IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.13346 of 2016

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Assistant Commissioner of Income Tax, Central Circle-3, Patna, through Mr. Praveen Kamal Srivastav, Son of Sri K.Lal Srivastav, Resident of I.T. Colony, D-8, Khajpura, P.S.- Shastri Nagar, Patna ... ... Petitioner

Versus

1. Union of India through its Secretary Income Tax Settlement Commission, Kolkata having its office at 10C, Middleton Street, Kolkata.
2. M/s Tirupati Homes Limited, Arvina Apartment, Nageshwar Colony, Boring Road, Patna-800001 (Bihar). ... ... Respondents

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with

Civil Writ Jurisdiction Case No. 13743 of 2017

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M/s Tirupati Homes Limited, Arvina Apartment, Nageshwar Colony, Boring Road, Patna, Bihar through its Managing Director Sri Shashi Bhushan Sinha, S/o Late Chandrika Prasad, R/o- 501 Laxmi Hariniwaz, Nageshwar Colony, Kaviraman Path, PO- GPO, P.S.- Buddha Colony, District- Patna.

... ... Petitioner

Versus

1. The Settlement Commissioner through its Secretary, (IT.WT) Additional Bench, 10-C Middleton Raw, Second Floor, Kolkata- 700071.
2. The Commissioner of Income Tax, Central, Central Revenue Building, Birchand Patel Path, Patna.
3. The Assistant Commissioner of Income Tax, Central Circle-3 Annexy Building, Birchand Patel Path, Patna. ... ... Respondents

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Appearance :

(In Civil Writ Jurisdiction Case No. 13346 of 2016)

For the Petitioner/s : Ms. Archana Sinha @ Archana Shahi, Adv.

For the Respondent/s : Mr. Krishna Mohan Mishra, Adv.

(In Civil Writ Jurisdiction Case No. 13743 of 2017)

For the Petitioner/s : Mr.Arjun Prasad, Adv.

For the Respondent/s : Ms. Archana Sinha @ Archana Shahi, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 08-01-2019

The Department of Income Tax through the Assistant Commissioner is before us, as a writ petitioner to question the order dated 30.9.2015 passed by the Settlement Commission in purported exercise of powers vested under section 245D(4) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for the assessment years 2011-12 and 2012-13. The assessee- respondent, on the other hand, has also filed separate writ petition feeling aggrieved by the same order of the Settlement Commission dated 30.9.2015 in so far as it has awarded interest under section 234A, 234B and 234C of 'the Act', which is placed analogous for consideration.

The facts of the case briefly stated is that respondent no.2 is a Company registered under the Companies Act, 1956 and as per their submission, has been filing their returns regularly under 'the Act'. The records of the proceeding transpire that a search and seizure operation was carried out in the business premises of the Company as well as on the residential premises of its Managing Director on 28.4.2011 and following which the Assessing Officer in the rank of the writ petitioner issued search notice in purported exercise of powers vested under section 153A and 153C of 'the Act', copies of which are enclosed in the writ petition filed on behalf of the assessee. The respondent- assessee filed his returns for the assessment years in question i.e. for the year 2011-12 on 9.9.2013 and for the assessment year 2012-13 on 15.10.2013. Despite the position a second notice was issued under section 153 of 'the Act' by the Department to the assessee for filing fresh returns.

The respondent- assessee looking into the complexity of the proceeding so initiated took recourse to the remedy available to him under Chapter XIXA of 'the Act' by filing an application for settlement of his case in the manner so provided thereunder and by filing an appropriate application to such effect under section 245C(1) thereof. A copy of such application is on record as Annexure 2 to the writ petition filed by the assessee. According to the respondent- assessee, it disclosed its total income for each of the two assessment years in question to the tune of Rs.1,60,40,700/- which was inclusive of additional income of Rs.1,05,00,000/- for the assessment year 2011-12. In a similar manner the Company made a true and proper disclosure of the total income for the assessment year 2012-13 to the tune of Rs.1,05,94,182/- which was inclusive of additional income of Rs.40,00,000/-. According to the assessee, the tax admissible on the income so dislcosed was Rs.53,28,320/- for the assessment year 2011-12 and Rs.34,37,283/- for the assessment year 2012-13. As per assessee, he has paid admissible interest on the amount of income tax payable, by making a total payment inclusive of interest for the period 2011-12 to the tune of Rs.75,22,464/- and for the assessment year 2012-13 to the tune of Rs.35,32,192/-. As per respondent-assessee, the application filed by him under section

245C of ‘the Act’ was entertained by the Commission by passing an order to such effect under section 245D(1) of ‘the Act’ on 4.4.2014.

According to the Department, the order dated 4.4.2014 allowing the settlement application was not correct because the assessee had not made full and true disclosure of his income. The records transpire that on 21.5.2014 an order was passed by the Settlement Commission under section 245D(2C) treating the application as not invalid and thus fit to be proceeded with. The notice was issued to the Commissioner of Income Tax for submission of his report under Rule 9 of the Rules framed thereunder and which has been furnished by the Commissioner of Income Tax, which is enclosed as Annexure 3 to the writ petition filed by the Department and which is dated 25.7.2014. According to the Department, the case was fixed for hearing and passing final orders under section 245D(4) of ‘the Act’ on 28.7.2015 on which date a written submission as well was submitted by the Department regarding holding of a special audit. However, the Settlement Commission has passed final orders on 30.9.2015 without having regard to the objection raised by the Department and feeling aggrieved the Department is before this Court through the writ petition in question and alongside the assessee has followed suit to question the order of the Commission in so far as it awarded interest.

Ms. Archana Sinha, learned counsel has appeared on behalf of the Department while Mr. Krishna Mohan Mishra, learned counsel has appeared for the assessee.

The issues that have been framed in paragraph 2 of the writ petition by the Department is ornamental in nature save and except the issue of perversity, if any, so committed by the Settlement Commission while passing the impugned order. The other issue canvassed by Ms. Sinha is that the assesseee having failed to make true and full disclosure of his income in the manner prescribed, he was not entitled to the benefit of the remedy available under Chapter XIXA of 'the Act'.

We have heard learned counsel for the parties and have perused the records.

The two issues that we have noted above are the only issues which in our opinion may invite an examination under Article 226 of the Constitution of India. Chapter XIXA by way of a special remedy, has been incorporated under 'the Act' to bring about a settlement, without the parties having to go through the long drawn process of the assessment, appeal, revision etc. The remedy provided under Chapter XIX of 'the Act' by the Parliament is special in nature and is founded on sound principles of voluntary disclosure by the assessee of his full and true income. The scheme underlying Chapter XIXA of 'the Act' presupposes a suppression by an assessee in disclosing his true income before the Assessing Officer and affords him an opportunity to make good the lapse by taking recourse to this remedy after making a full and true disclosure of his income in his settlement application before the Settlement Commission which would be inclusive of such income which was not disclosed by him before the Assessing Authority.

There are certain definite constraints accompanying such remedy but for the purpose of the present adjudication we are only to see whether or not the assessee has made such true and full disclosure of his income before the Settlement Commission which he did not do before the Assessing Authority and/or whether despite the objections raised by the Commissioner of Income Tax in his report submitted under Rule 9 of 'the Rules', there has been any perversity in disposal by the Commission of the settlement application by the order impugned.

For the purpose we would be referring to the relevant paragraphs of the report of the Commissioner of Income Tax submitted under Rule 9 of 'the Rules' in so far as it raises objections on the prayer made by the assessee for the settlement of his case by the Settlement Commission for the assessment year 2011-12 and 2012-13.

> "**<u>Assessment year 2011-12</u>**
> As already discussed, on the basis of entries found recorded in various seized documents, the "unaccounted for" cost of projects is worked out at Rs.23,70,22,535/- as against Rs.10,85,25,511/- declared by the applicant in the Settlement application. So, there is a discrepancy of Rs.**12,84,97,024/-** between the unaccounted for cost of projects worked out by the applicant and that worked out on the basis of entries in seized documents as discussed already. Hence, the additional undisclosed amount of Rs.12,84,97,024/- should be added back to his total undisclosed income for A.Y. 2011-12. Therefore, it is strongly felt that the assessee has dodged the Department by not making true and full disclosure before the Hon'ble Settlement Commission."

Similarly for the assessment year 2012-13 the operative portion of the report of the Commissioner of Income Tax runs under:

> " In the audited accounts submitted by the assessee itself, total expenses incurred by the assessee during the F.Y. 2011-12 were shown at Rs.9,64,73,029/- as against a receipt from business of Rs.10,14,84,111/-. Nowhere in his submission, the assessee has claimed any further expenses incurred for earning such additional revenue of Rs.6,00,00,000/-. So, it can be

> undoubtedly said that the net profit of the assessee for the F.Y. 2011-12 should be enhanced to the extent of his additional receipts of Rs.6,00,00,000/- keeping the total expenses at Rs.9,64,73,029/-. This again reveals that the assessee has not make a true and full disclosure before the Hon'ble Settlement Commission, Hence, the amount of Rs.6,00,00,000/- should be added to the total income of the assessee during the year under assessment."

The main thrust of argument of Ms. Sinha, learned counsel appearing on behalf of the Department to question the order of the Settlement Commission is that despite the Commissioner of Income Tax having demonstrated before the Settlement Commission that yet the assessee had not made full and true disclosure of his income but the Settlement Commission has ignored the objection and instead of rejecting the application on this count, has proceeded to dispose of the same on the basis of materials on record, which exercise is dehors the statutory provisions for once it is demonstrated that the assessee had failed to make full and true disclosure of his income even before the Settlement Commission, the remedy provided under Chapter XIXA of 'the Act' would not be available for such assessee but this relevant aspect of the matter has been bypassed by the Commission. According to the learned counsel, this default by the Commission renders the order perverse.

Mr. Mishra, learned counsel appearing for the assessee, while supporting the order impugned in so far as it proceeds to compute total income has submitted that there was no suppression by the assessee who had made true and full disclosure of income before the Commission and the relevant papers in support of which were also forwarded to the Commissioner of Income Tax for his report. In reference to the objections raised by the Commissioner, Income Tax in paragraph 3 in so far as assessment year 2011-12 and 2012-13 is concerned, he submits that each of the objections so raised by the Commissioner, Income Tax has been well taken care of by the Settlement Commission to record its opinion and which suffers no infirmity. In reference to the application filed by the assessee under section 245C of 'the Act', a copy of which is enclosed with the second writ petition, he submits that a bare perusal of the documents and the statements made in the application would confirm that there was no suppression by the assessee and it is thus being satisfied on this score that the order has been passed by the Commission which suffers no infirmity except that the situation did not warrant imposition of interest under sections 245A, 245B and 245C of 'the Act' which imposition has been questioned by the assessee in the second writ petition arising from C.W.J.C.No. 13743/2017.

Having noted the rival submissions it is now to be seen whether the Settlement Commission has defaulted in its exercise to warrant any interference. The thrust of objections taken by the Commissioner, Income Tax in his report in respect of each of the two assessment years 2011-12 and 2012-13 which we have reproduced hereinabove would confirm that in the opinion of the Commissioner there has been a discrepancy of Rs.12,84,97,024/- and which needs to be added to the total undisclosed income for the assessment year 2011-12 which disclosure has not been made by the assessee before the Commission.

In so far as the assessment year 2012-13 is concerned, according to the department a sum of Rs.6,00,00,000/- is to be added to the total income for the assessment year in question.

Before we would advert our attention to the finding on the Settlement Commission on the objection so taken, we deem it necessary to reproduce the submissions of the assessee before the Settlement Commission on the undisclosed income in respect of each of the two assessment years. In so far as the assessment year 2011-12 is concerned, a specific statement is made by the assessee in his settlement application after discussing the complexity of investigation so initiated by the Department following the search and seizure, wherein he has made the following disclosure:

> " During the course of search operation, the Managing Director, namely, S.B.Sinha was coerced and cajoled to make disclosure of undisclosed income of Rs.15 crore in respect of his business activities."

In so far as the assessment year 2012-13 is concerned, the Commissioner in his report, the extract of which we have reproduced hereinabove, has mentioned that the assessee while working out its work in progress during the assessment year 2012-13 has accepted a receipt of Rs.6,00,00,000/- which requires to be taken into account.

In the nature of the objections so raised by the Commissioner Income Tax seen alongside the statement of the assessee in his application, it needs to be seen whether the Settlement Commission has in any manner defaulted in its exercise. For the purpose we would be referring to the relevant paragraphs of the order impugned in so far as it discusses the objections raised by the Commissioner, Income Tax in his report and the manner of its disposal.

While paragraph 5 to 5.15 of the order impugned concludes on the claim put forth on the application in so far as it relates to the assessment year 2011-12, paragraph 5.16 and 5.17 deals with the objections taken by the Commissioner, Income Tax for the assessment year 2012-13. For the sake of convenience we are persuaded to reproduce paragraph 5.15 and paragraph 5.17 which would amply demonstrate that the objections raised by the Commissioner, Income Tax as regarding the assessment years in question stands well noted.

> "5.15 The CIT in his Rule 9 report has stated that the work in progress as estimated by the applicant in the settlement application at Rs.85 lakh has no basis and the unaccounted profits, earned from business was utilized in acquiring land and land development rights, procuring materials, meeting personnel expenditure of Directors and their family members. On the basis of entries found recorded in various seized documents, the 'unaccounted for cost of projects is worked out at Rs.23,70,22,535/- against Rs.10,85,25,511/- declared by the applicant in the Settlement Application. So there is a discrepancy of Rs.12,84,97,024/- between the 'unaccounted for' cost of projects worked out by the applicant and that worked out on the basis of entries in seized documents. Therefore, Rs.12,84,97,024/- should be added to the undisclosed income of the applicant for assessment year 2011-12.
>
> 5.17 The CIT has further submitted that during assessment year 2012-13 the applicant has accepted a receipt of Rs.6 crore over and above the business receipt of Rs.10,14,84,111/- as per books. This has taken his total business of Rs.17 crore. In the audited accounts, total expenses incurred by the applicant during (FY 2011-12) A.Yr. 2012-13 were shown at

Rs.9,64,73,029/- and nowhere the applicant has claimed any further expenses incurred for earning such amount of Rs.6 crore. Hence, the net profit of the applicant for this year should be enhanced to the additional receipt of Rs.6 crore keeping the total expenses at Rs.9,64,73,029/-. Thus, Rs.6 crore should be added back to the additional income of the applicant."

Paragraph 10 to 11.2 of the order passed by the Settlement Commission records the conclusion and runs under:

"10. We have considered the facts carefully. We note that purchases and expenditure are omitted, in fact, the assessee did not maintain accounts in a proper manner, and incriminating loose sheets only confirm the accounts are not maintained in any complete manner. For a proper and fair estimate, on the basis of material before us, the 'inferable' inference has to be drawn. We note that

(i) the applicant had entered into joint development agreement with holders of and- projects, namely Ram Gobind Enclave; Uday Kranti Ratan Sethee Apartment; Royal Garden Enfield and Hotel Ness Inn, were undertaken in F.Yr. 2008-09 and F.Yr. 2009-10.

(ii) the applicant did not in any of these projects own land, and therefore, the appreciation lacked therein was not monetized in any project;

(iii) the receipts of the developer do not inspire confidence after considering the issues raised in the Rule 9 report by the C.I.T.;

(iv) the expenditure is also available in the incriminating papers seized;

(v) the applicant's inventory had unsold stock of completed apartments;

(vi) the construction in the five blocks is not formally 'complete', and is stayed by the High Court's order, as G + 4 floor levels are permissible.

11. On these facts, we are of the view that in the above material facts, the gross receipts both disclosed and undisclosed have to be considered, and a net profit rate applied. Though the view of applying the rate of the provisions 44AD was canvassed by the A.R., we note that this is for civil construction business and, where the turnover is below Rs.40 lac. The underlying principle in that section would not be appropriate, as the parameters are different. The joint venture in real estate flats has been carried by the applicant. The appreciation in land is embedded, and the profit element increases if the land is held for a longer time. We consider this an important element in adopting the net profit. The applicant's submission regarding duplication of items of cost of labour (in para 9) and expenditure below Rs.20,000/- (in item 7 of para 8) have merit. We are therefore, inclined to estimate undisclosed receipts after factoring the applicant's submission. The undisclosed receipts in assessment year 2011-12 are estimated at Rs.15,00,00,000/- plus disclosed receipt Rs.5.83 crore on which a rate of 10% would be reasonable, from the point of equity and fairness. After considering all materials facts, the total

receipts i.e. undisclosed and disclosed are adopted at Rs.15.00.00.000/- for A.Yr. 2011-12, on which the net profit rate of 10% is applied.

11.1 For A.Yr. 2012-13, regular audited accounts have been filed. The undisclosed receipts have been shown on estimate basis at Rs.6 crore for F.Yr. 2011-12. In view of the above and considering the totality of the situation, we are of the considered view that a net profit rate of 10% on (Rs. 6 crore + Rs.10 crore on disclosed receipts i.e. Rs.16 crores) will be fair enough to be taken into account as income of the applicant company for the assessment year 2012-13.

11.2 In view of the discussion made above, the income of the applicant from real estate business is therfore computed assessment year-wise as under:

Asstt. Years	Disclosed Receipts as per applicant (Rs)	Undisclosed receipts as per applicant (Rs)	Undisclosed receipts as computed by Commission (Rs.)	Income from business of construction on undisclosed receipt taking N.P. rate @ 10%
2011-12	5,83,79,117/-	10,85,25,511/-	15,00,00,000/-	2,08,37,911.70
2012-13	10,14,84,111/-	6,00,00,000/-	6,00,00,000/-	1,61,48,411.10

The Settlement Commission has also taken note of undisclosed amount of lease rent for the assessment year 2011-12 at paragraph 12 and has computed income of undisclosed notional rent to the tune of Rs.9,54,630/- for the assessment period 2012-13, whereupon the computation of total income has been made which accompanies the impugned order by way of annexure.

In our opinion, the Department can raise no objections on this count because every objection raised by the Commissioner, Income Tax as regarding non-disclosure by the assessee is well discussed and disposed with reasons.

In the nature of exercise so undertaken by the Commission, we completely fail to appreciate as to the cause of action for the Department to maintain this writ petition. As we have noted above, Chapter XIXA of 'the Act' incorporates a special procedure for settlement on the basis of full and true disclosure of income by an assessee and considering that the Commission has taken note of each of the objections raised by the Commissioner in his report and after testing the same against the disclosure made by the assessee in his application, proceeded to dispose of the matter by the order impugned, in our opinion, it is on a misconception of a legal position that the writ petition has been filed which does not raise any issue having lawful support warranting any indulgence.

As we have already noted above, the power exercised by this Bench to examine an order passed by the Settlement Commission is limited on its statutory compliance or perversity and we do not find any instance present in the order impugned which draws itself in either of the two class requiring interference by this Court.

We also do note that the Chairman and the Vice Chairman of a Settlement Commission are appointed from amongst serving Chief Commissioners or Principal Chief Commissioners or Principal Commissioner of Income Tax of equivalent rank and which again is a relevant factor for the Department to ponder, whether at all any order of a Settlement Commission unless staring on statutory violation or on perversity, should be assailed in a routine manner as having been done in the present case.

For the reasons so discussed, C.W.J.C.No. 13346/2016 lacking in merit is dismissed accordingly.

Re: **C.W.J.C.No. 13743 of 2017**

This writ petition has been filed by the assessee to question award of interest by the Settlement Commission by the order impugned dated 30.9.2015 in purported exercise of power vested under section 234A, 234B and 234C of 'the Act'.

Learned counsel appearing for the contesting parties are in agreement that a Special Leave Petition involving the same issue is pending consideration before the Supreme Court in SLP

(Civil) No. 29660 of 2017 and in our opinion thus, this writ petition should await outcome of the said proceedings.

Learned counsel have also invited attention to an order passed by this Court in C.W.J.C.No. 11442/2016 heard analogous with C.W.J.C.No. 12419/2016 to submit that this Court taking note of similar circumstance arising in the said writ petitions, has adjourned the same for its posting, on disposal of the Special Leave Petition in question vide order passed on 4.12.2018.

Having considered the submissions of learned counsel and taking note of the issue raised, let C.W.J. C. No. 13743 of 2017 come up for consideration on disposal of SLP (Civil) No. 29660/2017.

Parties would be at liberty to make a motion on disposal of the matter by the Supreme Court.

(Jyoti Saran, J)

(Arvind Srivastava, J)

Surendra/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	08.01.2019
Transmission Date	NA