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IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.21039 of 2014

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Lal Bahadur Singh Son of Sri Ram Dev Singh Resident of Simla Bahal Colliery, Adarsh Nagar Colony, Jharia, Dhanbad, P.O & P.S- Jharia, District Dhanbad, PIN-828111.

.... Petitioner/s

Versus

1. The Union of India through the Secretary, Ministry of Finance, Department of Revenue (Central Board of Direct Taxes), New Delhi.
2. The Commissioner of Income Tax, Central Patna. Bihar, having his office at Central Revenue Bulding, Birchand Patel Marg, P.O P.S & District Patna, Bihar, PIN- 800001
3. Deputy Commissioner, Income Taxes, Central Circle, Dhanbad Having his Office at Room No - 405B & 423, Aaykar Bhawan, Luby Circular Road, P.O ., P.S & District Dhanbad.
4. Income Tax Settlement Commission, the Additional Bench (Income Tax & Wealth Tax), Kolkata through its Secretary, Having its Office at 10-C, Middleton Street, Kolkata-700071.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 20793 of 2014

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Kumbh Nath Singh Son of Sri Ram Dev Singh resident of Simla Bahal Colliery, Adarsh Nagar Colony, Jharia, Dhanbad, P.O. & P.S. - Jharia, District Dhanbad.

.... Petitioner/s

Versus

1. The Union of India through the Secretary, Ministry of Finance, Department of Revenue (Central Board of Direct Taxes), New Delhi.
2. The Comissioner of Income Tax, Central Patna, Bihar, having his office at Central Revenue Building, Birchand Patel Marg, P.O. ,P.S. & District Patna, Bihar, PIN-800001 null null
3. Deputy Commissioner, Income Taxes, Central Circle, Dhanbad having his office at Room No. 405B & 423, Aaykar Bhawan, Luby Circular Road, P.O., P.S. & District Dhanbad.
4. Income Tax Settlement Commission, The Additional Bench (Income Tax &Wealth Tax), Kolkata through its secretary , having its office at 10-C, Middleton Street, Kolkata-700071

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 21032 of 2014

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Bharat Singh Son of Sri Ram Dev Singh Resident of Simla Bahal Colliery, Adarsh

Nagar Colony, Jharia, Dhanbad, P.O & P.S - Jharia, District - Dhanbad.

.... Petitioner/s

Versus

1. The Union of India through the Secretary, Ministry of Finance, Department of Revenue (Central Board of Direct Taxes), New Delhi.
2. The Commissioner of Incom Tax, central Patna, Bihar having his office at central Revenue Building, Birchand Patel Marg P.O , P.S & District - Patna, Bihar , PIN-800001
3. Deputy Commissioner, Income Taxes, Central Circle, Dhanbad having his Office at Room No - 405B & 423, Aaykar Bhawan, Luby Circular Road, P.O ., P.S & District Dhanbad.
4. Income Tax Settlement Commission, the Additional Bench (Income Tax & Wealth Tax), Kolkata through its Secretary, having its office at 10-C, Middleton Street, Kolkata-700071.

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.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Suraj Samdarshi

For the Respondent/s : Mr. Archana Sinha @ Archana Shahi

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

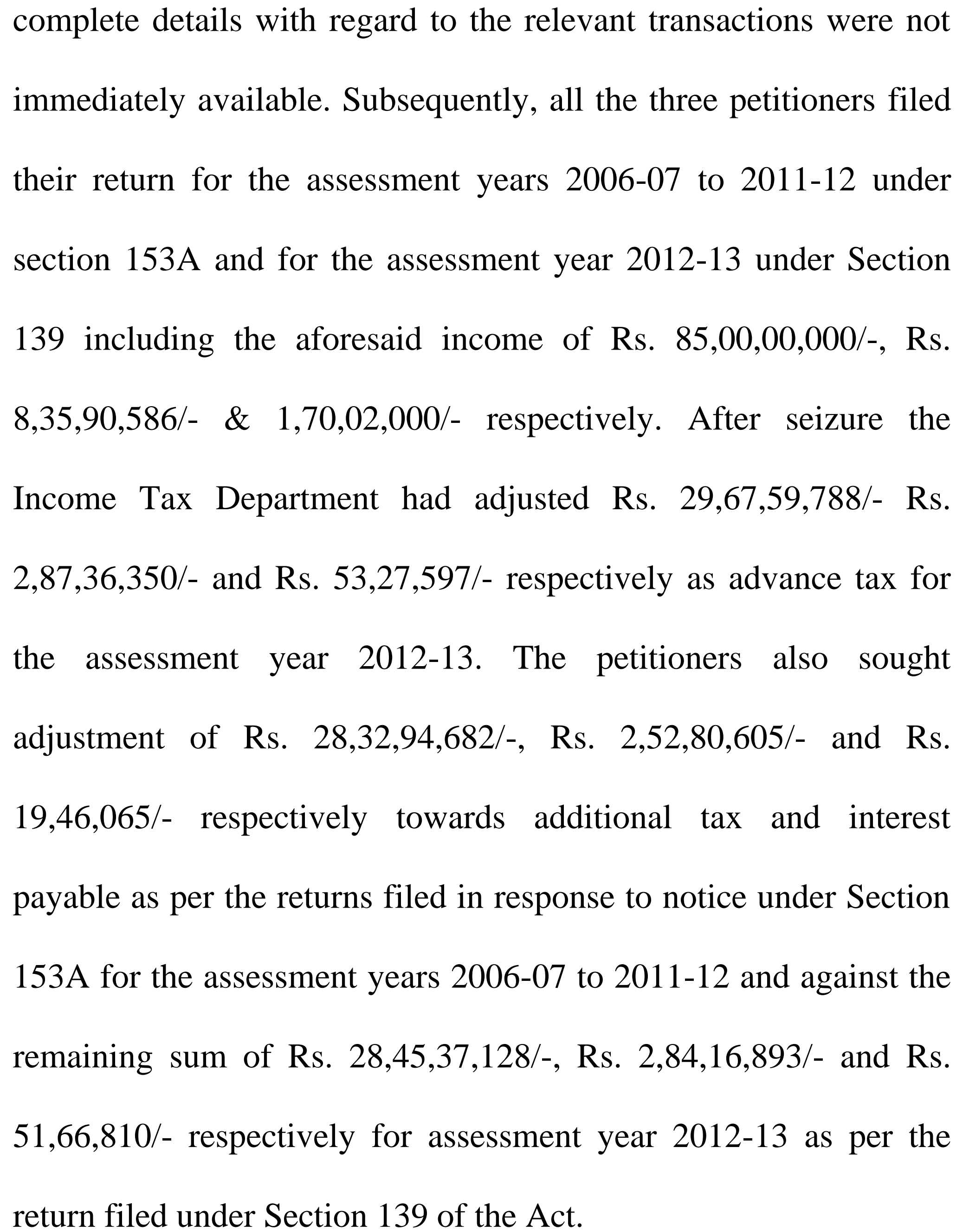
<u>Date: 23.11.2016</u>

Heard learned counsel for the petitioners in all the three writ petitions and learned Senior Standing Counsel for the Income Tax Department.

All the three writ petitions seek to impugn the common order dated 23.9.2014 passed by the Income Tax Settlement Commission, Additional Bench (Income Tax & Wealth Tax), Kolkata and have accordingly been heard together and are being disposed of with the consent of the parties by this common order at the stage of the admission itself.

By the aforesaid impugned order dated 23.09.2014 the Settlement Commission held that no order under Section 245D (4) was being passed in the case of the three applicants and that being so, the settlement applications filed by the three petitioners were rejected.

The facts leading up to the present matter may be noted. A search and seizure operation under Section 132 of the Income Tax Act was conducted on the three petitioners at their respective addresses at Dhanbad on 23.11.2011 by the Income Tax Department in the course of which an amount of Rs. 65,48,73,442/- in the Bank Account of the petitioner, Lal Bahadur Singh and Fixed Deposit of Rs. 17,40,00,000/- totaling to Rs. 82,88,73,442/- was seized which had not been accounted for in his books of accounts. Similarly, in the case of the petitioner, Kumbh Nath Singh, there was seizure of Rs. 8,99,40,042/- from his Bank Account and with respect to the petitioner Bharat Singh, an amount of Rs. 1,30,11,471/- was seized from the Bank Account as not having been accounted for in his books of accounts. All the three petitioners in the course of search and surveys in their statements before the Commissioner, Dhanbad admitted additional income in cash of Rs. 84,79,99,993/-, Rs. 8,21,03,858/- and Rs. 1,52,21,706.49 respectively stating that the figures were ad hoc as



complete details with regard to the relevant transactions were not immediately available. Subsequently, all the three petitioners filed their return for the assessment years 2006-07 to 2011-12 under section 153A and for the assessment year 2012-13 under Section 139 including the aforesaid income of Rs. 85,00,00,000/-, Rs. 8,35,90,586/- & 1,70,02,000/- respectively. After seizure the Income Tax Department had adjusted Rs. 29,67,59,788/- Rs. 2,87,36,350/- and Rs. 53,27,597/- respectively as advance tax for the assessment year 2012-13. The petitioners also sought adjustment of Rs. 28,32,94,682/-, Rs. 2,52,80,605/- and Rs. 19,46,065/- respectively towards additional tax and interest payable as per the returns filed in response to notice under Section 153A for the assessment years 2006-07 to 2011-12 and against the remaining sum of Rs. 28,45,37,128/-, Rs. 2,84,16,893/- and Rs. 51,66,810/- respectively for assessment year 2012-13 as per the return filed under Section 139 of the Act.

The three petitioners thereafter filed settlement applications under Section 245C (1) of the Income Tax Act, 1961 on 5.3.2013 with respect to assessment years 2006-07 to 2012-13 disclosing additional income of Rs. 1,89,85,266/-, Rs. 58,92,328/- and Rs. 52,45,901/- respectively and requested the additional tax of Rs. 57,54,326/-, Rs. 21,27,103 and Rs. 16,24,430/- and additional

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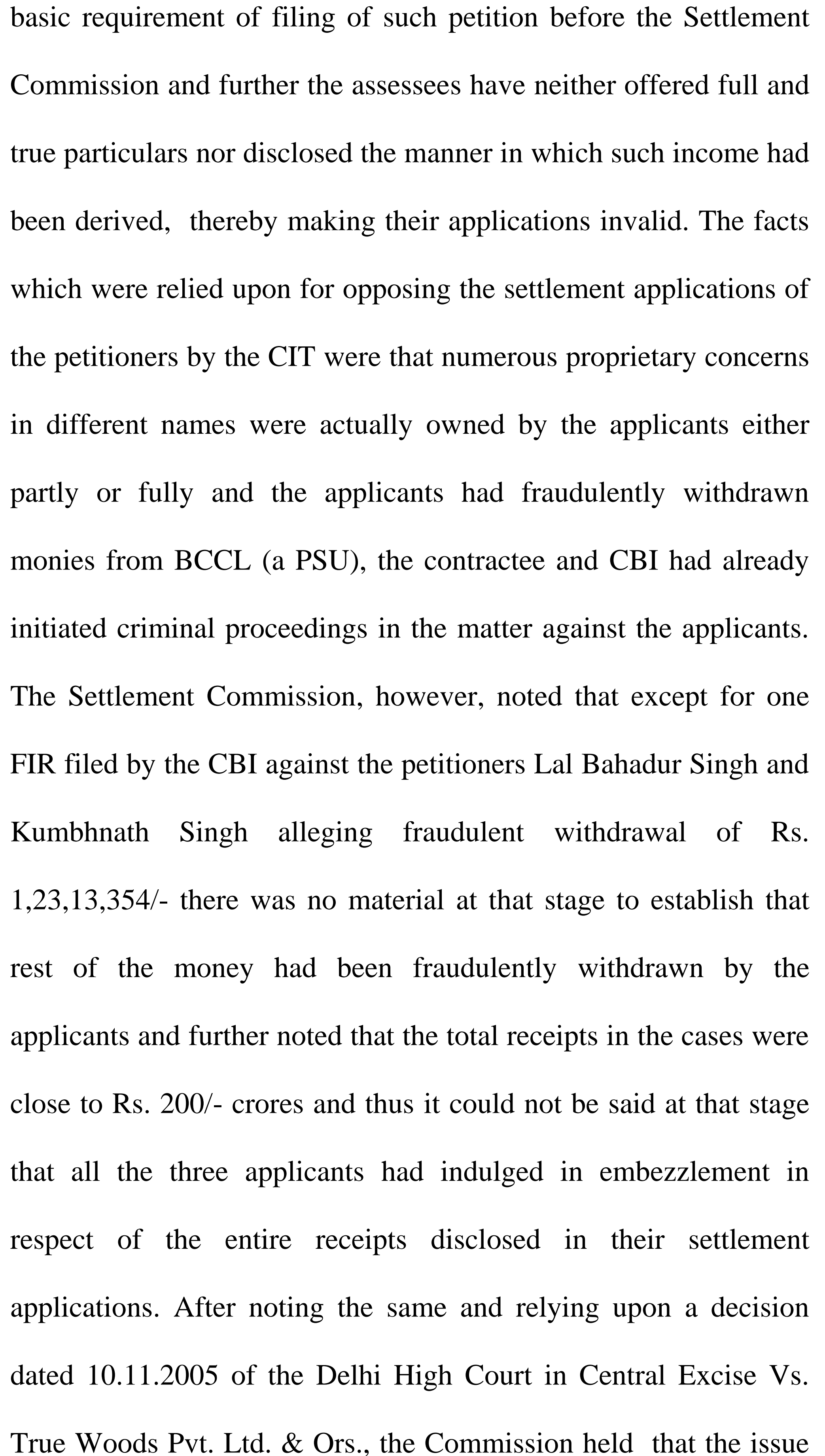
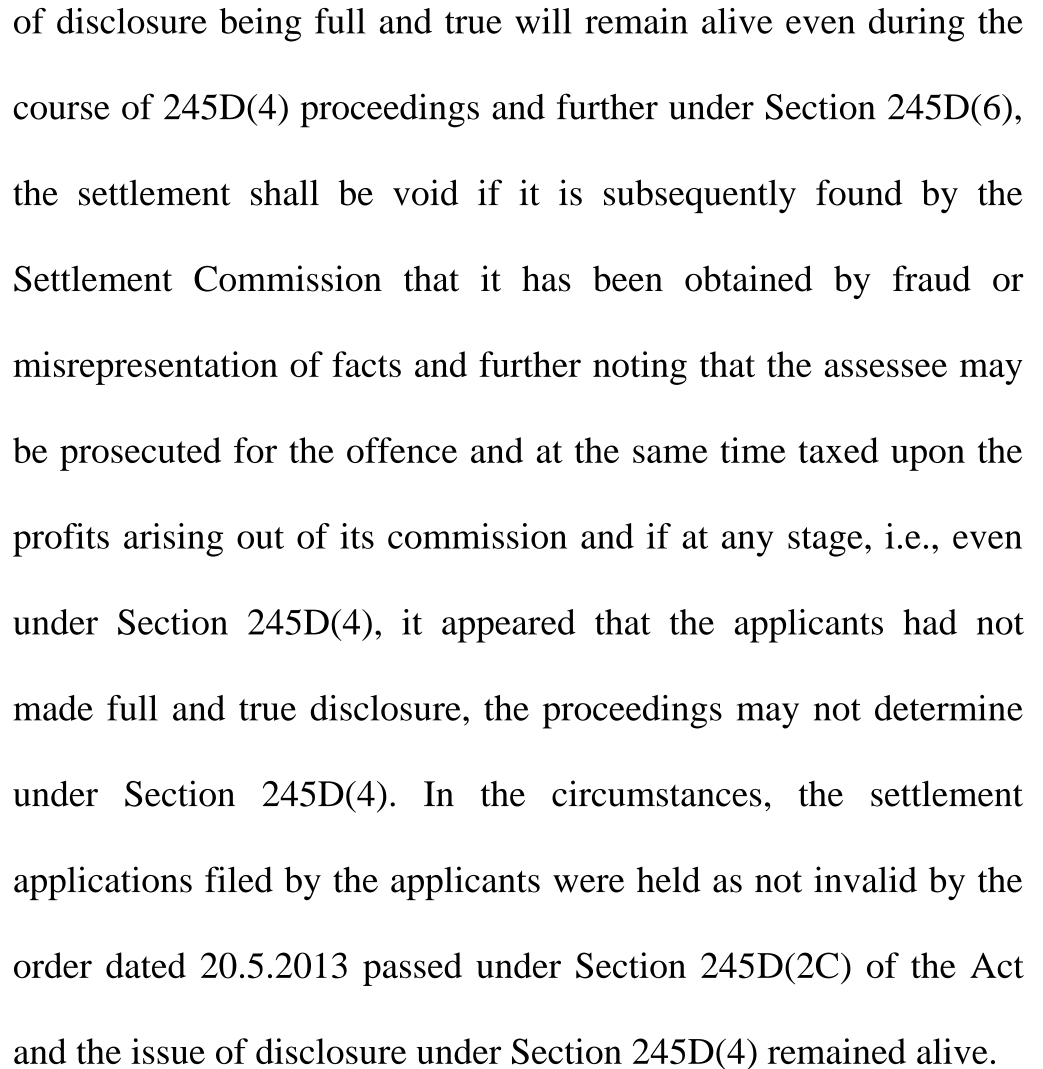
interest of Rs. 12,26,064/-, Rs. 6,96,970/- and Rs. 4,48,694/- respectively totaling to Rs. 69,80,390/-, Rs. 28,24,073/- and Rs. 20,73,104/- respectively payable on the basis of additional disclosure of income made before the Settlement Commission to be collected from the balance seizure amount lying with the Department.

On a consideration of the contentions of learned counsels for the petitioners and after examining the settlement application and the documents filed, by order dated 13.3.2013, the Settlement Commission allowed the settlement applications to proceed for the assessment years 2006-07 to 2012-13 under Section 245D(1) of the Income Tax Act and necessary directions were issued to the jurisdictional Commissioner for adjusting the amount lying in the said Account against the demand (tax and interest) in respect of income declared in settlement application with a further direction to submit his report under Section 245D (2B). The Commissioner in his report under section 245D (2B) submitted that on the basis of the facts submitted in the report as available, the applicants' applications to the Settlement Commission deserve to be rejected because the applicants have not paid such tax and interest on the additional income nor attached a proof of such payment with the application thereby not meeting the



basic requirement of filing of such petition before the Settlement Commission and further the assessees have neither offered full and true particulars nor disclosed the manner in which such income had been derived, thereby making their applications invalid. The facts which were relied upon for opposing the settlement applications of the petitioners by the CIT were that numerous proprietary concerns in different names were actually owned by the applicants either partly or fully and the applicants had fraudulently withdrawn monies from BCCL (a PSU), the contractee and CBI had already initiated criminal proceedings in the matter against the applicants. The Settlement Commission, however, noted that except for one FIR filed by the CBI against the petitioners Lal Bahadur Singh and Kumbhnath Singh alleging fraudulent withdrawal of Rs. 1,23,13,354/- there was no material at that stage to establish that rest of the money had been fraudulently withdrawn by the applicants and further noted that the total receipts in the cases were close to Rs. 200/- crores and thus it could not be said at that stage that all the three applicants had indulged in embezzlement in respect of the entire receipts disclosed in their settlement applications. After noting the same and relying upon a decision dated 10.11.2005 of the Delhi High Court in Central Excise Vs. True Woods Pvt. Ltd. & Ors., the Commission held that the issue



of disclosure being full and true will remain alive even during the course of 245D(4) proceedings and further under Section 245D(6), 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 and further noting that the assessee may be prosecuted for the offence and at the same time taxed upon the profits arising out of its commission and if at any stage, i.e., even under Section 245D(4), it appeared that the applicants had not made full and true disclosure, the proceedings may not determine under Section 245D(4). In the circumstances, the settlement applications filed by the applicants were held as not invalid by the order dated 20.5.2013 passed under Section 245D(2C) of the Act and the issue of disclosure under Section 245D(4) remained alive.

Thereafter a report under Rule 9 of the Income Tax Settlement Commission Rules, 1997 was submitted by the CIT on 2/6.8.2014. Further, a prayer was made on behalf of the CIT to permit the Department to carry out necessary inquiry under Section 245D(3) of the Act which was ultimately permitted by order dated 6.3.2014. The report under Section 245D (3) was submitted by the CIT on 15.5.2014 in which it was found that the total turn over in respect of the applicants of Rs. 478.89 crores is much more than that disclosed by them in their applications and it was therefore

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once again submitted that the applicants had not made full and true disclosure in their applications. An objection to the said report was filed by the petitioners. Thereafter the Settlement Commission by its impugned order dated 23.9.2014 held as follows in paragraphs 33 to 39 which are quoted below, except the tables quoted therein:

> 33. Certain events are more than mere coincidence when they are considered in the above backdrop. The CIT has reported that the books and documents were stolen and lost on 21.4.2013 which was duly reported to the police authorities by the applicants. From the CIT's reply dated 10.7.2014, the CBI had filed FIR on 31.1.2013 against Shri Kumbh Nath Singh. Shri Kumbh Nath Singh had misrepresented that he was the proprietor of M/s. D.K Singh, Dhanbad. Shri Lal Bahadur Singh was only charged of misrepresentation while opening an account. The learned A.R pointed out that however, no charge-sheet was filed,despite the time that had elapsed. By reply dated 14.7.2014 and its Annexure-B, it also transpires that vigilance action had been taken against certain officers including Shri D.K Ghosh, Manager, Kustore Area. The learned A.R. pointed out that such action did not relate to works executed by the applicants. Be that as it may from CIT's report dated 10.7.2014, it transpires that certain records had been reported to be lost owing to fire at the BCCL, Dhanbad. Suffice it would be

to say that the consequences of these incidents was loss of material evidence at both ends.

34. Then, one must also take notice of the fact that in the returns being filed the applicants were following the mercantile system of accounting. The statement of facts filed by the applicants is based on receipt basis – for working out assets accretion in the applications. If the latter method has admittedly been followed, then the sundry creditors' claims would be without any basis. The SOFs suffer from this infirmity too. The C.I.T. has submitted that in any case, as there is misappropriation of funds, no expenditure was allowable. The learned A.R on the other hand submitted that the applicant had owned all the bank accounts, and utilized 'Tally' software to incorporate all banks deposits, transfers, withdrawals and capital expenditure to re-construct account. The expenditure had been claimed on the basis of internal vouchers. The Department's allegations were too general in nature, and on the one hand, it was stating that the Department was not in possession of any evidence of expenditure, while concluding that such expenditure was for illegal gratification. However, if the nature of receipts is illegal, the expenditure 'incurred' on the basis of internal vouchers would also be questionable.

35. Before concluding, in the proceedings some

attempts have been made by both sides to reconcile receipts and entities belonging to applicants. The DIT (Inv.'s) report is on record. The Commission had desired that the figures of turnover by the applicant group be reconciled for F. Yr. 2005-06 to F. Yr. 2011-12. The D.I.(Inv.) has reported that the report was made in the presence of the Assessing Officer, Shri S.K. Mitra, D.C.I.T. (Central), Dhanbad and Shri Sanjay Chatterjee, A.R. The reconciliation statement is as under.

Sl. No.	Rs. In crore	Remarks
I. Turnover shown by applicants Group 2005-06 to F.Y. 2011-12	201.87	No dispute
II In addition to above turnover, Department has argued to consider Following item as part of turnover		
(a) Bill raised and submitted by the Applicants group to BCCL (After search)	101.46	
(b) Liability shown by BCCL in their Books of accounts including Rs. 1.01 crore of bills without date	11.98	
(c) Contingent liability shown by BCCL in its Books of Accounts	13.23	
(d) Difference between gross receipts Figure reported in Appraisal Report for F.Y. 2006-07, 2007-08 & 2008-09 (without bifurcation and Supporting evidence) and figures Given by applicants in reconstructed P & L Account	30.30	
	358.84 crore	

Remarks*:- The A.R.s have raised certain

objections, which has been reported by the DIT (Inv) as under:

1. The applicant's group is following the cash system for receipts and therefore the amount for which bills were raised is not considered as a part of contract receipts. Otherwise also till date the amount has not received from the BCCL. Therefore, same may be considered as a bad debt. It has also been pointed out that during the course of 245D(3) enquiry, the A.O. has recorded the statement of Manoj Kumar Gupta, Area Finance Manager of BCCL and reply to question No. 4 & 5 Shri Manoj Kumar Gupta, Area Finance Manager of BCCL has stated that no such bills were handed over by the erstwhile Kustore Area. These are mere correspondences of Shri L.B. Singh with Addl. General Manager, Kustore Area dated 26.12.2011 for making the payment. In all the three letters it transpires that passed bills along with pay-orders were handed over to Shri L.B. Singh which does not appear to be genuine as it is totally against the norms of the company that passed bills along with pay orders are handed back to the contractors/vendors for keeping with them. It is pertinent to note that Addl. General Manager does not have the authority to pass the bill. Prima facie the genuineness of so claimed bills appear to be doubtful.

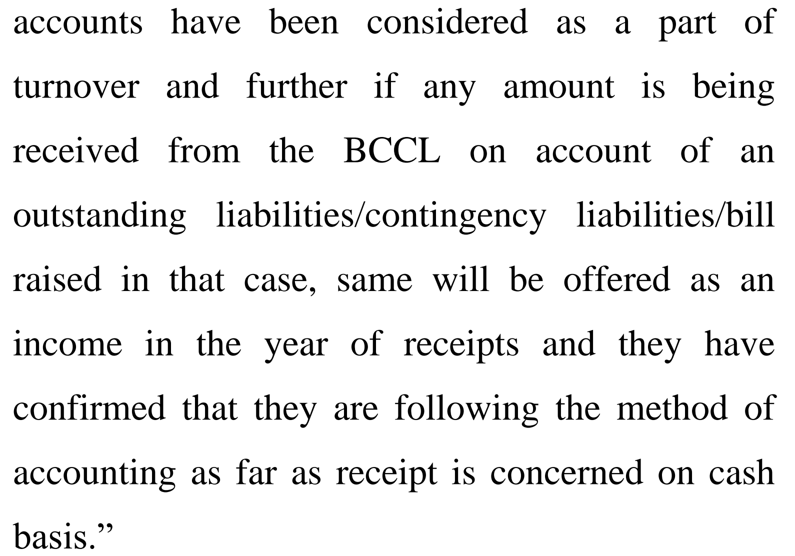
2. It has been argued on behalf of the applicants

that as and when amount will receive, same will be offered as an income in relevant assessment years. The similar argument was taken for liabilities shown by BCCL in their Books of Accounts.

3. As far as contingent liability is concerned, same is only part of notes of accounts of BCCL. Further, the A.R. has submitted that if any amount is received in future, same will be offered as an income in relevant assessment years. Regarding contingency bill, Shri Manoj Kumar Gupta has stated on 22.04.2014 that a committee has been constituted to find out the payability of the bills.

4. As far as difference in gross receipts for financial year 2006-07, 2007-08 and 2008-09 is concerned, the A.R. has submitted that the department has taken the figure on the basis of letter from BCCL which represented the figures of payments made by the BCCL to all contractors. Further, the amount actually received in those financial years has been considered as a part of turnover which comes to Rs. 20.38 crore. The department has not provide any bifurcation or details in respect of balance Rs. 30.30 crore. Therefore, same may not be considered as a part of turnover.

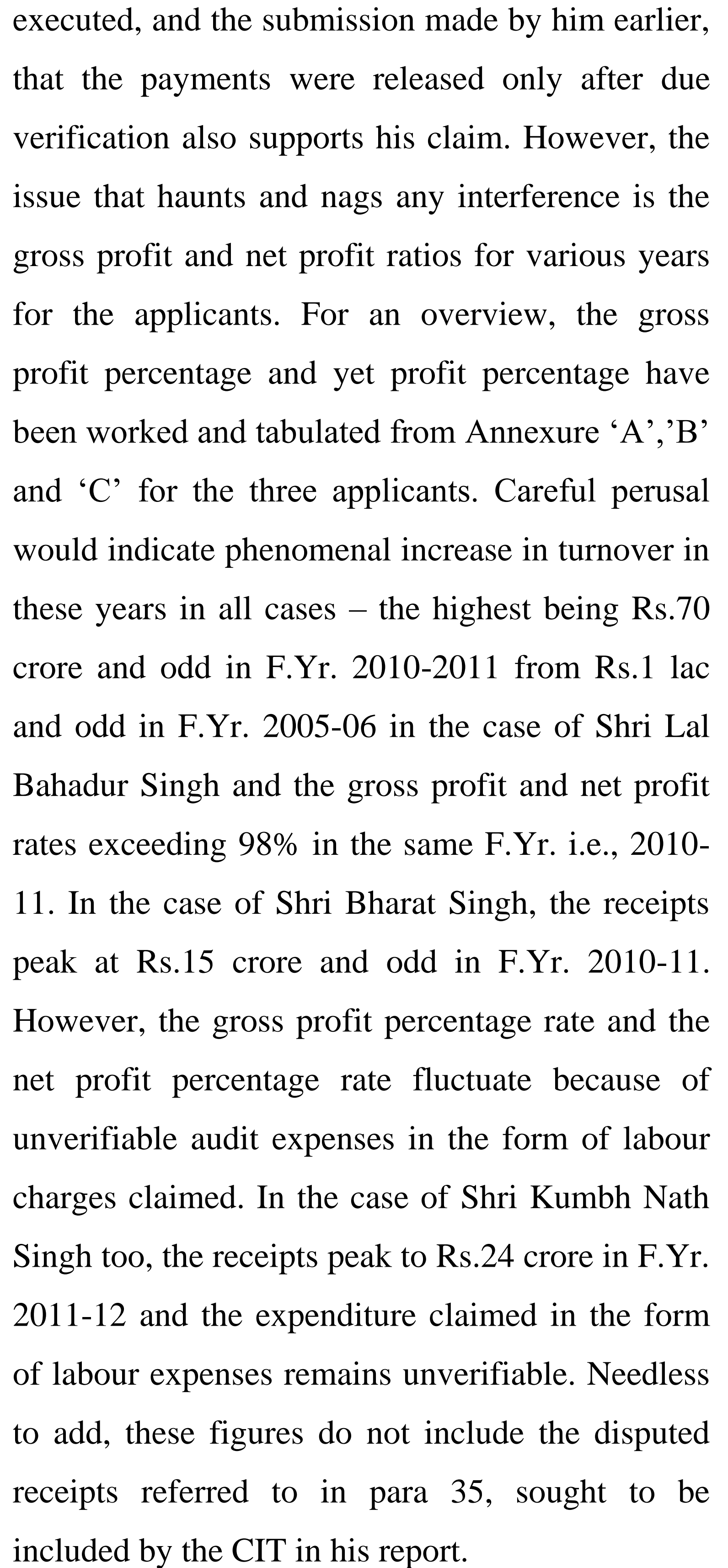
5. The A.R. has pointed out that applicant is filing an affidavit accepting the fact that entire receipts which were received and deposited in bank



accounts have been considered as a part of turnover and further if any amount is being received from the BCCL on account of an outstanding liabilities/contingency liabilities/bill raised in that case, same will be offered as an income in the year of receipts and they have confirmed that they are following the method of accounting as far as receipt is concerned on cash basis."

These very substantial receipts alongwith the details of seizure of para (5) of this order need not engage us any further, as no income (based on these receipts) is being determined in these applications. The enormity of the receipts in the range (as accepted by the CIT and acceptable to the applicants) and the various individuals in which seizures effected in para (5) of this order would only reinforce the view that the requirement of "full and true disclosure" and also "the manner in which income is earned" are met.(sic)

36. We must, however, revert to paras 32 and 33 where an attempt has been made to take an overview of all relevant and material facts. The A.R.'s contention has repeatedly been that the applicants have carried out the civil construction; other construction work; and the supply work, which are duly confirmed by way of payments received from the public sector undertaking BCCL. That itself implied that the work had been



executed, and the submission made by him earlier, that the payments were released only after due verification also supports his claim. However, the issue that haunts and nags any interference is the gross profit and net profit ratios for various years for the applicants. For an overview, the gross profit percentage and yet profit percentage have been worked and tabulated from Annexure 'A','B' and 'C' for the three applicants. Careful perusal would indicate phenomenal increase in turnover in these years in all cases – the highest being Rs.70 crore and odd in F.Yr. 2010-2011 from Rs.1 lac and odd in F.Yr. 2005-06 in the case of Shri Lal Bahadur Singh and the gross profit and net profit rates exceeding 98% in the same F.Yr. i.e., 2010-11. In the case of Shri Bharat Singh, the receipts peak at Rs.15 crore and odd in F.Yr. 2010-11. However, the gross profit percentage rate and the net profit percentage rate fluctuate because of unverifiable audit expenses in the form of labour charges claimed. In the case of Shri Kumbh Nath Singh too, the receipts peak to Rs.24 crore in F.Yr. 2011-12 and the expenditure claimed in the form of labour expenses remains unverifiable. Needless to add, these figures do not include the disputed receipts referred to in para 35, sought to be included by the CIT in his report.

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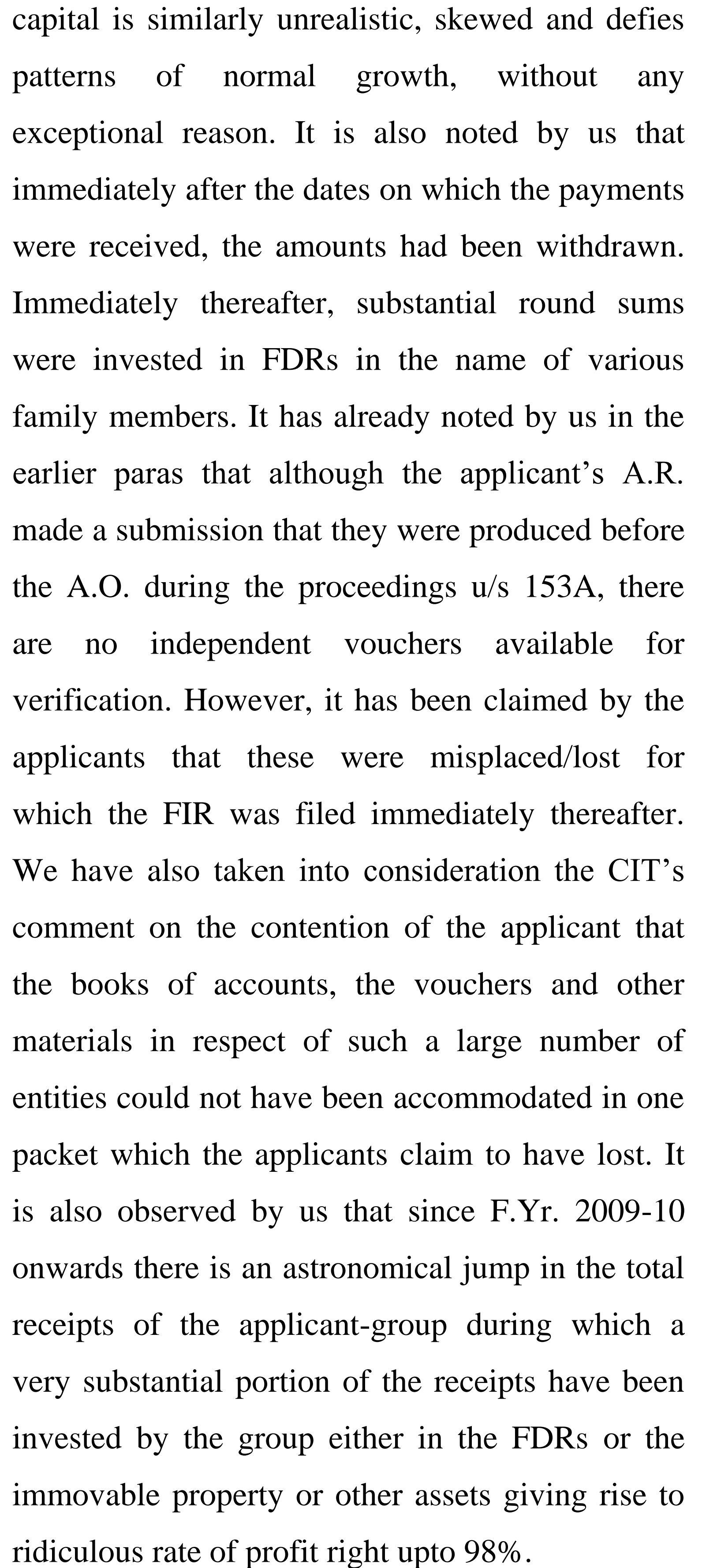
Consequently, the year-wise accretion to net



capital is similarly unrealistic, skewed and defies patterns of normal growth, without any exceptional reason. It is also noted by us that immediately after the dates on which the payments were received, the amounts had been withdrawn. Immediately thereafter, substantial round sums were invested in FDRs in the name of various family members. It has already noted by us in the earlier paras that although the applicant's A.R. made a submission that they were produced before the A.O. during the proceedings u/s 153A, there are no independent vouchers available for verification. However, it has been claimed by the applicants that these were misplaced/lost for which the FIR was filed immediately thereafter. We have also taken into consideration the CIT's comment on the contention of the applicant that the books of accounts, the vouchers and other materials in respect of such a large number of entities could not have been accommodated in one packet which the applicants claim to have lost. It is also observed by us that since F.Yr. 2009-10 onwards there is an astronomical jump in the total receipts of the applicant-group during which a very substantial portion of the receipts have been invested by the group either in the FDRs or the immovable property or other assets giving rise to ridiculous rate of profit right upto 98%.

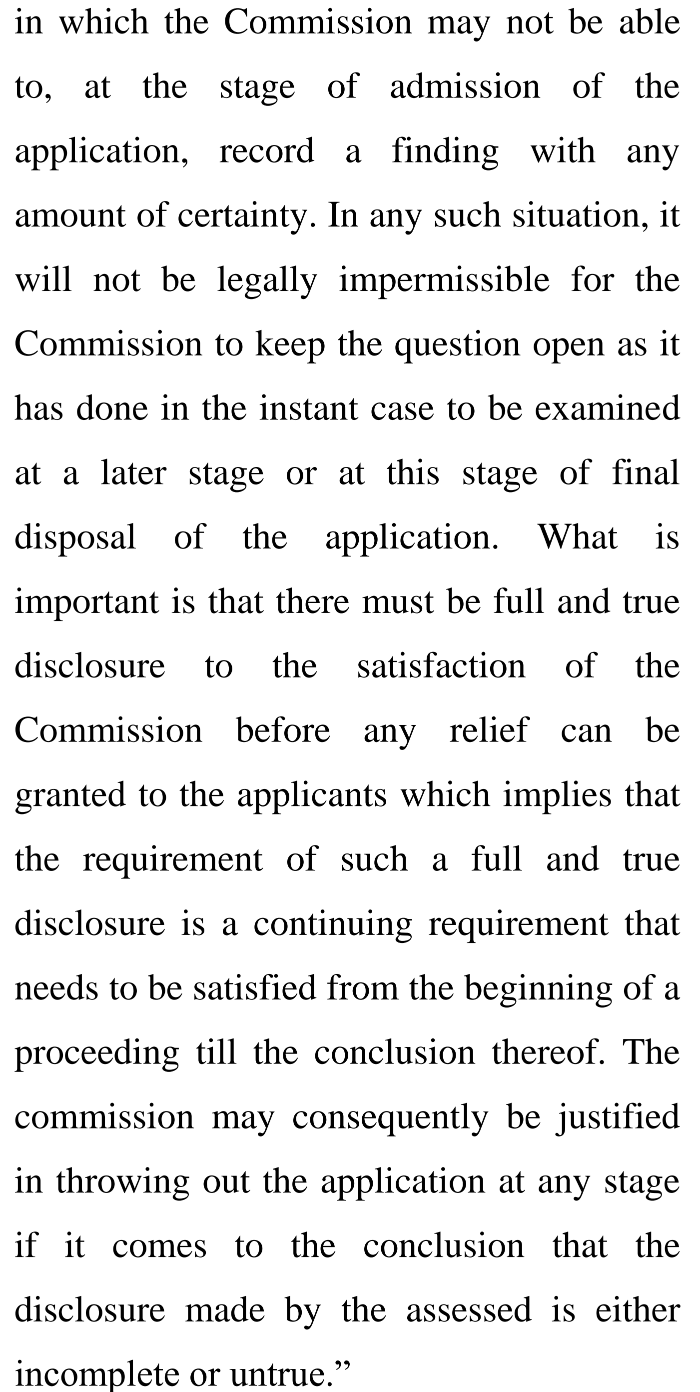
37. The learned A.R. submitted that Justice

Krishna Iyer's observations in CIT Vs. B.N. Bhattarcharjee case, 118 ITR 461 were on different facts. The learned A.R. has not appreciated the basic tenor of the judgment in the context of cases – of economic offences of the kind indicated in the present application. In that case, the provisions of law were as they stood at the time of introduction of Chapter XIX-A. In that case, the assessee was a rich businessman from whom Rs. 1 crore (approx) of cash was seized. The stakes ran into a crore or so ((for A.Yr. 1962-63 to 1973-74) plus a prosecution under Section 277 of the Act with unpredictable prospects of sentences. That was the narrative on which the assessee had approached the settlement Commission. The apex Court on the law as it then stood had expressed concern on the kind of cases that may find their way undeservedly to the Commission. The facts in the present application warrant a similar consideration. The preponderance of the evidence cumulatively considered clearly points to the likelihood of diversion of funds and the petition would fail in the absence of meeting these twin requirements – of "true and full disclosure" as also "disclosure of the manner" in which income is earned. The facts of the present case too in the context of law, as it presently stands, do not make the applications eligible for disposal by the Commission. On the

facts too, the assessees should face the rigours of the law, including possible penalties and prosecutions as suggested in Justice Iyer's judgment. Under the circumstances, the applicant(s) do not meet the twin requirements of "full and true disclosure" and the "manner in which such income is derived" of Section 245C.

38. It may be added, that where these twin conditions are not met, the proceedings could be allowed to abate at any stage of the proceedings. The relevant extracts of the decision of the Delhi High Court in the case of Commissioner of Central Excise vs. True Woods Pvt. Ltd. are reproduced as under :

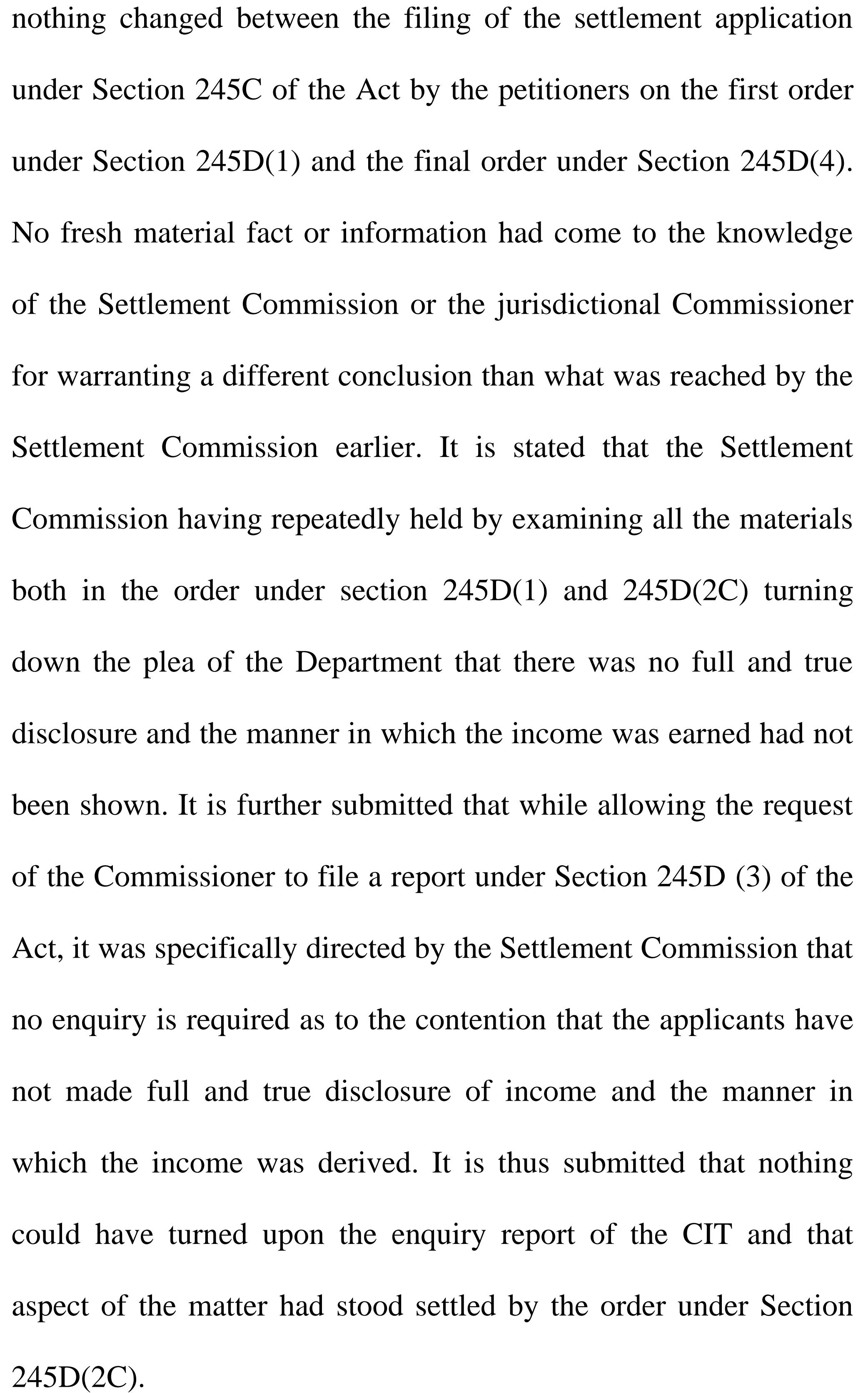
> " It is true that the foundation for settlement is an application from the assessed in which the assesse must make a full and true disclosure as required under the provisions of section 245C of the Income Tax Act or Section 32E of the Central Excise Act, but it is equally true that the requirement of the full and true disclosure need not be examined and authoritatively determined at the threshold of any proceeding initiated before the Commission under Chapter – V. There may be case where it is possible for the Commission to require a finding that the disclosure made in the application is "full and true". There may, however, the situation



in which the Commission may not be able to, at the stage of admission of the application, record a finding with any amount of certainty. In any such situation, it will not be legally impermissible for the Commission to keep the question open as it has done in the instant case to be examined at a later stage or at this stage of final disposal of the application. What is important is that there must be full and true disclosure to the satisfaction of the Commission before any relief can be granted to the applicants which implies that the requirement of such a full and true disclosure is a continuing requirement that needs to be satisfied from the beginning of a proceeding till the conclusion thereof. The commission may consequently be justified in throwing out the application at any stage if it comes to the conclusion that the disclosure made by the assessed is either incomplete or untrue."

39. In view of the above, no order under section 245(D) (4) is being passed in the case of the three applicants. That being so, the settlement applications filed by Shri Lal Bahadur Singh, Shri Kumbh Nath Singh and Shri Bharat Singh are hereby rejected."

Learned counsel for the petitioners submits that



nothing changed between the filing of the settlement application under Section 245C of the Act by the petitioners on the first order under Section 245D(1) and the final order under Section 245D(4). No fresh material fact or information had come to the knowledge of the Settlement Commission or the jurisdictional Commissioner for warranting a different conclusion than what was reached by the Settlement Commission earlier. It is stated that the Settlement Commission having repeatedly held by examining all the materials both in the order under section 245D(1) and 245D(2C) turning down the plea of the Department that there was no full and true disclosure and the manner in which the income was earned had not been shown. It is further submitted that while allowing the request of the Commissioner to file a report under Section 245D (3) of the Act, it was specifically directed by the Settlement Commission that no enquiry is required as to the contention that the applicants have not made full and true disclosure of income and the manner in which the income was derived. It is thus submitted that nothing could have turned upon the enquiry report of the CIT and that aspect of the matter had stood settled by the order under Section 245D(2C).

It is urged that it was not open to the respondents to have argued regarding the source of income and manner in

which it was derived as it is admitted in the counter affidavit that the receipts came from BCCL and the source is definite.

Learned counsel also submits that it was not open to the Settlement Commission to rely upon the legality of the transactions as there is no allegation by BCCL of any misappropriation except a small amount, in comparison to the amount of settlement exceeding Rs. 200 crores, of Rs. 1.23 crore against two of the petitioners only and even after all these years there being no such enquiry regarding siphoning of the amount of Rs. 200 crores of the BCCL, the same is merely a conjecture of the Settlement Commission.

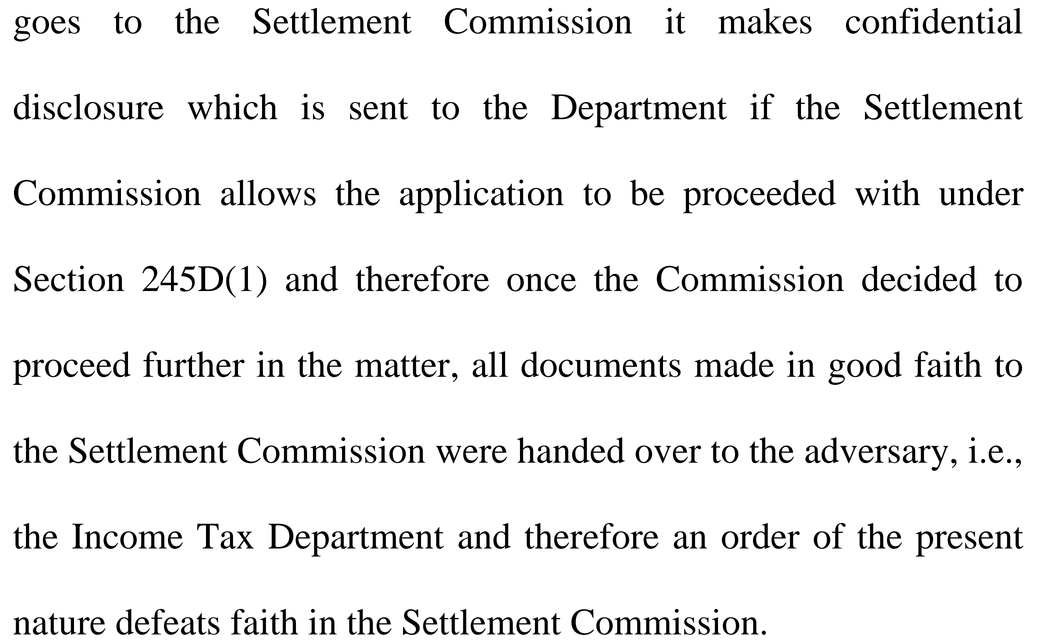
It is urged by learned counsel that in any view of the matter so far as the illegality part of the transaction is concerned, criminal proceedings can be taken which has not been done except with respect to a petty amount of Rs.1.23 crores and such issues are not at all relevant before the Settlement Commission which is only concerned with the taxation of the income.

It is also the contention of learned counsel for the petitioners that if it was the case of the Commission that these amounts are proceeds of misappropriation, then the Settlement Commission ought to have recorded categorical finding to that

effect and held that the assessees were not liable to tax on such receipts and thrown out the application without passing order under Section 245D (4) but it was not open to the Settlement Commission to stop short as it has done.

It is also the stand of learned counsel that reliance upon the decision of the Supreme Court by the Settlement Commission in the case of CIT Vs. B.N. Bhattachargee and another: 118 ITR 461 = (1979) 4 SCC 121 is wholly misplaced as the observations were given in the context of very different legal provisions and fact situation. It is submitted that under the law as prevailing at that time the Commissioner had a power to object, which as per sub-section (1A) of Section 245D as it then existed, provided that the application under Section 245C shall not be proceeded with under Section 245D(1) if the Commissioner raises an objection on the ground that the concealment of income is likely to be established or is already established. It is submitted that the Parliament having by amendment taken away the powers of the Commissioner to make such objection during settlement proceedings, it was not open for the Settlement Commission to have relied upon the said judgment of the Apex Court in the matter.

Learned counsel also submits that when a party



goes to the Settlement Commission it makes confidential disclosure which is sent to the Department if the Settlement Commission allows the application to be proceeded with under Section 245D(1) and therefore once the Commission decided to proceed further in the matter, all documents made in good faith to the Settlement Commission were handed over to the adversary, i.e., the Income Tax Department and therefore an order of the present nature defeats faith in the Settlement Commission.

Learned counsel also submits that whatever the Assessing Officer can do the Settlement Commission has been empowered under Chapter 19A of the Act to do and thus by rejecting the applications of the petitioners at the stage of Section 245D(4) it has shirked its responsibility by relegating it to the Assessing Officer to decide on the same facts.

It is further submitted by learned counsel that the amendments made to the provisions of Chapter 19A of the Act from time to time, and specifically to Section 245D, relating to Settlement Commission clearly indicates a change in legislative thinking and enlargement of the scope of proceedings from time to time, the precondition for such proceedings being conferred only to the question of making a true and full disclosure and also disclosure of the manner of income before the Commission and the

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proceedings could be rejected only on the said ground and not with reference to any so called misrepresentation or criminality involved.

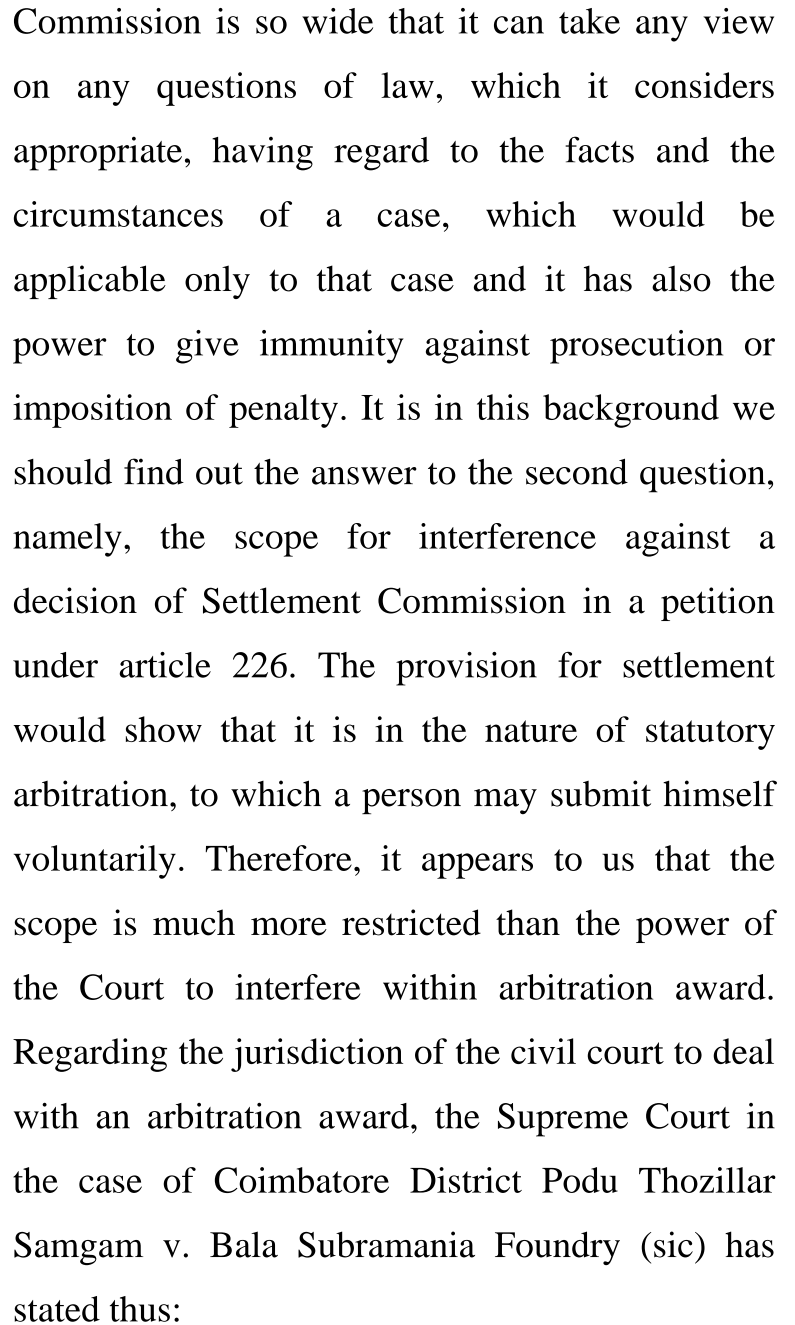
In this regard learned counsel has sought to support the petitioners having made full and true disclosure by stating that the petitioners had reported their income on cash basis of payments made after deduction of income tax at source by the BCCL which came to Rs. 211.87 crores, whereas the impugned order takes into account bills which were either not accepted or rejected by the BCCL or not paid and thus there was no discrepancy in reporting of true and full particulars of the income by the petitioners. It is urged by learned counsel that under the Income Tax Act the petitioners have liberty to choose cash system or mercantile system of accounting and they had adopted cash system and they had accordingly made full and true disclosure to the Settlement Commission.

It is also submitted by learned counsel that the stage had not arisen for consideration of the choice and method of computation and at the appropriate stage the Settlement Commission could have rejected the method and particulars of the petitioners and computed the income on mercantile system of accounting instead of outright rejecting the settlement applications

on the said ground.

In support of his aforesaid stand learned counsel relies upon a decision of a Division Bench of the Karnataka High Court in the case of N. Krishnan Vs. Settlement Commission & Ors: 180 ITR 585 (Karnataka) = (1989) 47 Taxman 294 in para-15 of which it has been held as follows:-

> 15. With reference to the second question arising for our consideration, as we have pointed out earlier, the provision for constitution of the Settlement Commission was not in existence earlier. This legislative step was taken on the recommendation of the Wanchoo Committee. As observed by us earlier, the Settlement Commission was to be constituted for settling the complicated claims of chronic tax evaders as an extraordinary measure, for saving an opportunity to such persons to make true confession and to have the matters settled once for all, and earn peace of mind. It is a forum for self surrender and seeking relief and not a forum for challenging the legality of assessment order or orders passed in any other proceedings. This is not only evident from the provision of the Act which prevents the application made, from being withdrawn as also the provision which makes the decision of the Settlement Commission final and conclusive both on question of law and fact. The power conferred on the Settlement



Commission is so wide that it can take any view on any questions of law, which it considers appropriate, having regard to the facts and the circumstances of a case, which would be applicable only to that case and it has also the power to give immunity against prosecution or imposition of penalty. It is in this background we should find out the answer to the second question, namely, the scope for interference against a decision of Settlement Commission in a petition under article 226. The provision for settlement would show that it is in the nature of statutory arbitration, to which a person may submit himself voluntarily. Therefore, it appears to us that the scope is much more restricted than the power of the Court to interfere within arbitration award. Regarding the jurisdiction of the civil court to deal with an arbitration award, the Supreme Court in the case of Coimbatore District Podu Thozillar Samgam v. Bala Subramania Foundry (sic) has stated thus:

> "The Court was also entrusted with the power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which were severable from those referred. The Court had also power to remit the award then it had left some matters referred undetermined or when the award was

indefinite, where the objection to the legality of the award was apparent on the face of the award. The Court might also set aside the award on the ground of corruption or misconduct of the arbitrator, or that a party had been guilty of fraudulent concealment or willful deception. But the Court could not interfere with the award if otherwise proper on the ground that the decision appeared to it to be erroneous. The award of the arbitrator was ordinarily final and conclusive, unless a contrary intention was disclosed by the agreement. The award was the decision of a domestic Tribunal chosen by the parties, and the civil courts which were entrusted with the power to facilitate arbitration and to effectuate the awards could not exercise appellate powers over the decision. Wrong or right the decision was binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. This Court reiterated in the said decision that it was now firmly established that an award was bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there was found some

legal proposition which was the basis of the award and which was erroneous.

In our opinion, many of the grounds on which arbitration award could be set aside, could not be available in view of the nature and jurisdiction of the Settlement Commission. We are of the view that decision of Settlement Commission could be interfered with only:

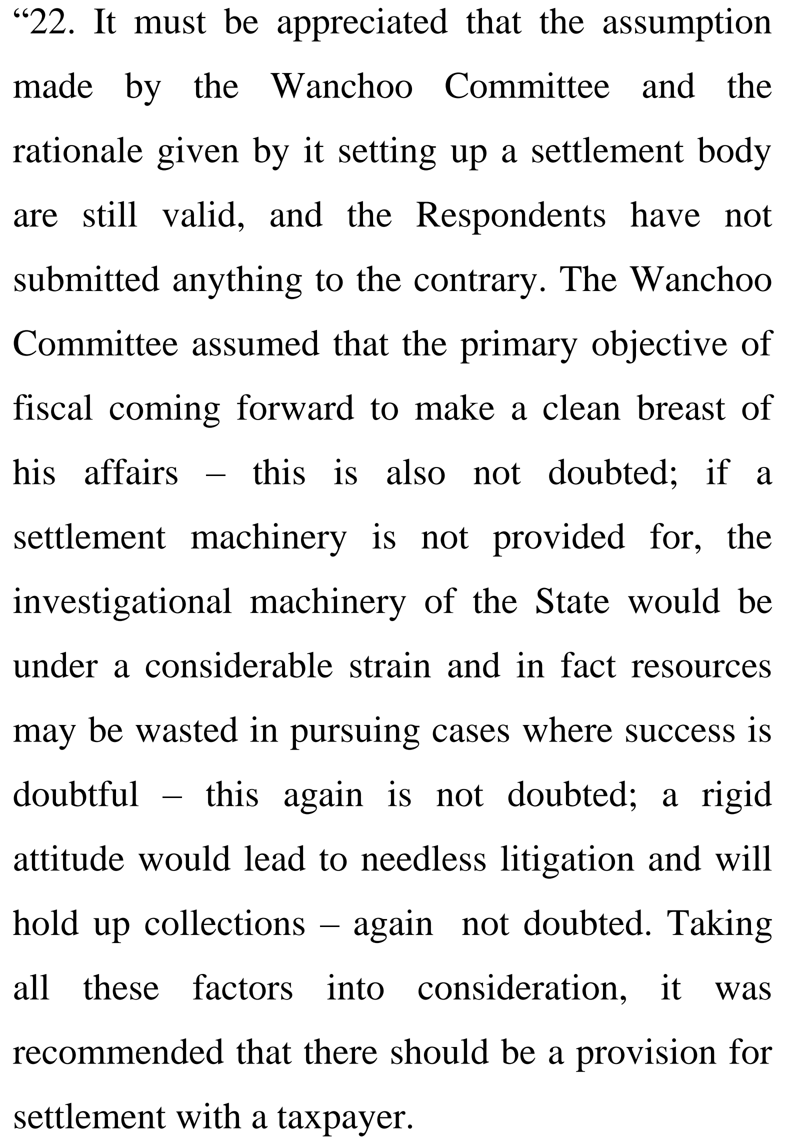
(i) if grave procedural defect such as violation of the mandatory procedural requirements of the provisions in Chapter XIX-A and/or violation of rules of natural justice is made out;

(ii) if it is found that there is no nexus between the reasons given and the decision taken by the Settlement Commission;

(iii) this Court cannot interfere either with an error of fact or error of law, alleged to have been committed by the Settlement Commission.

We answer the second question accordingly."

Learned counsel has also made strong reliance upon the observations made by the Delhi High Court in the case of Vatika Farms Pvt. Ltd. Vs. UOI: 302 ITR 98(Del) = (2008) 167 Taxman 366 relying upon a number of paragraphs of the said decision, paras 22 to 25, 27, 38, 44,45,46, 55 and 56 of which are quoted below:-



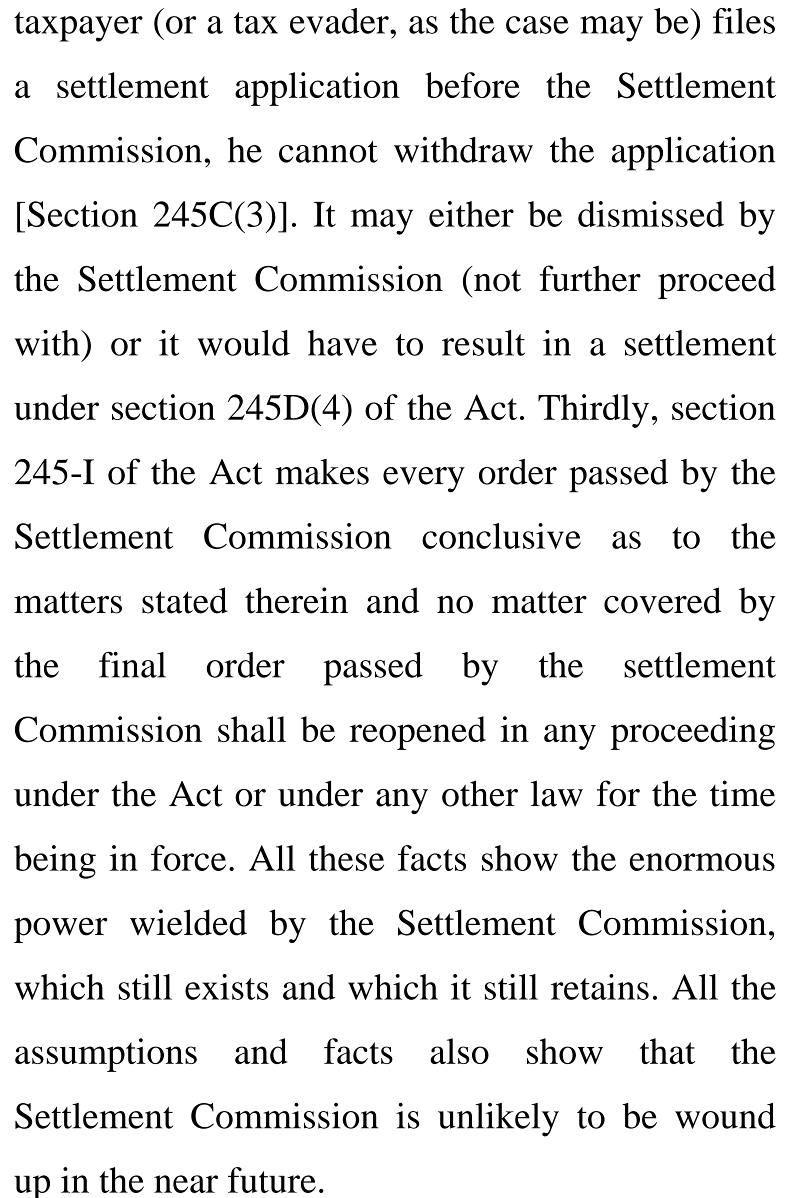
"22. It must be appreciated that the assumption made by the Wanchoo Committee and the rationale given by it setting up a settlement body are still valid, and the Respondents have not submitted anything to the contrary. The Wanchoo Committee assumed that the primary objective of fiscal coming forward to make a clean breast of his affairs – this is also not doubted; if a settlement machinery is not provided for, the investigational machinery of the State would be under a considerable strain and in fact resources may be wasted in pursuing cases where success is doubtful – this again is not doubted; a rigid attitude would lead to needless litigation and will hold up collections – again not doubted. Taking all these factors into consideration, it was recommended that there should be a provision for settlement with a taxpayer.

23. Similarly, even the Supreme Court has made certain assumption in favour of the revenue and given a justification for having settlement machinery. In CIT v. Express Newspaper Ltd. (1994) 206 ITR 443 the Supreme Court noted that there may be certain cases that need to be given a quietus to, once and for all, and they should not be fought through the usual channels. For example, there may be cases that are complex or cases that may require a prolonged investigation or cases that may require a cumbersome investigation etc.,

and it is these kinds of cases that may be entertained by the Settlement Commission.

24. That the assumptions made by the Wanchoo Committee and the Supreme Court are valid even today and that they subsist is clear from the fact that the Wanchoo Committee Report has not been trashed by the Respondents and the fact that the Settlement Commission still exists and has not been wound up. After all, if all the assumptions and reasons were not correct, the Respondents would have wound up the Settlement Commission – why keep an ineffectual or worthless body in place for no apparent reason? The fact that the Settlement Commission has been allowed to exist, and continues to exist and entertain fresh settlement applications, clearly suggests that it is needed, even if it is for a few cases. And, if it is needed for a few cases, why is it not needed for a greater number of cases? These are a few of the many doubts that the Respondents have not even cared to respond to or clear.

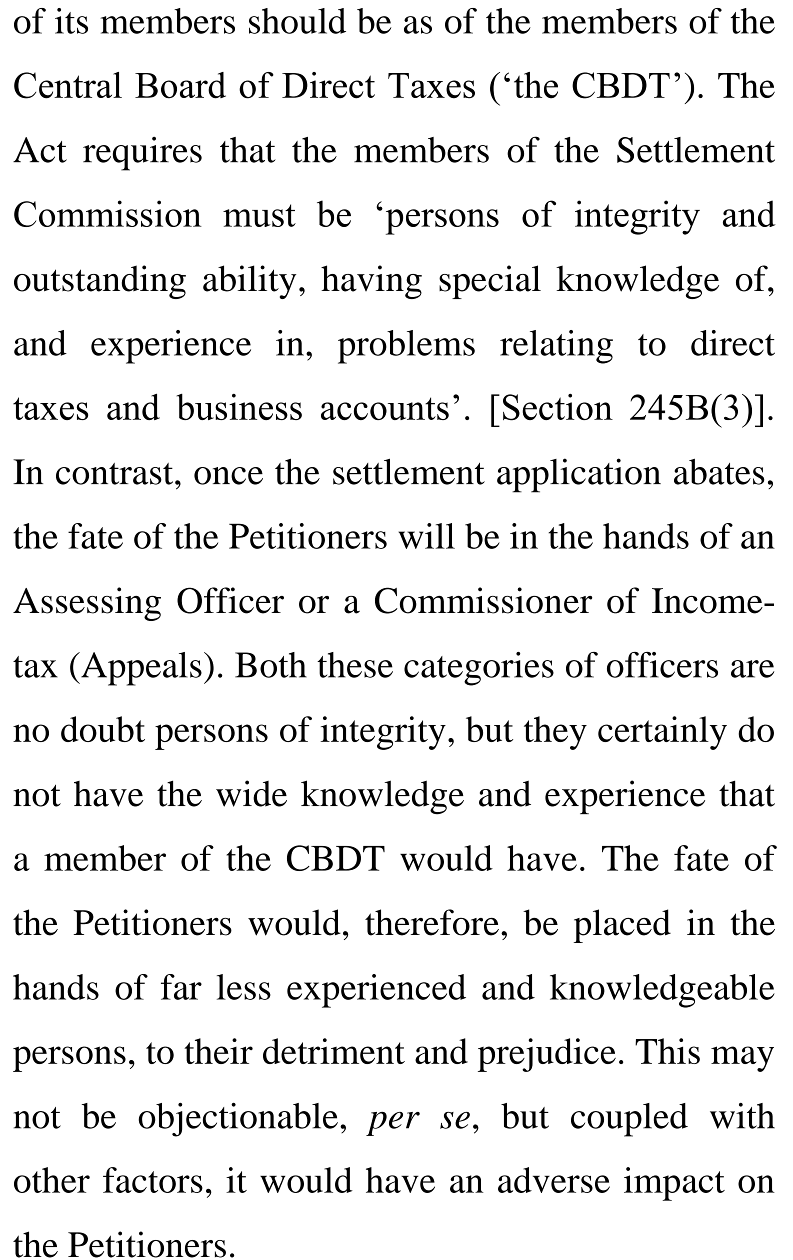
25. In this context, it is also important to note three other facts which suggest that the Settlement Commission is not a redundant appendage. Firstly, the Act provides that the Settlement Commission shall have 'exclusive jurisdiction to exercise the powers and perform the functions of an income-tax authority under this Act in relation to the case' before it [Section 245F(2)]. Secondly, when a



taxpayer (or a tax evader, as the case may be) files a settlement application before the Settlement Commission, he cannot withdraw the application [Section 245C(3)]. It may either be dismissed by the Settlement Commission (not further proceed with) or it would have to result in a settlement under section 245D(4) of the Act. Thirdly, section 245-I of the Act makes every order passed by the Settlement Commission conclusive as to the matters stated therein and no matter covered by the final order passed by the settlement Commission shall be reopened in any proceeding under the Act or under any other law for the time being in force. All these facts show the enormous power wielded by the Settlement Commission, which still exists and which it still retains. All the assumptions and facts also show that the Settlement Commission is unlikely to be wound up in the near future.

27. The consequences of abatement are calamitous, as submitted by learned counsel for the Petitioners. This can best be appreciated by comparing and contrasting the pre and post 31-3-2008 situation. Some of these are:-

The Wanchoo Committee recommended that the constitution of the settlement body should “encourage officers with integrity and wide knowledge and experience to accept assignments on the Tribunal” and so the status and emoluments



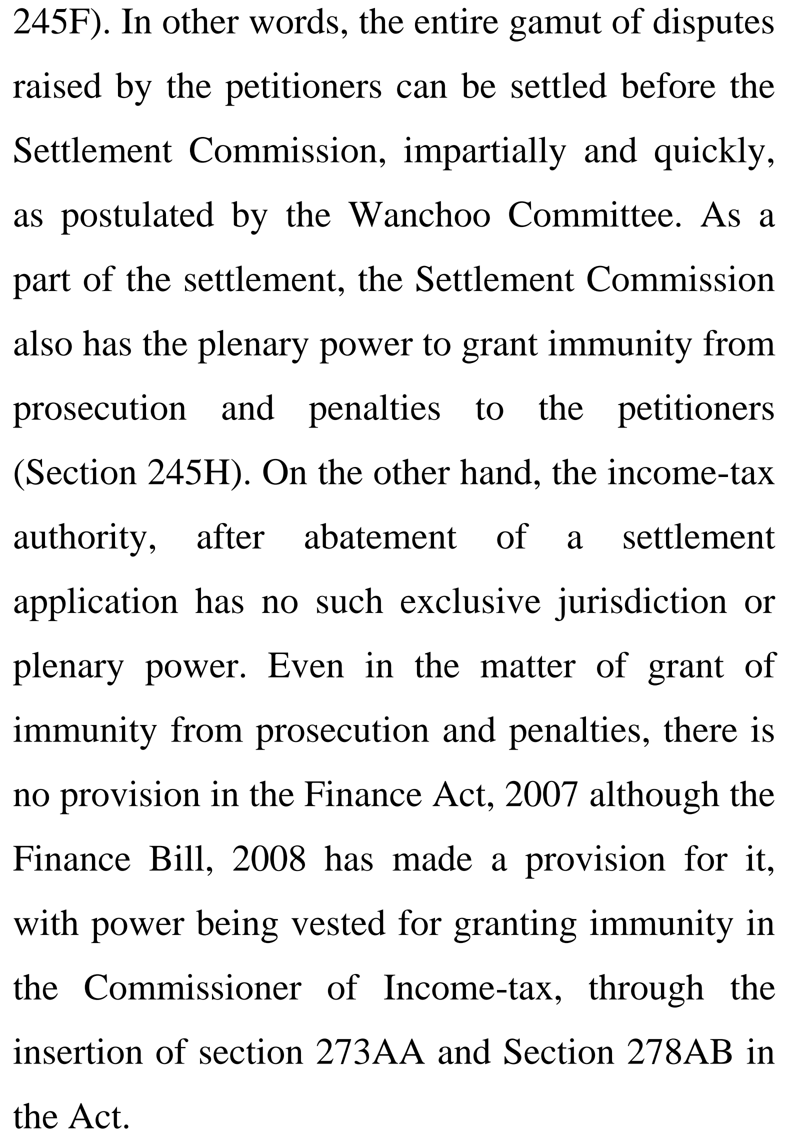
of its members should be as of the members of the Central Board of Direct Taxes ('the CBDT'). The Act requires that the members of the Settlement Commission must be 'persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts'. [Section 245B(3)]. In contrast, once the settlement application abates, the fate of the Petitioners will be in the hands of an Assessing Officer or a Commissioner of Income-tax (Appeals). Both these categories of officers are no doubt persons of integrity, but they certainly do not have the wide knowledge and experience that a member of the CBDT would have. The fate of the Petitioners would, therefore, be placed in the hands of far less experienced and knowledgeable persons, to their detriment and prejudice. This may not be objectionable, *per se*, but coupled with other factors, it would have an adverse impact on the Petitioners.

Proceedings before the Settlement Commission are conducted by a Bench of independent persons and they are judicial proceedings for all intents and purposes but the proceedings before the Assessing Officer are conducted by only one person and they are only quasi-judicial. The Assessing Officer is an officer of the Income-Tax Department, having loyalty to his department (not that there is anything wrong in it as such), but in

the present circumstances, that officer may not necessarily be independent in a case pertaining to any one of the petitioners. It is well-settled that a hearing by an impartial Tribunal is a fundamental requirement of the rule of law and that may be missing in the case of some of the petitioners.

An order passed by the Settlement Commission is final and conclusive 'as to matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter (XIX-A), be reopened in any proceeding under this Act or any other law for the time being in force.' [Section 245-I]. A settlement application is decided on a one-stop basis but an aggrieved Petitioner would still have a constitutional remedy of judicial review in a High Court. However, in the case of a regular assessment after abatement of a settlement application, the Petitioner would have to go through a plethora of appeals and authorities before a final decision is taken in his case and even then the remedy available to him is extremely limited – only on a substantial question of law in a High Court. This is clearly not an adequate substitute available in law.

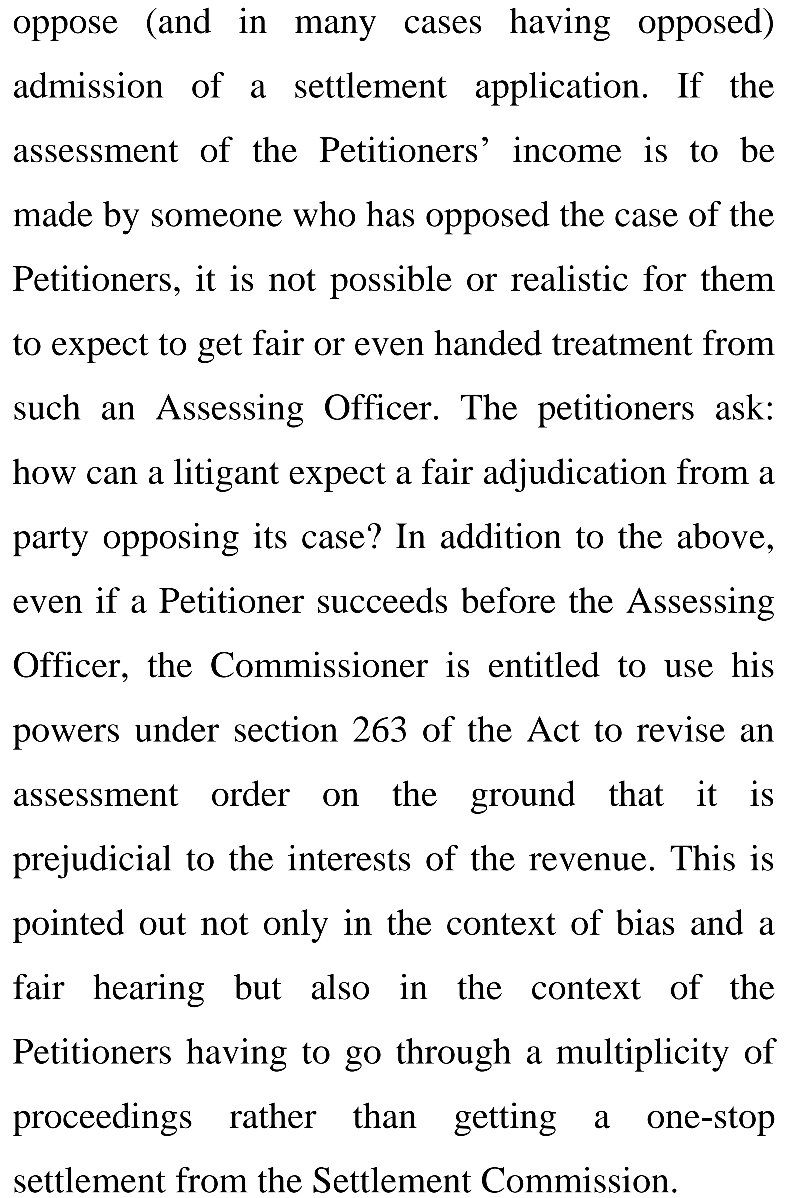
The Settlement Commission has exclusive jurisdiction and plenary powers to decide all issues brought before it including, in an appropriate case and where expediency so demands, the power to reopen completed proceedings (Sections 245E and



245F). In other words, the entire gamut of disputes raised by the petitioners can be settled before the Settlement Commission, impartially and quickly, as postulated by the Wanchoo Committee. As a part of the settlement, the Settlement Commission also has the plenary power to grant immunity from prosecution and penalties to the petitioners (Section 245H). On the other hand, the income-tax authority, after abatement of a settlement application has no such exclusive jurisdiction or plenary power. Even in the matter of grant of immunity from prosecution and penalties, there is no provision in the Finance Act, 2007 although the Finance Bill, 2008 has made a provision for it, with power being vested for granting immunity in the Commissioner of Income-tax, through the insertion of section 273AA and Section 278AB in the Act.

There is a fundamental distinction between a settlement under Chapter XIX-A of the Act and a regular assessment through adjudication under the provisions of the Act. As far as the Petitioners are concerned, this has considerable relevance to the way in which the problem is viewed and addressed by the appropriate authority.

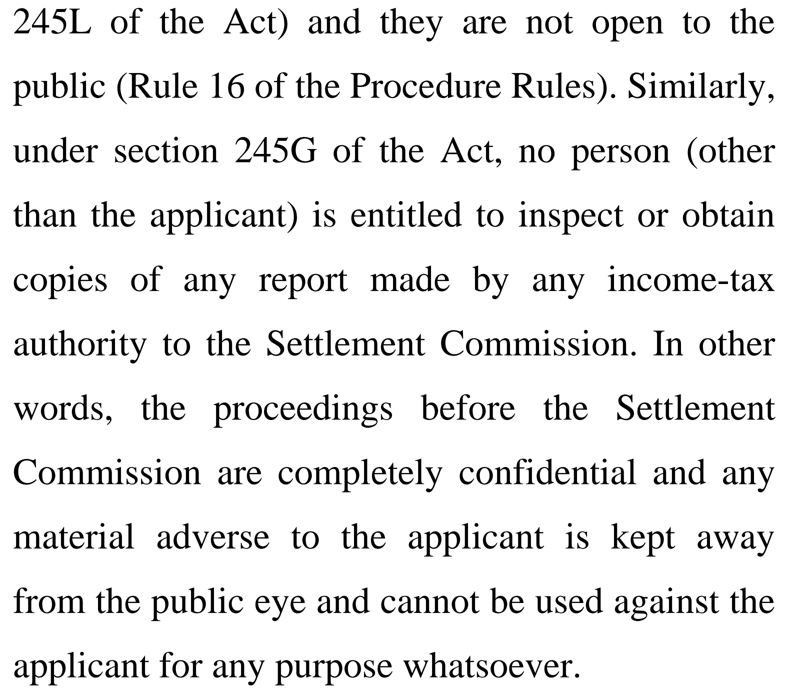
The Assessing Officer to whose jurisdiction the Petitioners are relegated on the abatement of the settlement application, is himself a litigant before the Settlement Commission having a right to



oppose (and in many cases having opposed) admission of a settlement application. If the assessment of the Petitioners' income is to be made by someone who has opposed the case of the Petitioners, it is not possible or realistic for them to expect to get fair or even handed treatment from such an Assessing Officer. The petitioners ask: how can a litigant expect a fair adjudication from a party opposing its case? In addition to the above, even if a Petitioner succeeds before the Assessing Officer, the Commissioner is entitled to use his powers under section 263 of the Act to revise an assessment order on the ground that it is prejudicial to the interests of the revenue. This is pointed out not only in the context of bias and a fair hearing but also in the context of the Petitioners having to go through a multiplicity of proceedings rather than getting a one-stop settlement from the Settlement Commission.

38. Another issue that greatly agitated learned counsel for the Petitioners relates to a breach in the confidentiality of materials made available to the Settlement Commission. To appreciate the prejudice to the Petitioners after abatement of the settlement application, it is necessary to understand the procedure laid down by law that is binding on the Settlement Commission.

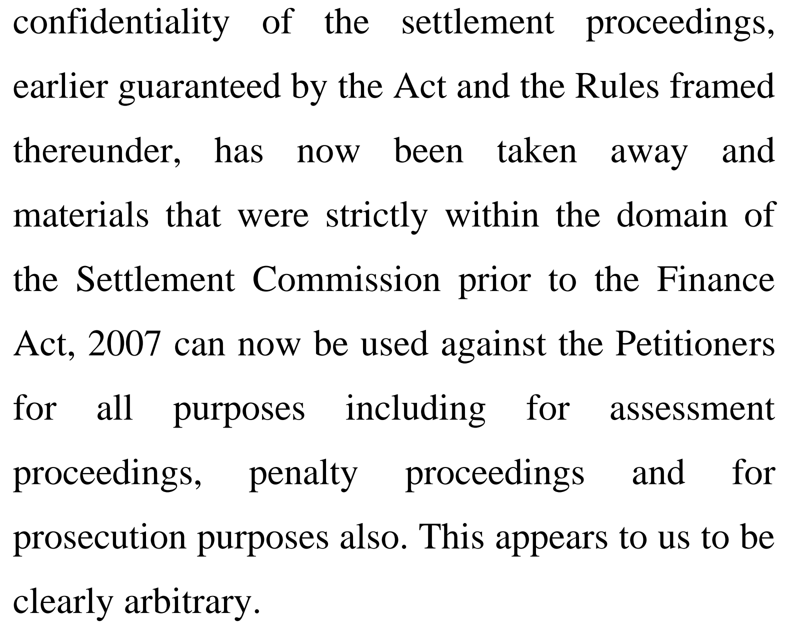
44. The proceedings before the Settlement Commission are judicial proceedings (Section



245L of the Act) and they are not open to the public (Rule 16 of the Procedure Rules). Similarly, under section 245G of the Act, no person (other than the applicant) is entitled to inspect or obtain copies of any report made by any income-tax authority to the Settlement Commission. In other words, the proceedings before the Settlement Commission are completely confidential and any material adverse to the applicant is kept away from the public eye and cannot be used against the applicant for any purpose whatsoever.

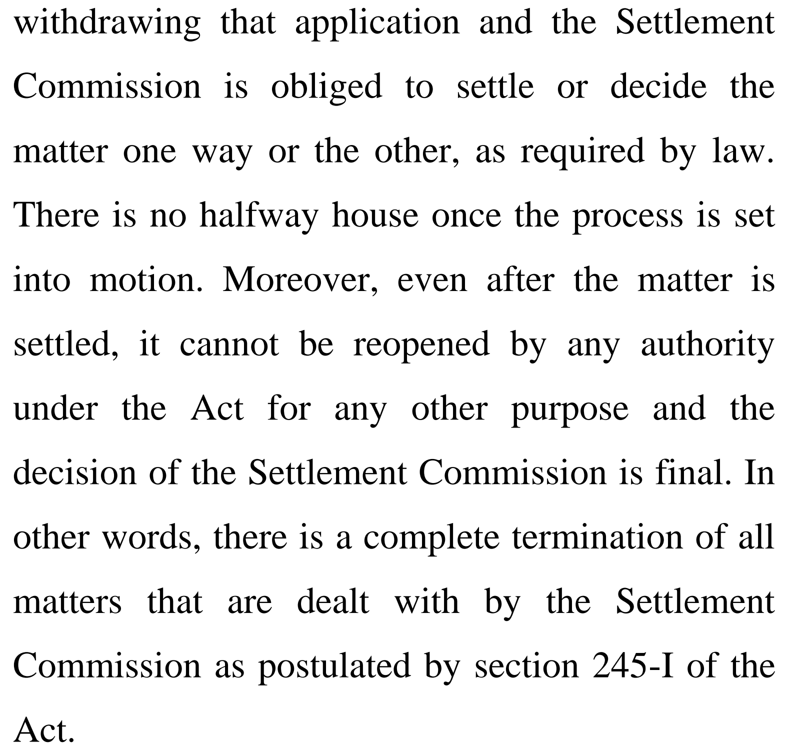
45. Our attention was drawn to Chhotalal S. Ajmera (HUF) v. CIT [2007] 289 ITR 1, wherein the Supreme Court has considered the annexure to Form 34B in Appendix II to the Income-tax Rules 'as a confidential document, which is not disclosed to the Commissioner of Income-tax until the Settlement Commission admits the application for being proceed with'. Consequently, there can be no doubt that the information in the annexure is confidential.

46. By virtue of section 245H(3) of the Act, as incorporated by the Finance Act, 2007, the Assessing Officer or any other income-tax authority shall be entitled to use all the confidential information produced by the Petitioners before the Settlement Commission and can even use it in proceedings before him against the Petitioners. The result of this is that the



confidentiality of the settlement proceedings, earlier guaranteed by the Act and the Rules framed thereunder, has now been taken away and materials that were strictly within the domain of the Settlement Commission prior to the Finance Act, 2007 can now be used against the Petitioners for all purposes including for assessment proceedings, penalty proceedings and for prosecution purposes also. This appears to us to be clearly arbitrary.

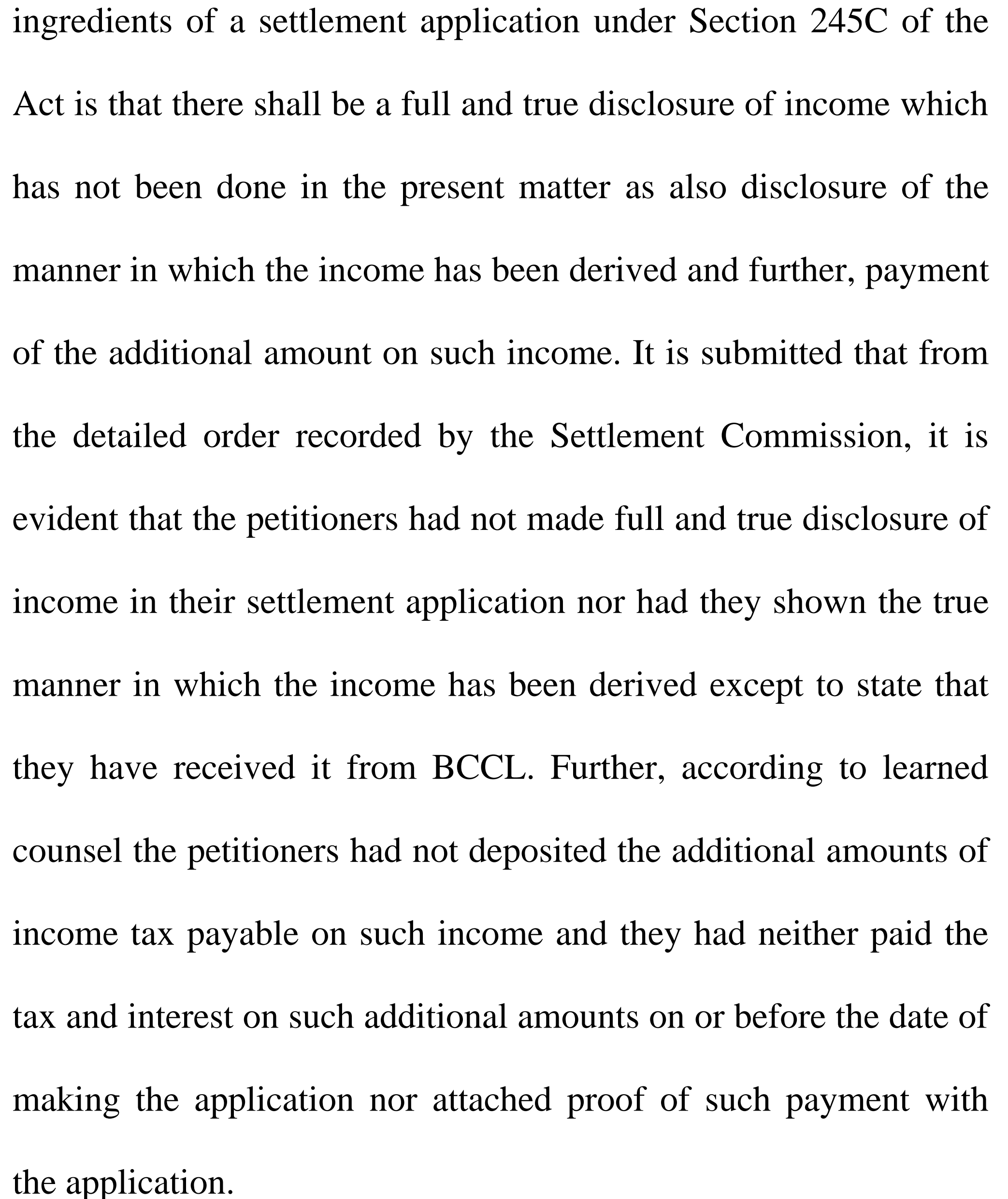
55. In our opinion, the learned Additional Solicitor General has overlooked that the confidential information was and continues to remain within the exclusive domain of the Settlement Commission during the pendency of the settlement application in the Settlement Commission, even after it is disclosed to the Commissioner. Whatever information is disclosed by the Petitioners before the Settlement Commission can be used and will be used only by persons of integrity and experience and exclusively for the purpose of settling the dispute raised by the Petitioners before the Settlement Commission. The confidential information cannot be used for any purpose other than for the settlement of application filed under section 245C(1) of the Act. The procedure having been set into motion by the Petitioners by filing settlement application under section 245C of the Act, they are precluded from



withdrawing that application and the Settlement Commission is obliged to settle or decide the matter one way or the other, as required by law. There is no halfway house once the process is set into motion. Moreover, even after the matter is settled, it cannot be reopened by any authority under the Act for any other purpose and the decision of the Settlement Commission is final. In other words, there is a complete termination of all matters that are dealt with by the Settlement Commission as postulated by section 245-I of the Act.

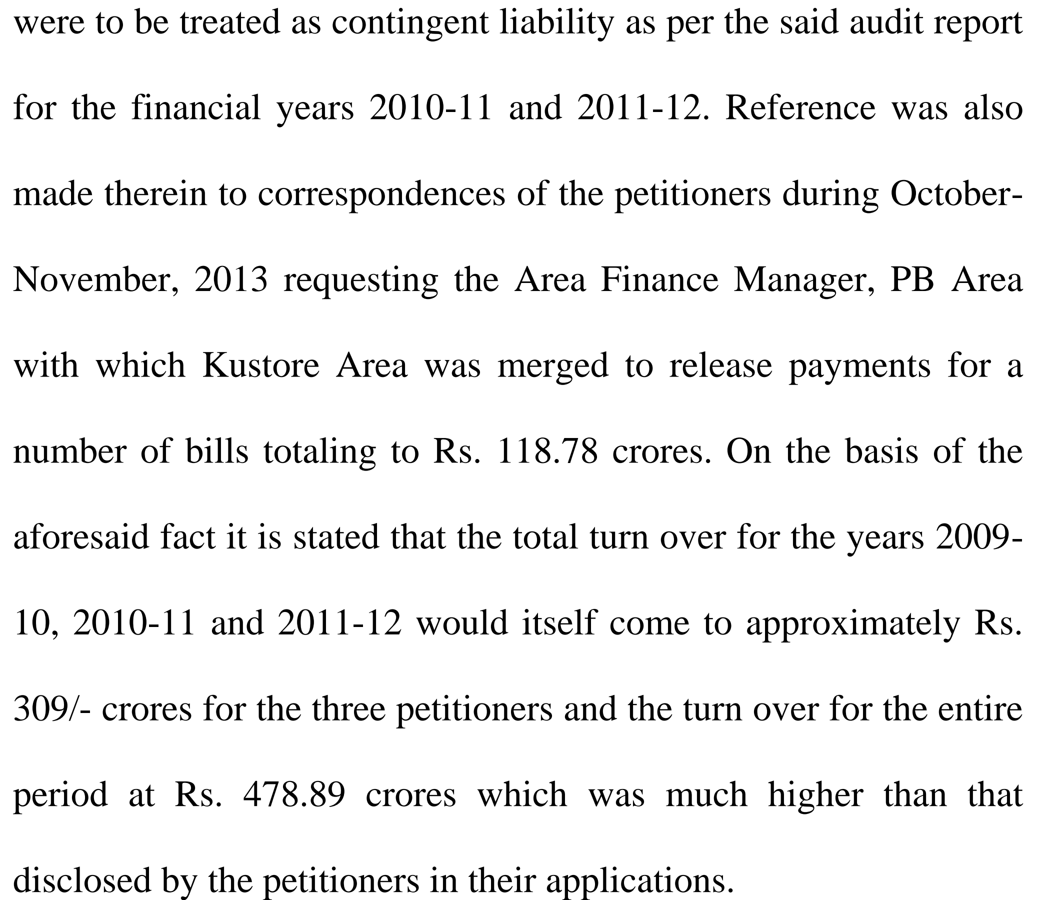
56. The trust that the petitioners placed in the Settlement Commission is completely dashed by the amendments brought about by the Finance Act, 2007 and the entire confidential and undisclosed material can be used by any income tax authority for any purpose, prejudicial to the interests of the petitioners. The confidential information disclosed by the petitioners will be put into the hands of the Assessing Officer who is likely to have an implicit and inherent bias against them knowing fully that they have approached the Settlement Commission for a settlement in respect of income which they have not disclosed to any income-tax authority.

On the other hand, learned counsel for the respondent-Income Tax Department submits that the very basic



ingredients of a settlement application under Section 245C of the Act is that there shall be a full and true disclosure of income which has not been done in the present matter as also disclosure of the manner in which the income has been derived and further, payment of the additional amount on such income. It is submitted that from the detailed order recorded by the Settlement Commission, it is evident that the petitioners had not made full and true disclosure of income in their settlement application nor had they shown the true manner in which the income has been derived except to state that they have received it from BCCL. Further, according to learned counsel the petitioners had not deposited the additional amounts of income tax payable on such income and they had neither paid the tax and interest on such additional amounts on or before the date of making the application nor attached proof of such payment with the application.

With regard to the full and true disclosure, learned counsel submits that it has clearly come out in the report of the CIT dated 15.5.2014 that the bills of as much as Rs. 11.98 crores relating to the petitioners for the financial year 2011-12 as per the auditor report for the year ending 31.3.2012 of the area show liability towards the petitioners to the extent of Rs. 11,98,70,828/-. Further bills raised by the petitioners amounting to Rs. 13.23 crores



were to be treated as contingent liability as per the said audit report for the financial years 2010-11 and 2011-12. Reference was also made therein to correspondences of the petitioners during October-November, 2013 requesting the Area Finance Manager, PB Area with which Kustore Area was merged to release payments for a number of bills totaling to Rs. 118.78 crores. On the basis of the aforesaid fact it is stated that the total turn over for the years 2009-10, 2010-11 and 2011-12 would itself come to approximately Rs. 309/- crores for the three petitioners and the turn over for the entire period at Rs. 478.89 crores which was much higher than that disclosed by the petitioners in their applications.

Reference is also made to the fact that when the assessees were issued letter to produce the books of accounts, bills, vouchers and receipts for claiming different expenses, they replied, inter alia, that the bills, vouchers and documents were stolen and lost on 23.4.2013 and the copy of the station diary filed before the police station to this effect was enclosed.

It is also asserted that considering the turn over of the applicants during the years in question and their own admission that IVPS, KVPs and post office deposits in question are required for collateral or earnest money deposits in the case of tenders and contracts but in their applications they have owned the KVPs, IVPs

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of Rs. 2,30,000/- only which was grossly inadequate in comparison to the enormity of the contracts obtained by them and therefore the applicants had failed to disclose to the Settlement Commission the requisite values of KVPs and IVPs.

It is thus, submitted by learned counsel that the aforesaid facts clearly point to the inevitable conclusion that the petitioners had not made full and true disclosure of their income before the Settlement Commission.

In this regard it is submitted by learned counsel that the admitted position as per the returns filed by the petitioners is that they were following the mercantile system of accounting and thus it is not open to the petitioners to argue that the figures supplied by them in their settlement application were on cash basis. It is submitted that they had given incorrect figures ignoring their own choice of mercantile system of accounting at the time of filing of the application before the Settlement Commission, as full and true disclosure could only have been under the mercantile system which has not admittedly been done by the petitioners.

It is also submitted that it is not open to the petitioners to argue that the question of system of accounting must be considered at the final stage for determining income of the petitioners and not at the stage of passing order under Section

243D(4) rejecting the application and such failure to approach the Settlement Commission with the correct facts and figure could itself be sufficient to throw out the application.

Reference was also made by learned counsel to the fact that there was huge variation in the net profit ranging from 1% to 98% which was taken into account by the Settlement Commission and which clearly go to show that it was not a business activity on the basis of contract work and supplies being carried out by the petitioners and would further go to show that the manner in which the income has been derived has also not been fully and truly disclosed before the Commission.

Learned counsel further submits that at least two of the petitioners including the main petitioner Lal Bahadur Singh are accused in the FIR lodged under Sections 319,380,468, 471 and 120B of the Indian Penal Code and Sections 3(2) of the Prevention of Corruption Act which is under investigation by the CBI.

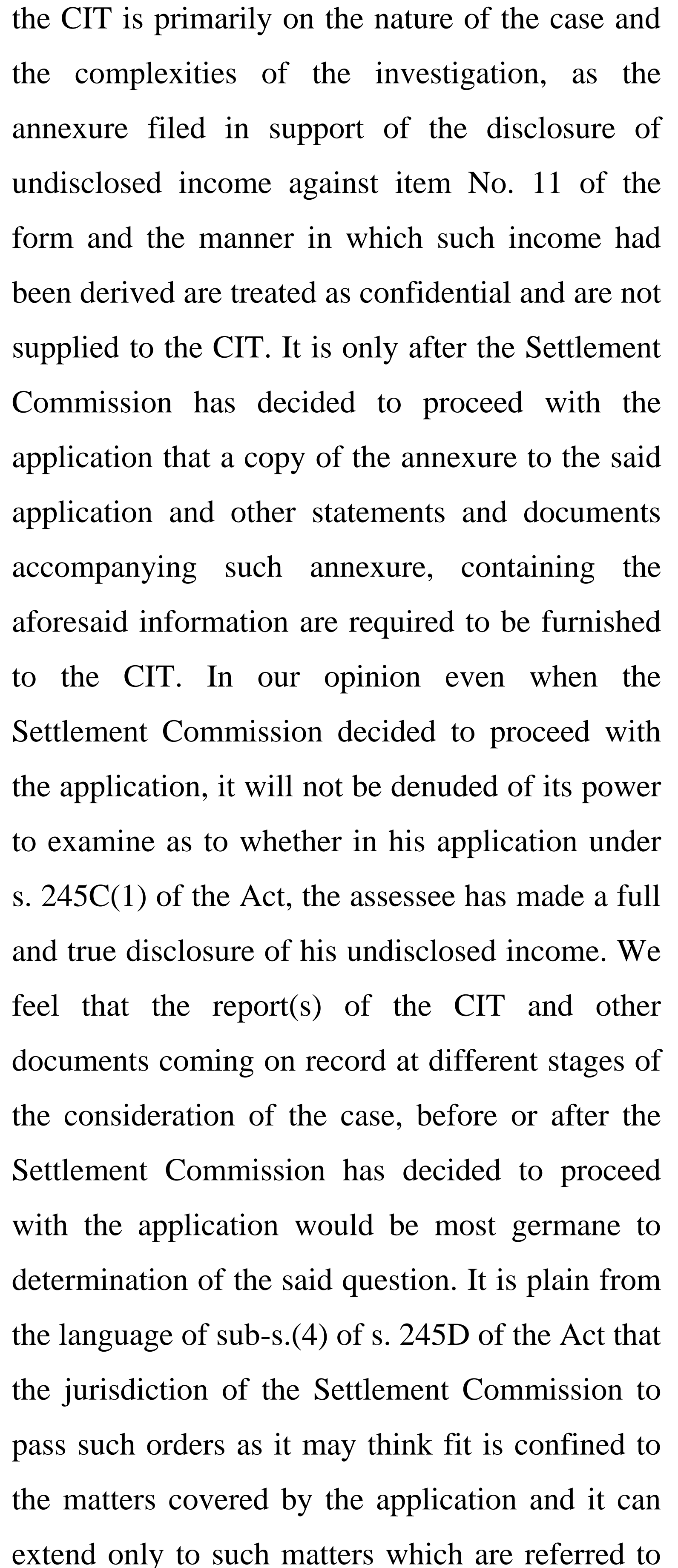
It is also submitted by learned counsel for the respondents that the order under Section 245D (2C) itself made it clear that the question of full and true disclosure would remain open till the stage of 245D(4) and thus it cannot be said that there was any finality to what was decided at that stage and in view of the further facts which came on the record on the basis of the report

dated 15.5.2014 of the jurisdictional CIT, it was evident that there has not been full and true disclosure by the petitioners and therefore, it cannot be argued by the petitioners that there was no fresh material before the Settlement Commission to take a different view in the matter.

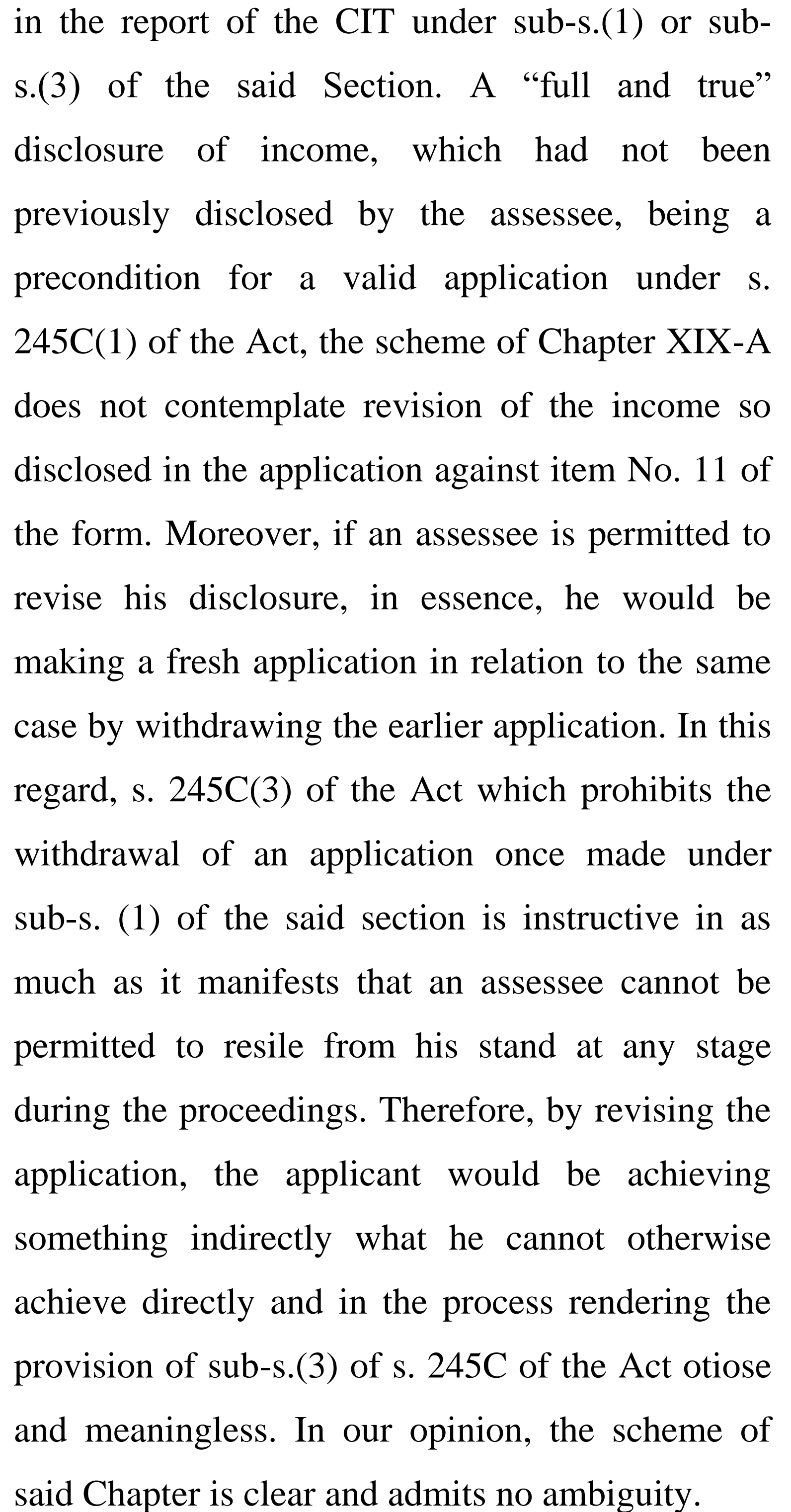
In support of her stand learned counsel relies upon a decision of the Supreme Court in the case of Ajmera Housing Corporation & Anr. Etc. Vs. Commissioner of Income Tax: 326 ITR 645 = (2010) 234 CTR 118, in paras 26 and 27 of which it has been held as follows:

> "26. The procedure laid down in s. 245D of the Act, contemplates that on receipt of the application under s. 245C(1) of the Act, the Settlement Commission is required to forward a copy of the application filed in the prescribed form (No. 34B), containing full details of issues for which application for settlement is made, the nature and circumstances of the case and complexities of the investigation involved, save and except the annexures, referred to in item No. 11 of the form and to call for report from the CIT. The CIT is obliged to furnish such report within a period of 45 days from the date of communication by the Settlement Commission. Thereafter, the Settlement Commission, on the basis of the material contained in the said report and having

regard to the facts and circumstances of the case and/or complexity of the investigation involved therein may by an order, allow the application to be proceeded with or reject the application. After an order under s. 245D(1) is made, by the Settlement Commission, r. 8 of the 1987 Rules mandates that a copy of the annexure to the application, together with a copy of each of the statements and other documents accompanying such annexure shall be forwarded to the CIT and further report shall be called from the CIT. The Settlement Commission can also direct the CIT to make further enquiry and investigations in the matter and furnish his report. Thereafter, after examining the record, CIT's report and such further evidence that may be laid before it or obtained by it, the Settlement Commission is required to pass an order as it thinks fit on the matter covered by the application and in every matter relating to the case not covered by the application and referred to in the report of the CIT under sub-s(1) or sub-s.(3) of the said section. It bears repetition that as per the scheme of the Chapter, in the first instance, the report of the CIT is based on the bare information furnished by the assessee against item No. 10 of the prescribed form, and the material gathered by the Revenue by way of its own investigation. It is evident from the language of s. 245C(1) of the act that the report of

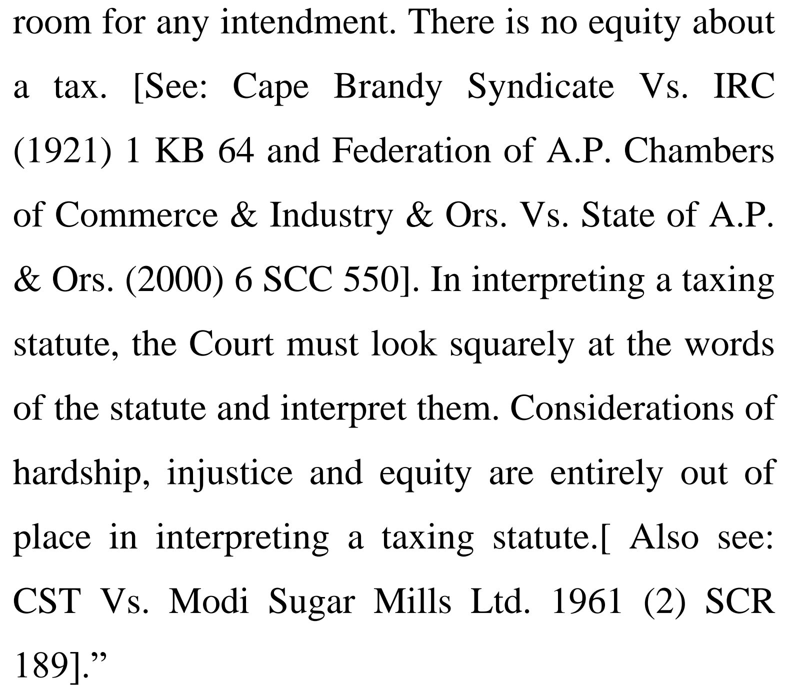


the CIT is primarily on the nature of the case and the complexities of the investigation, as the annexure filed in support of the disclosure of undisclosed income against item No. 11 of the form and the manner in which such income had been derived are treated as confidential and are not supplied to the CIT. It is only after the Settlement Commission has decided to proceed with the application that a copy of the annexure to the said application and other statements and documents accompanying such annexure, containing the aforesaid information are required to be furnished to the CIT. In our opinion even when the Settlement Commission decided to proceed with the application, it will not be denuded of its power to examine as to whether in his application under s. 245C(1) of the Act, the assessee has made a full and true disclosure of his undisclosed income. We feel that the report(s) of the CIT and other documents coming on record at different stages of the consideration of the case, before or after the Settlement Commission has decided to proceed with the application would be most germane to determination of the said question. It is plain from the language of sub-s.(4) of s. 245D of the Act that the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to



in the report of the CIT under sub-s.(1) or sub-s.(3) of the said Section. A “full and true” disclosure of income, which had not been previously disclosed by the assessee, being a precondition for a valid application under s. 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 relation to the same case by withdrawing the earlier application. In this regard, s. 245C(3) of the Act which prohibits the withdrawal of an application once made under sub-s. (1) of the said section is instructive in as much 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-s.(3) of s. 245C of the Act otiose and meaningless. In our opinion, the scheme of said Chapter is clear and admits no ambiguity.

27. It is trite law that a taxing statute is to be construed strictly. In a taxing act one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no



room for any intendment. There is no equity about a tax. [See: Cape Brandy Syndicate Vs. IRC (1921) 1 KB 64 and Federation of A.P. Chambers of Commerce & Industry & Ors. Vs. State of A.P. & Ors. (2000) 6 SCC 550]. In interpreting a taxing statute, the Court must look squarely at the words of the statute and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statute.[Also see: CST Vs. Modi Sugar Mills Ltd. 1961 (2) SCR 189]."

Learned counsel also relies upon a decision of the Bombay High Court in the case of Hassan Ali Khan Vs. Settlement Commission & Ors: 299 ITR 127 = (2008) 217 CTR 163 in para 16 of which it has been held as follows:-

> 16. It was also argued that the Section 245D(2C) as now introduced by Finance Act 2007 w.e.f. 1st June, 2007 has conferred power on the Commission to treat the application as "invalid". The expression "invalid" has not been defined under the Act and would therefore, require consideration. It is submitted that the Commission at the prima facie stage could not have held the application as invalid considering that the Petitioners have complied with the other requirements. The expression "invalid", it is pointed out, is used in Article 255 of the Constitution of India. Section 245D(2C) reads as under:
>
> 245D(2C). Where a report of the Commissioner called for under Sub-section (2B) 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 Commissioner.

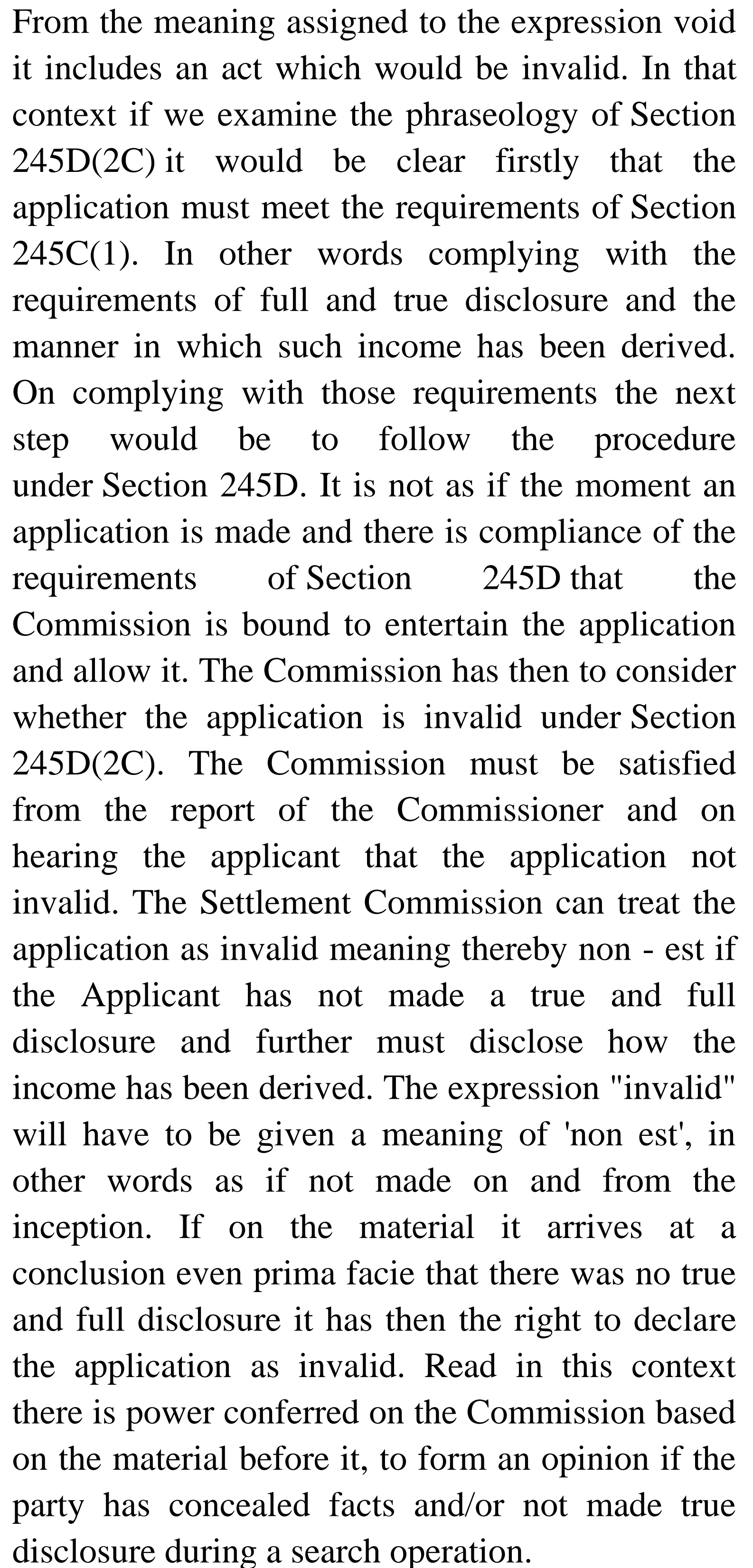
Provided that an application shall not be declared invalid unless an opportunity has been given to the applicant of being heard:

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

As the expression "invalid" is not defined in the Act, what is its true import. In K.J. Aiyar's Judicial Dictionary, "Invalid" is equated with the word "void". Referring to Black's Law Dictionary, 6th Edition the word "void" has been given meanings such as null, ineffectual, nugatory, having no legal force or binding effect, unable, in law, to support the purpose for which it was intended. In State of Kerala v. M.K.Kunhikannan Nambiar it has been held that word "void" has a relative rather than an absolute meaning, it only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise.

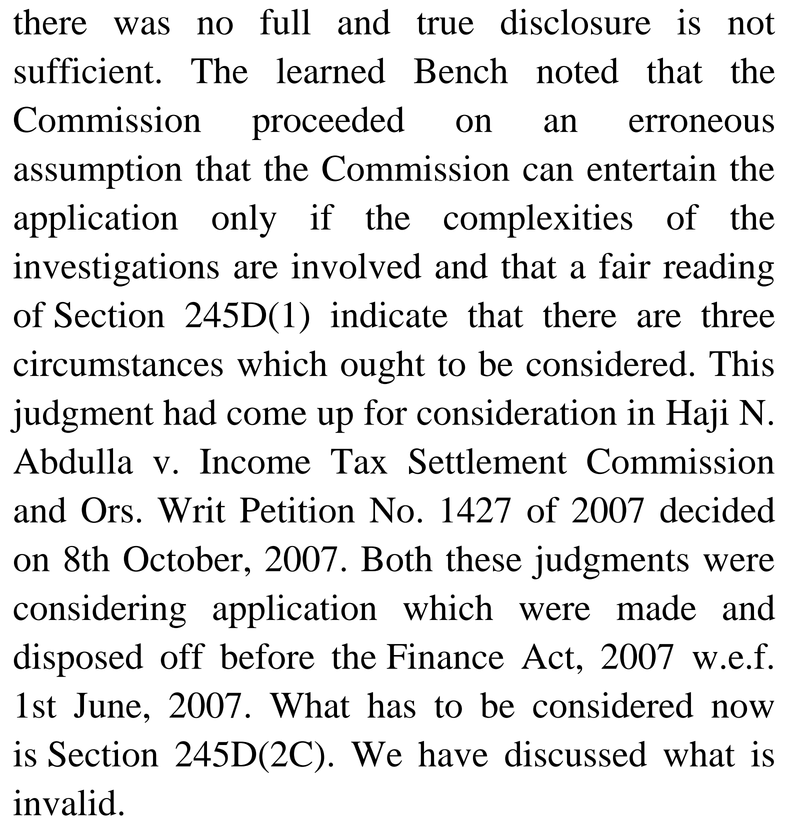
Learned Counsel had relied upon definition of the word "invalid" from Concise Law Dictionary, Abridged Edition 1997 where the word "invalid" is described as under:

The word 'invalid' has precisely the same meaning as the two words 'not valid.' Of no force; without legal force; void.



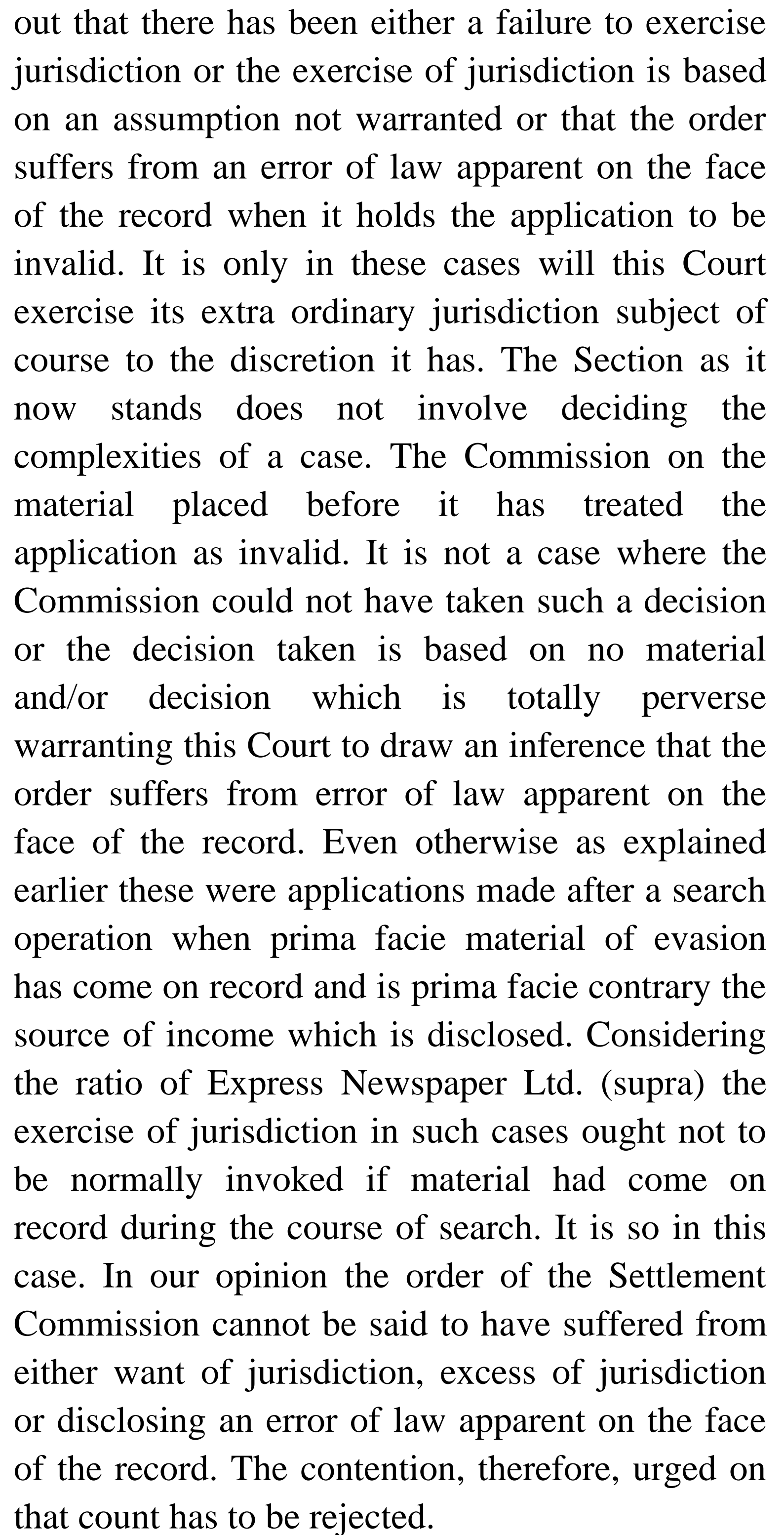
From the meaning assigned to the expression void it includes an act which would be invalid. In that context if we examine the phraseology of Section 245D(2C) it would be clear firstly that the application must meet the requirements of Section 245C(1). In other words complying with the requirements of full and true disclosure and the manner in which such income has been derived. On complying with those requirements the next step would be to follow the procedure under Section 245D. It is not as if the moment an application is made and there is compliance of the requirements of Section 245D that the Commission is bound to entertain the application and allow it. The Commission has then to consider whether the application is invalid under Section 245D(2C). The Commission must be satisfied from the report of the Commissioner and on hearing the applicant that the application not invalid. The Settlement Commission can treat the application as invalid meaning thereby non - est if the Applicant has not made a true and full disclosure and further must disclose how the income has been derived. The expression "invalid" will have to be given a meaning of 'non est', in other words as if not made on and from the inception. If on the material it arrives at a conclusion even prima facie that there was no true and full disclosure it has then the right to declare the application as invalid. Read in this context there is power conferred on the Commission based on the material before it, to form an opinion if the party has concealed facts and/or not made true disclosure during a search operation.

Reliance was placed on the Judgment in Centurion Bank of Punjab Ltd. v. Income-tax Settlement Commission and Ors. . The learned Bench of this Court on the facts held that mere statement that



there was no full and true disclosure is not sufficient. The learned Bench noted that the Commission proceeded on an erroneous assumption that the Commission can entertain the application only if the complexities of the investigations are involved and that a fair reading of Section 245D(1) indicate that there are three circumstances which ought to be considered. This judgment had come up for consideration in Haji N. Abdulla v. Income Tax Settlement Commission and Ors. Writ Petition No. 1427 of 2007 decided on 8th October, 2007. Both these judgments were considering application which were made and disposed off before the Finance Act, 2007 w.e.f. 1st June, 2007. What has to be considered now is Section 245D(2C). We have discussed what is invalid.

Next reference was also made to the judgment in Shakti Metal Box and Anr. v. Union of India and Ors. 204 ITR 450 Punjab and Haryana. The issue in that case was when an application was filed before the Settlement Commission and was admitted whether there was a power in the Commission to order launching of prosecution. The issue therein was completely different from what is in issue here. The ratio of that judgment would be of no assistance to the petitioners. In the instant case the petitioners had come before the Commission on the ground that the income which they were disclosing was income from horse racing. There was material before the Settlement Commission that there were acts which would constitute foreign exchange dealings without following the due procedure of law. If there was prima facie such material it is always open to the Commission to have rejected the application made by the petitioners. Once the decision is taken by the Settlement Commission, which acts in a quasi judicial capacity, it is for the petitioners to point



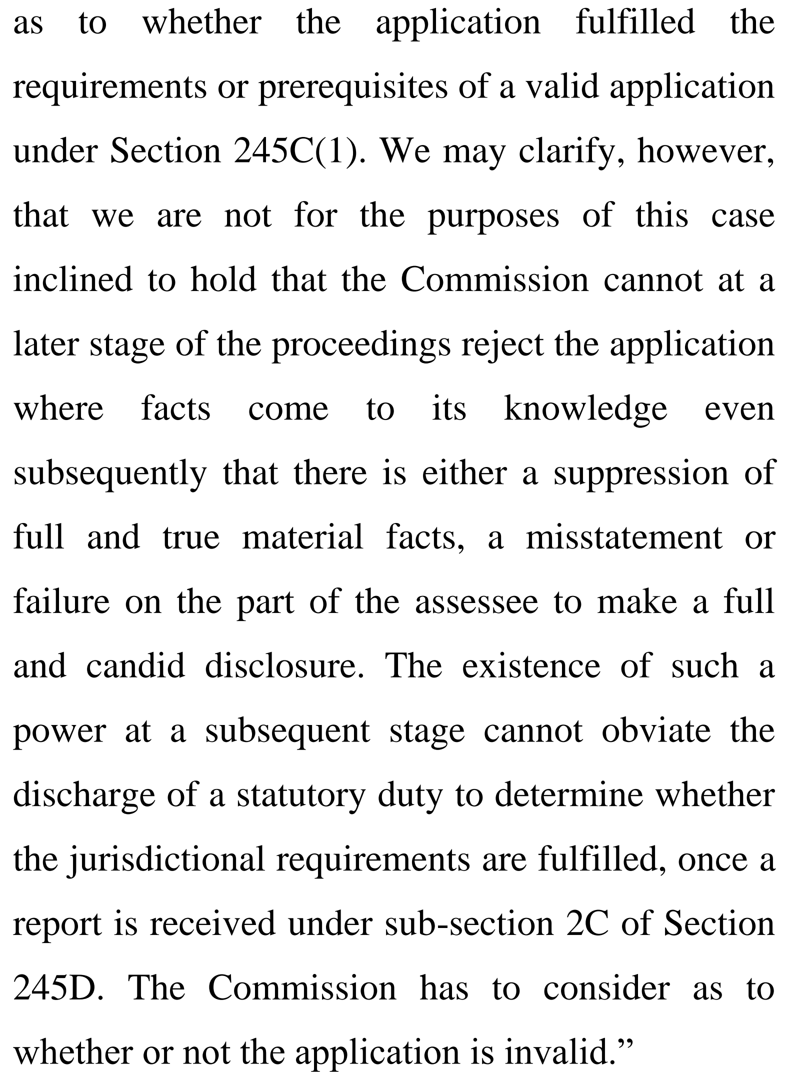
out that there has been either a failure to exercise jurisdiction or the exercise of jurisdiction is based on an assumption not warranted or that the order suffers from an error of law apparent on the face of the record when it holds the application to be invalid. It is only in these cases will this Court exercise its extra ordinary jurisdiction subject of course to the discretion it has. The Section as it now stands does not involve deciding the complexities of a case. The Commission on the material placed before it has treated the application as invalid. It is not a case where the Commission could not have taken such a decision or the decision taken is based on no material and/or decision which is totally perverse warranting this Court to draw an inference that the order suffers from error of law apparent on the face of the record. Even otherwise as explained earlier these were applications made after a search operation when prima facie material of evasion has come on record and is prima facie contrary the source of income which is disclosed. Considering the ratio of Express Newspaper Ltd. (supra) the exercise of jurisdiction in such cases ought not to be normally invoked if material had come on record during the course of search. It is so in this case. In our opinion the order of the Settlement Commission cannot be said to have suffered from either want of jurisdiction, excess of jurisdiction or disclosing an error of law apparent on the face of the record. The contention, therefore, urged on that count has to be rejected.

Further reliance is placed by learned counsel upon a decision of the Bombay High Court in the case of Commissioner of Income Tax (Central) Vs. Income Tax Settlement Commission

(ITSC) 361 ITR 68 (Bom) = 267 CTR 7, paras 19 and 20 of which is quoted below:-

> "19. The judgment of the Supreme Court in Ajmera Housing Corporation is a clear authority for the principle that in order to constitute a valid application under Section 245C(1), there must be a full and true disclosure of income which has not been disclosed and of the manner in which it has been derived besides a computation of the income tax payable on such undisclosed income. It is only upon the satisfaction of the Commission that the application meets the prerequisites of a valid application that the Commission shall have the jurisdiction to proceed. The Commission is bound to determine in the course of its proceedings under sub-section 2C of Section 245D as to whether the application is invalid. The Commission has to be satisfied from the report of the Commissioner and upon hearing the applicant that the application is not invalid. For, it is only then that the Commission has the jurisdiction to proceed.
>
> 20. The error in the order of the Commission in the present case lies in permitting the application to proceed without that satisfaction being recorded by the Commission, which is a fundamental aspect which goes to the root of its jurisdiction to entertain an application under Section 245C. The Commission has proceeded on the basis that at this stage it cannot hold a view that the income offered

in the statement of facts is not a true and full disclosure. In the same vein, the Commission was of the view that the subject of true and full disclosure is open for examination in the proceedings under sub-section 4 of Section 245D. In holding this, the Commission has moved over to the stage of Section 245D(4) without entering upon the fundamental issue as to whether the application was or was not invalid. This exercise had to be carried out by the Commission at the stage of the proceedings under sub-section 2C of Section 245D on the basis of the report submitted by the Commissioner and after hearing the applicant. The Commission has abdicated the discharge of that obligation at that stage, by deferring its consideration at a later stage. The Commission, in our view, was completely in error in holding that unless it is established by a competent authority that the purchases are all bogus, that the application at this stage could not be held to be invalid, though the department may have in its possession certain evidence indicating the fact that the income has not been truly and fully disclosed, or that the quantum of income disclosed in the application in comparison to the claim of the department is meager. The Commissioner had submitted his report under the provisions of sub-section 2B of Section 245D. The Commission could not have declined to determine



as to whether the application fulfilled the requirements or prerequisites of a valid application under Section 245C(1). We may clarify, however, that we are not for the purposes of this case inclined to hold that the Commission cannot at a later stage of the proceedings reject the application where facts come to its knowledge even subsequently that there is either a suppression of full and true material facts, a misstatement or failure on the part of the assessee to make a full and candid disclosure. The existence of such a power at a subsequent stage cannot obviate the discharge of a statutory duty to determine whether the jurisdictional requirements are fulfilled, once a report is received under sub-section 2C of Section 245D. The Commission has to consider as to whether or not the application is invalid."

Learned counsel also relies upon a decision of the Supreme Court in the case of Jyotendrasinhji Vs. S.I. Tripathi & Ors.: 201 ITR 611 = (1993) 111 CTR 370, in para 14 of which it has been held as follows:

"14. It is true that the finality clause contained in Section 245-I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this court under Article 32 or under Article 136, as the case may be. But that does not mean that the jurisdiction of this Court in the appeal preferred directly in this court is any different than what it would be if the assessee had first approached the High Court under Article 226

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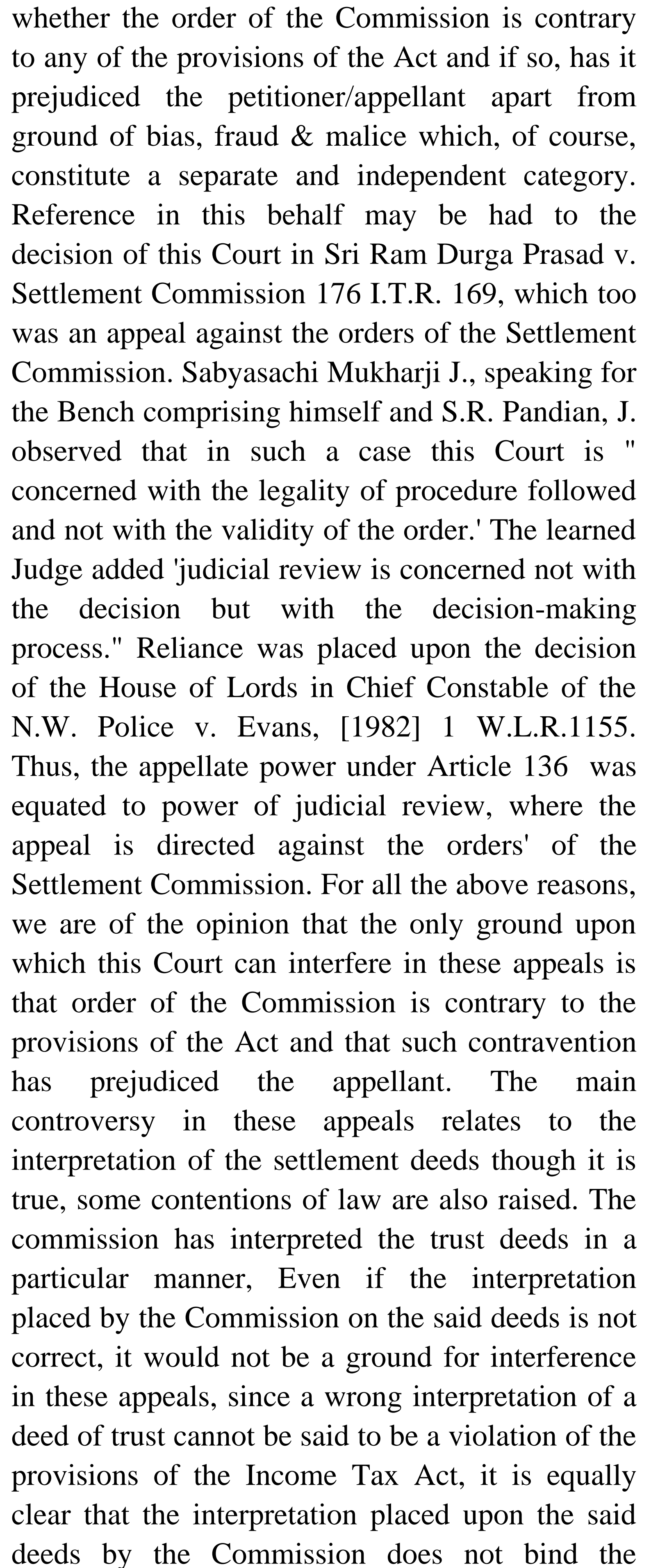
and then come up in appeal to this court under Article 136. A party does not and cannot gain any advantage by approaching this Court directly under Article 136, instead of approaching the High Court under Article 226. This is not a limitation inherent in Article 136 it is a limitation which this court imposes on itself having regard to the nature of the function performed by the Commission and keeping in view the principles of judicial review. May be, there is also some force in what Dr. Gauri Shankar says viz., that the order of commission is in the nature of a package deal and that it may not be possible, ordinarily speaking, to dissect its order and that the assessee should not be permitted to accept what is favourable to him and reject what is not. According to learned counsel, the Commission is not even required or obligated to pass a reasoned order. Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the commission to make a particular order, unless of course the commission itself chooses to, give reasons for its order. Even if it gives reasons in a given case, the scope of enquiry in the appeal remains the same as indicated above viz., whether it is, contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (audi alteram partem) has been incorporated in Section 245-D itself. 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 & 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 I.T.R. 169, which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji J., speaking for the Bench comprising himself and S.R. Pandian, J. observed that in such a case this Court is " concerned with the legality of procedure followed and not with the validity of the order.' The learned Judge added 'judicial review is concerned not with the decision but with the decision-making process." Reliance was placed upon the decision of the House of Lords in Chief Constable of the N.W. Police v. Evans, [1982] 1 W.L.R.1155. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders' of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. The main controversy in these appeals relates to the interpretation of the settlement deeds though it is true, some contentions of law are also raised. The commission has interpreted the trust deeds in a particular manner, Even if the interpretation placed by the Commission on the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be said to be a violation of the provisions of the Income Tax Act, it is equally clear that the interpretation placed upon the said deeds by the Commission does not bind the

> authorities under the Act in proceedings relating to other assessment years. ……..”

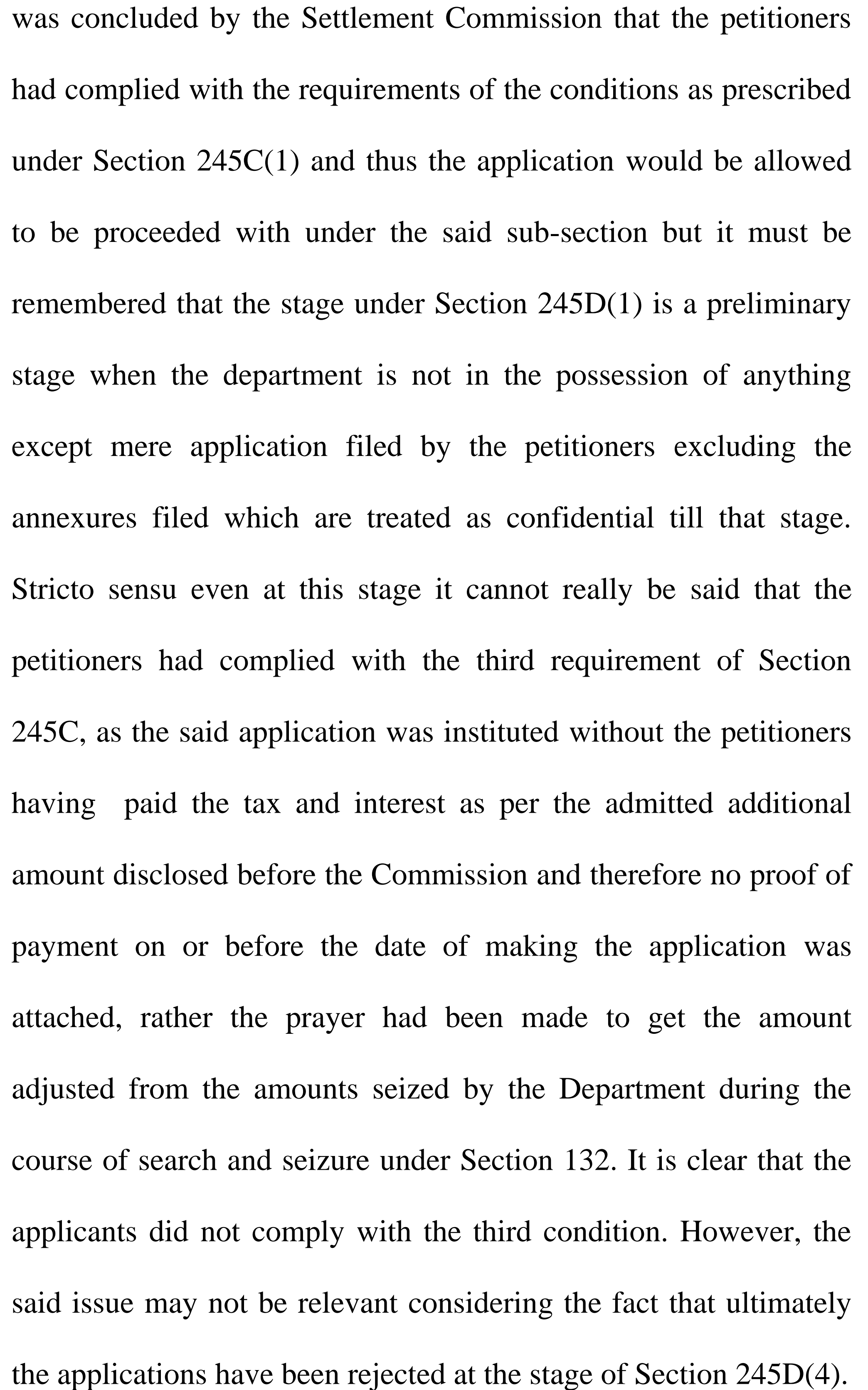
Finally reliance is placed by learned counsel upon the decision of the Allahabad High Court in the case of Smt. Neeru Agarwal Vs. Union of India & Ors.: 330 ITR 422 = (2010) 231 CTR 153, in para 18 of which it has been held as follows:-

> “18. The aforesaid section should be read conjointly with s. 245-I of the Act which attaches finality and conclusiveness to every order of settlement. Legislative intent is loud and clear. The order passed by the Settlement Commission has been treated to be conclusive. It can be recalled only under the circumstance if it is subsequently found by the Settlement Commission that the order was obtained by fraud or misrepresentation of facts, as per sub-s. (6) of s. 245D of the Act. On a conjoint reading of sub-ss. (4) and (6) of s. 245D and ss. 245F(4) and 245-I, it would appear that except in the case of fraud or misrepresentation of facts, the order passed by the Settlement Commission is final and conclusive and binding on all the parties. This appears to be so because the Settlement Commission was constituted to reduce the lifespan of litigation and to provide speedy remedy to an assessee who voluntarily discloses his/her undisclosed income for hassle free settlement of the case. The very use

of the words ‘settlement of cases” is indicative of the fact that the provision has been made to settle the case in its entirety forever and leave no issue open for subsequent decision.”

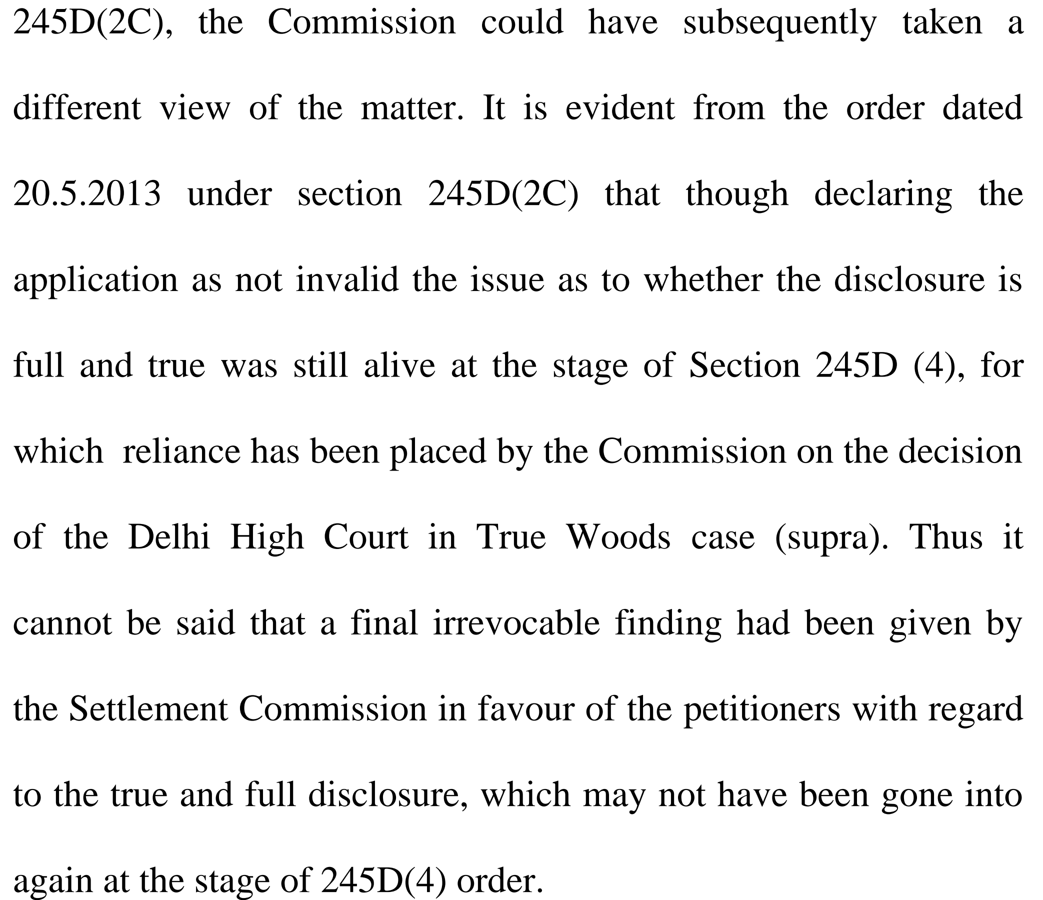
We have considered the submissions of learned counsels for the parties and perused the materials on the record. It is evident from the decision of the Karnataka High Court in the case of N. Krishnan (supra), relied upon by learned counsel for the petitioners, that in writ proceedings the decision of the Settlement Commission can be interfered with only if there has been grave procedural defect or violation of the mandatory procedural requirements of the provisions in Chapter-19-A and/or violation of the rules of natural justice, or if it is found that there has been no nexus between the reasons given and the decision taken by the Settlement Commission and further the writ Court cannot interfere either with an error of fact or error of law alleged to have been committed by the Settlement Commission.

It is evident that the matter cannot be argued as though it is an appeal from the decision of the Settlement Commission, as it has been repeatedly held that judicial review is of the decision making process and not of the decision itself. It is true in the present matter that in the order under Section 245D(1) it



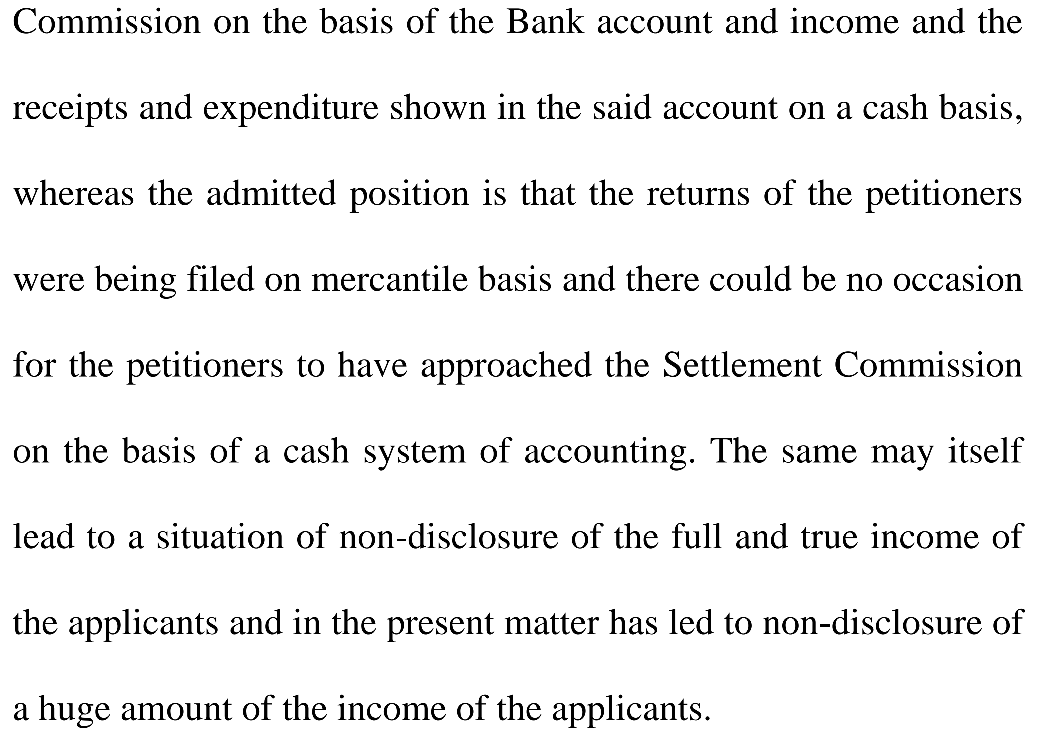
was concluded by the Settlement Commission that the petitioners had complied with the requirements of the conditions as prescribed under Section 245C(1) and thus the application would be allowed to be proceeded with under the said sub-section but it must be remembered that the stage under Section 245D(1) is a preliminary stage when the department is not in the possession of anything except mere application filed by the petitioners excluding the annexures filed which are treated as confidential till that stage. Stricto sensu even at this stage it cannot really be said that the petitioners had complied with the third requirement of Section 245C, as the said application was instituted without the petitioners having paid the tax and interest as per the admitted additional amount disclosed before the Commission and therefore no proof of payment on or before the date of making the application was attached, rather the prayer had been made to get the amount adjusted from the amounts seized by the Department during the course of search and seizure under Section 132. It is clear that the applicants did not comply with the third condition. However, the said issue may not be relevant considering the fact that ultimately the applications have been rejected at the stage of Section 245D(4).

The next question would be whether the finding regarding there being true and full disclosure at the stage of Section



245D(2C), the Commission could have subsequently taken a different view of the matter. It is evident from the order dated 20.5.2013 under section 245D(2C) that though declaring the application as not invalid the issue as to whether the disclosure is full and true was still alive at the stage of Section 245D (4), for which reliance has been placed by the Commission on the decision of the Delhi High Court in True Woods case (supra). Thus it cannot be said that a final irrevocable finding had been given by the Settlement Commission in favour of the petitioners with regard to the true and full disclosure, which may not have been gone into again at the stage of 245D(4) order.

The question then would be as to whether there was some material before the Commission to have arrived at the said conclusion. In our view such materials are to be found in the further reports of the Commissioner, particularly the report under Section 245D (3) wherein the fact regarding the petitioners not having disclosed the turn over with regard to the huge amount of bills which had been treated as liability and contingent liability in the audited accounts of the BCCL for the area in question with respect to the petitioners. It is not in dispute that the petitioners had not disclosed the said turn over. The stand taken by the petitioners is that they had filed their applications before the Settlement



Commission on the basis of the Bank account and income and the receipts and expenditure shown in the said account on a cash basis, whereas the admitted position is that the returns of the petitioners were being filed on mercantile basis and there could be no occasion for the petitioners to have approached the Settlement Commission on the basis of a cash system of accounting. The same may itself lead to a situation of non-disclosure of the full and true income of the applicants and in the present matter has led to non-disclosure of a huge amount of the income of the applicants.

This Court finds it difficult to accept the submission of learned counsel for the petitioners that the question of the system of accounting was to be considered at the final stage of determination of income and not at the stage when the application of the petitioners had been rejected on such grounds. Such contentions are not permissible as it is not a case where shifting from the mercantile system to cash system would not lead to any substantial difference in the ultimate income rather in the mercantile system of accounting the incomes would have to be shown on an accrual basis which has admittedly not been done by the petitioners. Thus, it was open to the Settlement Commission to have considered it as a failure to make full and true disclosure by the petitioners.

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Having arrived at the said conclusion it may not be necessary for us to deal with the other issues raised by learned counsel for the petitioners but we may consider them shortly.

It is true that the observations of the Supreme Court in B.N. Bhatchargee case (supra) may not be wholly relevant in view of the very different legal provisions and factual matrix in which the said case had been decided. Undisputedly there has been a change in the law since then and the power of the Commissioner to practically veto the settlement before the Settlement Commission has been taken away. But the principles of making full and true disclosure of income and the manner in which the income has been derived remains. In the present matter even the manner in which the income has been derived does not appear to fully meet the requirements of law. The petitioners claim to have been carrying the business of civil construction related work, repairing work of plant and machinery and consultant work on the basis of procuring contract against tender floated by the BCCL. It is not in dispute that such tenders were open tenders in which there would be other participants and the contract would be awarded to the lowest tenderer as admitted by the petitioners themselves. Evidently, the work of such tenders would not lead to profits in the range of very high percentages including net profit of 98.31%,

86.99% and 75.99% as have been shown in the table included in the order of the Settlement Commission.

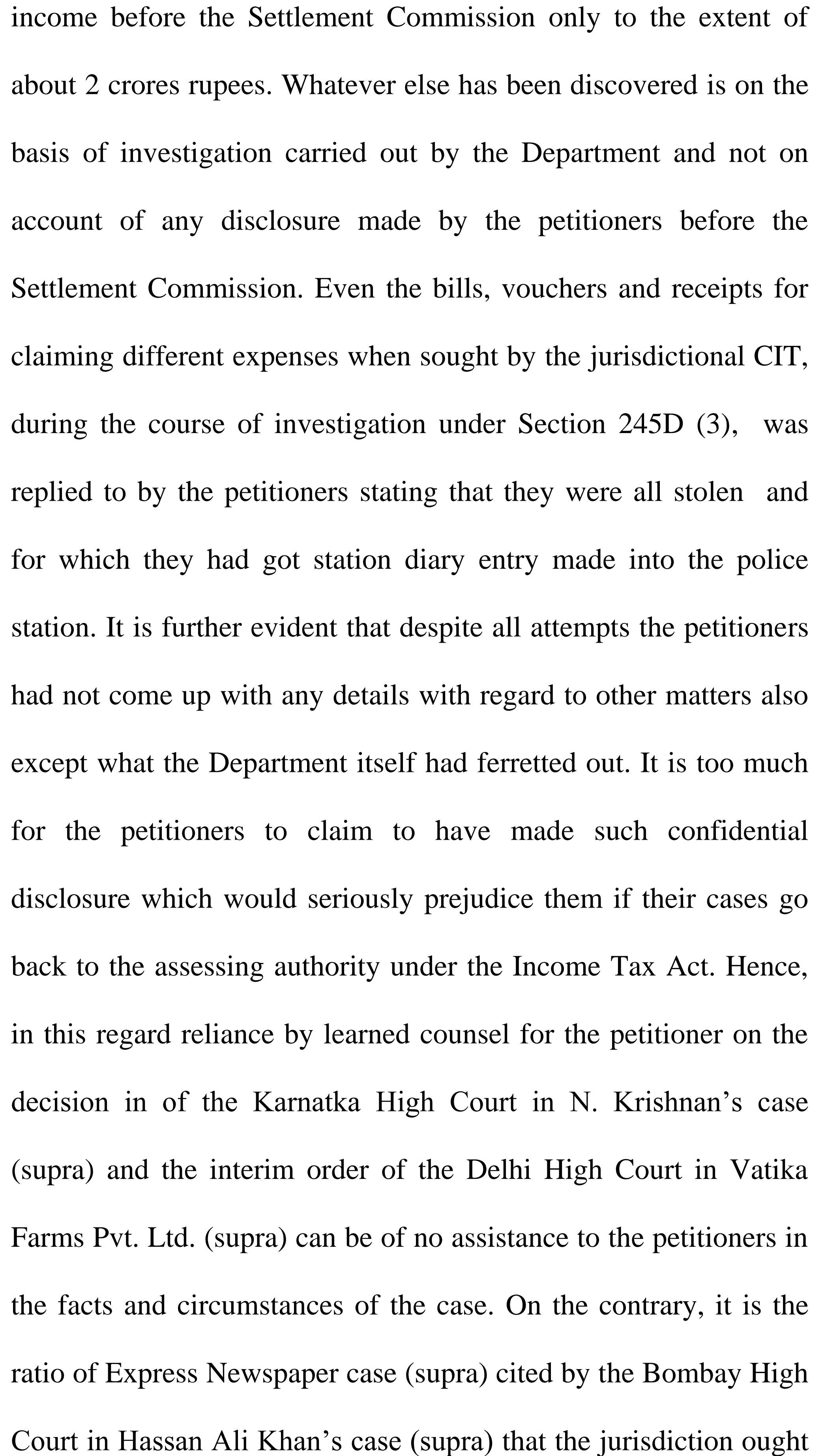
In view of the aforesaid facts it is not open to the petitioners to argue that the Income Tax Department or the Settlement Commission ought to be only concerned with the income tax to be collected on the income disclosed and not the nature of the transactions even if they amounted to a criminal act. The provisions of Section 245C make it very clear that not only full and true disclosure of income has to be made but also the manner in which the income has been derived. It is true that grounds of criminality may not lead to a situation where the Settlement Commission shall refuse to go ahead with the settlement, otherwise there would have been no occasion to confer upon it powers under Section 245H to grant immunity from prosecution and penalty, but the same does not mean that the applicant before the Settlement Commission can choose to evade the requirement of disclosing the manner in which the income has been derived. The only fact that has been admitted by the respondents even in the counter affidavit is that the source of income of the petitioners is from the BCCL. This Court does not find any cogent material produced by the petitioners with regard to the manner in which the income has been derived and thus we see

no reason to consider the conclusion of the Commission as suffering from any infirmity.

We do not find any substance in the submission of the learned counsel for the petitioners that the Settlement Commission must record categorical finding that the incomes were the proceeds of misappropriation. It is quite open to the Settlement Commission not to enter into any such arena for rejecting the application on account of non-compliance of the requirement with regard to the full disclosure.

We also find no substance in the facts of the present case with regard to the argument regarding disclosure before the Settlement Commission being of confidential nature and if the settlement is rejected as in the present matter then all the documents and information made in good faith to the Settlement Commission shall be handed over to the adversary of the petitioner, namely, the Income Tax Department.

As a matter of fact, in the present case the petitioners had already disclosed before the assessing authority in the returns filed under Section 153A and 139 practically the entire amounts which had come out during the search and seizure as undisclosed income of the petitioners which was running into almost 200 crores rupees and thereafter they declared additional



income before the Settlement Commission only to the extent of about 2 crores rupees. Whatever else has been discovered is on the basis of investigation carried out by the Department and not on account of any disclosure made by the petitioners before the Settlement Commission. Even the bills, vouchers and receipts for claiming different expenses when sought by the jurisdictional CIT, during the course of investigation under Section 245D (3), was replied to by the petitioners stating that they were all stolen and for which they had got station diary entry made into the police station. It is further evident that despite all attempts the petitioners had not come up with any details with regard to other matters also except what the Department itself had ferretted out. It is too much for the petitioners to claim to have made such confidential disclosure which would seriously prejudice them if their cases go back to the assessing authority under the Income Tax Act. Hence, in this regard reliance by learned counsel for the petitioner on the decision in of the Karnatka High Court in N. Krishnan's case (supra) and the interim order of the Delhi High Court in Vatika Farms Pvt. Ltd. (supra) can be of no assistance to the petitioners in the facts and circumstances of the case. On the contrary, it is the ratio of Express Newspaper case (supra) cited by the Bombay High Court in Hassan Ali Khan's case (supra) that the jurisdiction ought

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not to be normally invoked if material had come on the record during course of search, that would apply to the present matter.

For the aforesaid reasons we also do not find any substance in the submission of learned counsel for the petitioners that the Settlement Commission has shirked its responsibility by leaving it to the Assessing Officer to decide the issue on the same facts. Since the basic requirements of Section 245C have been found to have been not met by the Settlement Commission in view of the materials before it, there could have been no question of the Settlement Commission to have proceeded further in the matter except to reject the applications of the petitioners.

Thus, in the light of the aforesaid discussions, we do not find any reason to interfere with the impugned order of the Settlement Commission.

The writ applications are, accordingly, dismissed.

(Ramesh Kumar Datta, J)

I agree.

(Anjana Mishra, J)

S.Pandey/-

AFR/NAFR	
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