

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2521 OF 2013

The Commissioner of Income Tax-Central-I .. Petitioner.
V/s.
Income Tax Settlement Commission
& Others .. Respondents.

Mr. Abhay Ahuja with Ms. Padma Divakar, for the Petitioner.
Mr. J. D. Mistri, Sr. Advocate with Mr. Sameer Dalal, for the Respondents.

**CORAM: M.S.SANKLECHA, &
N.M.JAMDAR, JJ.
DATE : 14th AUGUST, 2015.**

P.C:-

This Petition under Article 226 of the Constitution of India impeaches the order dated 28th December, 2012 passed by the Settlement Commission, Additional Bench, Mumbai(the Commission) under Section 245D(4) of the Income Tax Act, 1961 (the Act). The impugned order of the Commission settles the dispute between the Petitioner-Revenue and Respondent No.2 – Assessee for the Assessment Years 2004-05 to 2009-10.

2 Before we consider the grievance of the Petitioner to the impugned order of the Commission, it would be useful to reiterate the scope of judicial review in respect of final orders passed by the Commission under Section 245D(4) of the Act. In fact, the scope and extent of the judicial review from orders of the Commission stands settled by the decision of the Apex Court in *Jyotendrasinhji v/s. S. I. Tripathi & Others*¹ – wherein the scope of judicial review from the orders under

1 201 ITR 631

Section 245D(4) of the Act has been set out as under:

“
The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same – whether the order of the commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant. Apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in Sri Ram Durga Prasad v. Settlement Commission, 176 ITR 169: (AIR 1989 SC 1038), which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji, J., speaking for the Bench comprising himself and S. R. Pandian, J observed that in such a case this Court is “concerned with the legality of procedure followed and not with the validity of the order.” The learned Judge added “judicial review is concerned not with the decision but with the decision-making process.” Reliance was placed upon the decision of the House of Lords in Chief Constable of N. W. Police v. Evans, (1982) 1 WLR 1155. Thus, the appellant power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that the order of the commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant.”

Thus the scope of judicial review in respect of final orders passed by the Commission under Section 245D(4) of the Act is indeed very limited and like in any other case of judicial review by way of a writ, the Court does not sit in appeal over the order of the Commission. Indisputably, this court does have powers of judicial review over orders passed by the Commission and would certainly correct any miscarriage of justice or where the orders are without jurisdiction. However, in the

absence of the above being established, we would be averse to interfere. This is more so on account of the legislative intent as discerned from Section 254-I of the Act which protects an order of the Commission under Section 254D(4) of the Act from challenge in any other proceeding. Further, the members who are appointed on the Commission have statutorily in terms of Section 245B of the Act are required to be persons of integrity and outstanding ability, having special knowledge of problems relating to direct taxes and business accounts. However, we hasten to add, least we be misunderstood, that none of these would fetter our jurisdiction under Article 226 of the Constitution to exercise powers of judicial review over orders passed by the Commission under Chapter XIXA of the Act. This is being pointed out by us only to emphasis that a challenge to the order of the Commission by way of a writ would not be examined through the prism of an appeal. Thus, while exercising judicial review under Article 226 of the Constitution of India we examine the decision making process of the Commission and not per se the merits of the decision when the same is not shown to be perverse.

3 Keeping the above broad contour of the self imposed limitations to the exercise of our jurisdiction under Article 226 of the Constitution of India in mind, we will examine the grievance of the Petitioner. This in the context of the facts giving rise to this petition which are as under:-

- (a) The Respondent No.2-assessee is a company incorporated under the Companies Act, 1956 and is an subsidiary of one M/s. Jupiter Networks LLC USA (holding company). The Respondent No.2 is engaged in rendering I. T. related services to its holding company

inter alia from its unit registered with the Software Technology Park of India (STPI unit) and also from its non-STPI Units. The Respondent No.2 is exempted from tax under Section 10-A of the Act in respect of its profits arising from its STPI unit i.e. 95% of its entire profits. The business model of the Respondent No.2 is to provide its IT services to its holding company at cost + 10%. The capital goods i.e. equipments were purchased by the Respondent through its holding company. This has been illustrated by the parties with a figure of Rs.100/- (for ease of understanding) as the cost price of the equipments to the Respondent No.2. At this figure of Rs.100/-, the equipment was recorded in the Respondent No.2's books and also depreciation taken, was on the above value. The sales were reflected at cost i.e. Rs.100/- + 10%. However, at the instance of the Customs department, the Respondent No.2 enhanced the value of equipments imported from 2006 onwards to Rs.225/- i.e the Customs valuation for import and also recorded it at Customs value in its Books. This resulted not only in depreciation being taken at a higher figure but also the sales being recorded at Rs.225/- + 10% i.e. higher than the actual/real transaction value between the Respondent No. 2 and its holding company;

- (b) Consequent to a search operation on 30 July 2009 under Section 132 of the Act and notice under Section 153-A of the Act, the Respondent No.2 filed its return of income for A. Y. 2004-05 to 2009- 10. In its return of income, the Respondent No.2 wrote back higher depreciation claimed on Rs.225/- but claimed exemption under Section 10A in respect of the same. However, the higher

sales revenue i.e. Rs.225+10% continued to be shown. In the above circumstances, the Respondent filed on 22nd July 2011 an application for settlement for A. Y. 2004-05 to 2009-10 with the Commission, claiming the benefit of deduction under Section 10-A of the Act. The Respondent also claimed that the inflated sales i.e. Rs.225/- + 10% in excess of the actual income of Rs.100/-+10% be ignored. The Respondent had declared an additional income of Rs.8.54 Crores for Assessment Years 2004-05 to 2009-10 on account of transfer pricing adjustment of 5% in respect of STPI unit and 6% of non-STPI units as its transaction value of I.T. Services with its Associated Enterprise i.e. holding company. Further, on this additional income, no deductions under Section 10-A of the Act was claimed. The Commission in its order dated 24 January 2012 at the stage of Section 245D(3) of the Act, at the instance of the petitioner, allowed/directed the Petitioner make a reference to the Transfer Pricing Officer(TPO) to determine the Arms Length Price(ALP) and verify the satisfaction of the conditions for grant of exemption under Section 10A of the Act claimed by the Respondent No.2; and

- (c) Thereafter the Petitioner filed its Rule 9 report in terms of the Settlement Commission (Procedure) Rules, 1977 (Commission Rules) to the Application for settlement made by Respondent No.2. The Commission on consideration of the material and submissions made before it passed the impugned order holding that the unbilled revenue (excess sales figures at Rs.225/-+10%) is not genuine income as it is a mere book entry made by the applicant. The additional income was determined by virtue of Transfer Pricing

Adjustment at Rs.76.03 Crores and the impugned order also negated the contention of the Petitioner that the benefit of Section 10-A of the Act will not be available to the extent of Rs.264 Crores being extra ordinary profits. It is the impugned order that is the subject of challenge before us.

4 The Primary challenge of the petitioner is one of jurisdiction that is the Commission had no jurisdiction to entertain the application for settlement made by the Respondent-Assessee. This for the reason that the Respondent-Assessee did not satisfy the two independent conditions precedent as provided under Section 245C(1) of the Act for invoking the jurisdiction of the Commission as under:-

- (a) making full and true disclosure of its income in its application; and
- (b) the manner in which this income has been derived.

This failure to make full and true disclosure, according to the Petitioner is evident from the fact that during the course of the hearing of the application under Section 245D(4) of the Act, the Respondent-Assessee had revised/ increased the income offered for settlement by offering Rs.59.11 Crores and Rs.3 Crores. This itself, according to the petitioner would warrant the dismissal of the application by the Respondent No.2 in view of the decision of the Apex Court in *Ajmera Housing Corporation v. CIT*²

5 The decision in Ajmera Housing (supra) has to be considered in the context of the facts arising therein. The bare facts, there were:

- (a) On 30 September 1993, Ajmera (Applicant) made an application for

² 320 ITR 642.

settlement to the Commission, making an offer of Rs.1.94 Crores for the Assessment Years 1998-90 to 1993-94;

- (b) On 27th January, 1994, the Commissioner of Income tax objected to entertaining the application on account of failure on the part of the Applicant to make a true and full disclosure of its Income. This was by filing a report under Rule 6 of the Commission Rules;
- (c) On 12th September, 1994, the Commissioner as well as the Applicant were heard with regard to the application and reserved for orders under Section 245D(I) of the Act;
- (d) On 19th September, 1994 i.e. before the order was passed under Section 245D(I) of the Act, Ajmera Housing (supra) filed a revised settlement application containing confidential annexure and related papers declaring the additional income of Rs.11.41 Crores.

The Orders passed by the Commission was challenged in the High Court and it was carried to the Apex Court which restored the challenge to the High Court, keeping all the issues open. The High Court by its order dated 8th July, 2009 while remitting the issue to the Settlement Commission for fresh adjudication, inter alia, observed that

“ In view of the facts and the legal position noted above, even though we find that the Respondent-Assessee had not made full and true disclosure of their income while making an application under Section 245C of the Act, it would not be proper to set aside the proceedings.”.

(emphasis supplied)

6 It was in the background of the aforesaid facts that the Apex Court in Ajmera Housing (supra) observed that Chapter XIX-A of the Act(Settlement Provisions) does not contemplate revision of income

disclosed in the application for settlement. Further, it observed in paragraph 35 as under:-

“35:- ...The High Court addressed itself on the said issue and found that the assessee had not made full and true disclosure of their income while making an application under Sectionwpl-1806-2015 245C(1) of the Act, yet did not find it proper to set aside the proceeding on that ground. Having recorded the said adverse finding on the very basic requirement of the valid application under Section 245C(1) of the Act, the High Court's opinion that it would not be proper to set aside the proceeding as clearly erroneous.”

7 It would, therefore, be noticed that there was a clear finding of failure to make full and true disclosure of the income made by the Applicant in Ajmera Housing (supra) to the Settlement Commission. Thewpl-1806-2015 revision of the income offered for tax therein was suo-motu. This was after the hearing had concluded and orders were awaited. Normally, the income offered for tax in an application for settlement would bind the parties concerned and any revision thereof, would prima facie, be evidence of the original application for settlement not declaring the full income in its original application. However, this is not cast in stone and will depend upon the factual context from case to case towpl-1806-2015 determine whether there was any failure to disclose fully and truly the income. This is particularly so where the correct determination of income is dependant upon the application of the appropriate Transfer Pricing Rule which to an extent is subjective, as in this case. In such a case, if an additional income is declared during the course of the hearing in view of what emerges during debate before the Commission, it cannot be said that the original application did not make true and full disclosure of its undisclosed income. It is for the Commission to consider

on the basis of the facts that emerge before it, whether the original application contained a bonafide true and full disclosure of the Applicant's income or not. This would necessarily be dependant upon various factors including the manner in which the application for wpl-1806-2015 settlement has been made out.

8 The Petitioner's application for settlement, in particular, seeks the settlement of the various issues including determining the correct taxable income under the normal provisions of the Act and under Section 115JB of the Act. It has not been urged before the Commission or even before us that there was a deliberate failure on the part of the Respondent-Assessee to make full and true disclosure of its income and it was not a bonafide application. In the present case, the additional income was offered by the Respondent No.2-Assessee, only after the Petitioner had filed its Rule 9 report and it was only during the course of hearing under Section 245D(4) of the Act that the additional income of Rs.59.11 Crores and Rs.3 Crores were offered. This also on accepting the view of the Petitioner and without prejudice to their primary contention that the same cannot be added. This acceptance of the further offer only with a view to expeditiously settle the dispute, according to us, in the peculiar facts of the case, cannot be held against the Petitioner.

9 An identical submission as made before us on behalf of the petitioner was a subject matter of consideration by this Court in W. P. No.559 of 2008 (Director of Income v/s. Income Tax Settlement Commission) and decided on 28th February 2014. In the above case, an identical submission was raised by the Revenue as raised before us with regard to failure to make true and full disclosure. For the purpose of convenience, we reproduce in the objection of the Petitioner and the

decision of the Court on the aforesaid objections as under:-

“7 In this case, the primary objection of the petitioner as urged before us is that the application for settlement filed by the respondents does not meet the jurisdictional requirement of full and true disclosure of their income as required under Section 245-C of the Act. This according to the petitioner is a statutory jurisdictional pre-condition that has to be satisfied before the application can be entertained by the Commission. The failure on the part of the respondent to make full and true disclosure in its application is established, according to the petitioner, by the fact that an additional income of Rs.150 Crores was declared before the Commission on 10 September 2007 i.e. over and above, the income declared in their application dated 5 March 2007. This additional disclosure of income on the part of the respondent itself, without anything more is a tacit admission that the original application filed on 5 March 2007 did not make a full and true disclosure of the respondents income. According to the petitioner, the issue stands concluded by the decision of the Apex Court in Ajmera Housing (supra) wherein it has been held that the Chapter XIX-A of the Act does not contemplate the revision of income as disclosed in the original application. It is submitted that such revision of income amounts to withdrawing of original application and making a fresh application. The Apex Court in the matter of Ajmera Housing (supra) has observed as under:-

“ A bare reading of the provision would reveal that besides such other particulars, as may be prescribed, in an application for settlement, the assessee is required to disclose : (i) a full and true disclosure of the income which has not been disclosed before the Assessing Officer; (ii) the manner in which such income has been derived; and (iii) the additional amount of income-tax payable on such income.

It is clear that disclosure of 'full and true' particulars of undisclosed income and 'the manner' in which such income had been derived are the pre-requisites for a valid application under Section 245C(1) of the Act. Additionally, the amount of income-tax payable on such undisclosed income is to be computed and mentioned in the application. It needs little emphasis that

section 245C(1) of the Act mandates 'full and true' disclosure of the particulars of undisclosed income and 'the manner' in which such income was derived and, therefore, unless the Settlement Commission records its satisfaction on this aspect, it will not have the jurisdiction to pass any order on the manner covered by the application."

It further held that:-

" A "full and true" disclosure of income, which had not been previously disclosed by the assessee, being a pre-condition for a valid application under section 245C(1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No.11 of the Form. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application. In this regard, section 245C(3) of the Act which prohibits the withdrawal of an application once made under sub-section (1) of the said section is instructive inasmuch as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Therefore, by revising the application, the applicant would be achieving something indirectly what he cannot otherwise achieve directly and in the process rendering the provision of sub-section (3) of section 245C of the Act otiose and meaningless. In our opinion, the scheme of the said Chapter is clear and admits of no ambiguity."

8 The above observations of the Apex Court may at first blush seem to cover the petitioner's case completely. However before the above observations being relied upon by the petitioner can be applied to the present facts the following further observations of the Apex court should be taken note of which read as under:

" We are convinced that, in the instant case, the disclosure of Rs.11.41Crores as additional undisclosed income in the revised annexure, filed on September 9, 1994 alone was sufficient to establish that the application made by the assessee on September 30, 1993 under section 245C(1) of the Act could not be entertained as it did not contain a 'true and full' disclosure of their undisclosed income and 'the manner' in which

such income had been derived. However, we say nothing more on this aspect of the matter as the Commissioner, for reasons best known to him, has chosen not to challenge this part of the impugned order.”

9 *It would, therefore be noted that the aforesaid issue of whether or not by virtue of disclosure of additional income, there was a failure to make a true and full disclosure was not an issue for consideration before the Apex Court. This is so as it was not a subject matter of challenge by the revenue either before the High Court or before the Supreme Court. In view of the above, the above observations of the Apex Court in the Ajmera Housing (supra), cannot be said to be a ratio- decidendi of the decision. It is trite law that a decision of a Court is not to be read as a statutory provision. The observation of Court must be read in the context of the facts before the Court.”*

10 The above observations equally apply to the present case. Moreover, the facts as pointed out herein above in the present case, are very different from the facts which arose for consideration before the Apex Court in Ajmera Housing (supra). Consequently, the same in the peculiar facts of the present case, cannot be applied. Therefore we do not agree with the submission of the Petitioner that there has been a failure to disclose truly and fully undisclosed income in the settlement application in the peculiar facts of the Petitioner’s case.

11 So far as the other objection is concerned viz failure to disclose the manner in which this income has been derived, we find that the application for settlement sufficiently explains the source of the income being declared. The application mentions how the additional income which is being disclosed as been derived i.e. on application of the ALP in respect of exports made to its Associated Enterprise viz holding company. We do not see any merit in the above submission on behalf of

the petitioner.

12 The other jurisdictional objection to the impugned order urged by the petitioner is the grant of immunity from penalty and prosecution under Section 245H of the Act. It is submitted that before immunity can be granted, the Statute requires the Commission to be satisfied that the person who has made an application for settlement:

- (a) has cooperated in the proceedings before the Commission;
- (b) has made a full and true disclosure of his income; and
- (c) disclosed the manner in which such income has been earned.

Attention is invited to the impugned order to contend that the question of unbilled revenue was not raised in its application for settlement but raised only during the course of the hearing. Thus not a full and true disclosure. This is factually not correct. In fact in the statement of facts filed by Respondent No.2 along with the application for settlement does mention at para 25 as under:

“
In so far as the income which has been disclosed as per profit and loss Account is at a higher figure and the applicant cannot reduce its income, whether it would remain taxable as such or on its being abated could a lower figure be is a circumstance which deserves consideration by the Commission. In view of such concession which the applicant is willing to offer, the disputable issues regarding the taxability of real income and book profits requires settlement.”

In any event on consideration of the submissions made before it the impugned order at Para 47.3 records its satisfaction in respect of all the three prerequisites for grant of immunity from penalty and prosecution. Thus the immunity from penalty and prosecution was

granted only on satisfaction of the jurisdictional requirements. This satisfaction has not been shown to be perverse.

13 The last grievance of the petitioner is that the impugned order is bad on merits. It is submitted that concepts like real income have been invoked when the same has no application. In support reliance is placed upon the decision of the Apex Court in **State Bank of Travancore v. CIT**³ and **CIT v. Shiv Prakash Janak Raj & Co.**⁴ [relies upon State Bank of Travancore (supra)]. The decision of the Apex Court in State Bank of Travancore (supra) was reversed to the extent it held that accrued interest is real income in **UCO Bank v. CIT**⁵. Be that as it may, the Counsel for the Revenue places reliance upon the propositions set out by the Apex Court in relation to the theory of real income. The Counsel for Respondent No.2 also has no quarrel with the same and according to him the view on real income taken by Commission is in line with those directions/propositions. On application of the first proposition set out therein that real income is income which has really accrued or arisen to the assessee that is taxable. Whether the income has really accrued or arisen must be judged in the light of the reality of the situation. It is on application of the above principle that the Commission has come to the conclusion that unbilled revenue was only a book entry and no real income accrued or arose. This view of the Commission in the impugned order cannot be said to be perverse in the least. It is a possible view. Therefore, keeping in view the self imposed limitations as set out in Jyotinderesinghji (supra) we see no reason to interfere with the merits of the decision in the present facts.

3 158 ITR 102

4 222 ITR 583

5 237 ITR 889.

14 Before we close, one aspect of matter may be adverted to and that is the impugned order was passed on 28th December, 2012. It was on the basis of the impugned order that the Assessing Officer raised a demand upon Respondent No.2, payable in installments up to 31st March, 2013. The impugned order was accepted by the Revenue and at no point of time, was the Respondent No.2 informed of the likely challenge to the impugned order. It was only in July 2013 that this Petition was filed. Not a whisper in the Petition, why the delay occurred.

15 In the above, view we see no reason to interfere with the impugned order of the Commission. Accordingly, **Petition dismissed.** No order as to costs.

(N.M.JAMDAR,J.)

(M.S.SANKLECHA,J.)