not raise any objections to the enquiry conducted or the subject matter of the enquiry. The Principal Commissioner had submitted a report dated October 10, 2016 with regard to the enquiry. The assessee through its Advocate's letter dated October 9, 2016 had responded to the queries raised by the Settlement Commission. The Principal Commissioner by a report dated October 24, 2016 had stated before the Settlement Commission that, the enquiry directed by the Order dated September 2, 2016 could not be completed as various details called from diverse parties were not made available to it within time. It had sought another three months time to complete the enquiry. The assessee through its Advocate's letter dated October 25, 2016 had dealt with the report of the Principal Commissioner dated October 4, 2016. It had sought to explain the queries raised by the Principal Commissioner. The Principal Commissioner by its report dated December 26, 2016 had submitted its views on the enquiry directed by the Order dated September 2, 2016. The assessee through its Advocate's letter dated January 5, 2017 had dealt with the various queries raised on December 14, 2016.

The Settlement Commission after consideration of the materials placed before it, and after hearing the parties has passed the impugned

Order dated January 24, 2017. By its order, the Settlement Commission has returned a finding that, the assessee did not come with clean hands to it. The assessee did not make a full and true disclosure of all material facts and income. The prerequisites for a settlement proceedings not being fulfilled by the assessee, the Settlement Commission, by the impugned order, has considered the proceedings to be abated. It has identified three principal heads where the assessee did not make a full and true disclosure of its income.

In the proceedings before the Settlement Commission, the assessee was represented by its Advocates. At no point of time before the Settlement Commission, did the assessee raise any jurisdictional issue with regard to the conduct of the proceedings by the Settlement Commission. It did not complain to the Settlement Commission as to the alleged infractions of any statute made by the Settlement Commission in the conduct of the settlement proceedings, at all.

It has been contended on behalf of the petitioners that, the petitioners having offered settlement, they had considered it prudent not to raise any jurisdictional issues with regard to the conduct of the proceedings by the Settlement Commission during its process on the apprehension that such issues may derail the settlement proceedings. In

the facts of the present case and particularly in view of the conduct of the parties before the Settlement Commission, I am afraid that, I am not in a position to accept such contention. The infraction, if any, was not pointed out to the Settlement Commission by the petitioners at the relevant point of time. The petitioners had filed detailed replies before the Settlement Commission at various stages. They were heard at every stage and before any of the four orders were passed by the Settlement Commission. None of these replies show that, the petitioners did raise the point of judicial errors in the conduct of the proceedings by the Settlement Commission or the issue of jurisdiction as sought to be agitated now, at the first instance. Not having done so, a plausible inference of such a conduct is that, such a party has waived its rights with regard to such jurisdictional issues and has submitted to the jurisdiction unconditionally. It is not a case of inherent lack of jurisdiction. The complaint of the petitioners is limited to procedural irregularities which had allegedly infringed upon the jurisdiction propriety of the conduct of the proceedings by the Settlement Commission.

Virgo Steels, Bombay & Anr. (supra) has held that, a mandatory requirement of a statute can be waived by the party concerned, if the statute seeks to confer a privilege on the party. It has noted four

Supreme Court decisions and a decision of the Privy Council on the issue. It has held that, even though a provision of law is mandatory in its operation, if such provision is one which deals with the individual rights of the person concerned and is for his benefit, such person can always waive such a right.

Johri Mal (supra) has held that, while exercising the power of judicial review, the Court is more concerned with the decision making process rather than the merit of the decision itself. It has also held that, while examining and scrutinizing the decision making process, it becomes inevitable to also appreciate the facts of a given case, as otherwise, the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety.

Brij Lal & Ors. (supra) has considered issues referred to it. The issues that have been considered are summarized in paragraph 2 of the report. Such issues relate to whether Section 235B applies to the proceedings of the Settlement Commission under Chapter XIXA of the Income Tax Act, 1961 and if the answer to such question is in affirmative, what is the terminal point for levy of interest and whether the Settlement Commission could reopen its concluded proceedings by invoking Section 154 so as to levy interest under Section 234B though

not done in the original proceedings. While discussing such issues, the provisions for settlement under Chapter XIXA of the Act of 1961 have been discussed. It has also held that, the provisions for settlement are different to the provisions for regular assessment.

On the scope and ambit of judicial review of an order passed by the Settlement Commission, **Jyotendrasinhji (supra)** has held that, although there is no bar to the writ jurisdiction of the High Court under Article 226 of the Constitution of India to scrutinize an order of the Settlement Commission, the scope of judicial review under Article 226 of the Constitution of India is to consider whether the order of the Settlement Commission is contrary to the provisions of the Income Tax Act, 1961 and if so, whether it has prejudiced the petitioner and whether the impugned order suffers from bias, fraud or malice. Similar view has been expressed in **Ind-Swift Laboratories Ltd. (supra)**. It has also held that, so far as the findings of fact recorded by the Settlement Commission or questions of facts are concerned, the same is not open for examination either by the High Court or by the Supreme Court. **Shriyans Prasad Jain (supra)** has held that, findings of fact recorded by the Settlement Commission cannot be reviewed by the Court.

V.M. Shaik Mohammed Rowther (supra) has held that, an assessee has to satisfy the essential condition of making full and true disclosure before the Settlement Commission. A Settlement Commission is not meant to be an optional forum chosen by the assessee for the settlement of tax liability and other liability while such assessee continues to be dishonest and deliberately fails to make a full and true disclosure of its income. **Smt. Sudha Patil & Anr. (supra)** has held that, merely because no appeal has been provided against the order of the Settlement Commission, the same does not enlarge the scope of supervisory power of the High Court nor can the High Court exercise powers as an appellate authority.

Rashmi Infrastructure Developers Ltd. (supra) on the facts of that case has found that, the petitioner is not in a position to substantiate that the finding of the Settlement Commission that, the assessee did not make full and true disclosure, was perverse. The writ petition was not entertained.

An assessee is entitled to approach the Settlement Commission for the purpose of settlement of tax liability or any other liability that may arise under the provisions of the Income Tax Act, 1961. An assessee is, however, required to make a full and true disclosure of its income, the

manner in which the income has been derived, the additional amount of income tax payable on such income and such other particulars as may be prescribed to the Settlement Commission. The Principal Commissioner immediately on receipt of the Order dated September 15, 2015 passed under section 245D(1) by the Settlement Commission has by its report dated October 9, 2015 raised issues with regard to the assessee not making a full and true disclosure of its income and the source from which such income had been derived. The Settlement Commission by the Order dated October 28, 2015 passed under Section 245D(2C) had postponed the decision on the correctness of the disclosure of additional income by the assessee to be considered in course of Section 245D(4) proceedings. This order has not been assailed by the assessee at the relevant point of time. The assessee has allowed the settlement proceedings to continue on the basis of such a premise as recorded in the Order dated October 28, 2015. The assessee has unconditionally participated in the settlement proceedings subsequently. The correctness of the disclosures made by the assessee was taken up for consideration by the Settlement Commission on different occasions. The assessee could not satisfy the Settlement Commission as to the correctness of the disclosures made to it. The assessee was found not to have made full and true disclosure of its income. A finding of fact made

by the Settlement Commission is not open to judicial review unless it is established that, such finding of fact suffers from perversity or is vitiated due to bias or malice. None of the grounds known to law to upset a finding of fact returned by a Settlement Commission has been substantiated in the facts of the present case. The findings of the Settlement Commission on the correctness of the disclosures made by the assessee before it have not been substantiated to be perverse. The contention that, the Settlement Commission ought to have arrived at the tax liability on the materials disclosed before it, is unacceptable. For the Settlement Commission to assume jurisdiction, it must return a finding that, the assessee before it has made a full and true disclosure of its income and the other matters referred to Section 245C(1). In the present case, the assessee did not made a full and true disclosure of its income before the Settlement Commission. Such is the finding of the Settlement Commission. Such finding has not been substantiated to be perverse or to be suffering from such a legal infirmity so as to warrant an interference by a Writ Court. It is not for the Writ Court to exercise appellate jurisdiction over an order passed by the Settlement Commission. The Writ Court is not called upon to reappraise the evidence placed before the Settlement Commission. It is also not called upon to enlarge its jurisdiction under Article 226 to have a more detailed

scrutiny of the order of the Settlement Commission in view of the non-availability of an appellate forum. The order of the Settlement Commission has not been established to be contrary to the provisions of the Income Tax Act, 1961.

In the present case, the impugned order is well-reasoned. It is not alleged that, the impugned order suffers from the vice of bias or is vitiated by fraud or is actuated by malice. No part of the impugned order has been substantiated to be perverse. The impugned order has been passed after affording reasonable opportunity of hearing to the assessee. It cannot be said that, the impugned order suffers from breach of principles of natural justice. That case has not been argued also. The petitioners having not been able to establish that, the finding of the Settlement Commission that the assessee is guilty in not making a full and true disclosure of its income is perverse, an interference is not called for. The Settlement Commission has noted three instances where the petitioner did not make full and true disclosures of its income. Even before the High Court, the petitioners have not come clean with regard to the three issues noted by the Settlement Commission. The petitioners have not improved on the facts made available to the Settlement Commission.

In such circumstances, the first issue is answered in the negative and against the petitioners. In view of the answer to the first issue the second issue is answered by holding that, the petitioners are not entitled to any relief.

W.P. No. 126 of 2017 is dismissed. In the facts of the present case, however, there will be no order as to costs.

[DEBANGSU BASAK, J.]