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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 3373/2013 & CM No.6413/2013 (stay)**

**RADICO NV DISTILLERIES
MAHARASHTRA LTD.**

..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate
with Ms. Kavita Jha and Mr. Vaibhav
Kulkarni, Advocates.

versus

**COMMISSIONER OF INCOME TAX (CENTRAL)-III,
NEW DELHI & ORS**

..... Respondents

Through: Mr. Rahul Chaudhary, Senior
Standing Counsel with Mr. Sanjay
Kumar, Junior Standing Counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

% **09.10.2017**

Prathiba M. Singh, J.:

1. The present petition impugns the order dated 3rd April, 2013 passed by the Income Tax Settlement Commission (hereinafter referred to as the 'ITSC') under Section 245D (2C) of the Income Tax Act, 1961 (*hereinafter referred to as 'the Act'*) in application nos. DL/DC53/2012-13/75-IT & DL/DC53/2012-13/76-IT for the Assessment Years ('AY') 2005-06 to 2011-12. By the impugned order, the ITSC rejected the application for settlement of the pending cases filed by the Petitioner.

Brief Facts

2. A search was conducted at the business premises of the Petitioner on 15th February, 2011 under Section 132 of the Act. Pursuant to the search,

proceedings were initiated on 27th January, 2012 under Section 153A for the AYs 2005-06 to 2010-11. At that time, the assessment proceedings for AY 2011-12 were also pending before the Assessing Authority.

3. While the proceedings under Section 153A of the Act were pending, the Petitioner approached the ITSC under chapter XIX-A of the Act. In its applications before the ITSC, the Petitioner made a disclosure of additional income of Rs.11,60,96,390/- and paid additional tax and interest payable thereon aggregating to Rs. 97,29,856/-. The applications also contained the confidential portion which provided the details relating to the mode and manner of earning such additional income. The Petitioner also apprised the Assessing Officer ('AO') of the factum of filing of settlement applications on 30th January, 2013.

4. Apart from the Petitioner's application, applications were also filed by the group companies and individuals on whom searches were carried out. In total the said applicants have declared a sum of Rs.104,10,90,845/-. A consolidated order was passed by the ITSC on 8th February, 2013 directing that *"Since the applicants have prima-facie fulfilled the conditions prescribed under Section 245C (1) of the Act, the applications are allowed to be proceeded with."*

5. The ITSC had simultaneously called for a report from the Commissioner of Income Tax ('CIT') which was submitted on 18th March, 2013. In this report, the 'CIT' averred that the Petitioner has received substantial amount of share capital from bogus/non-existent companies. The report further

states that the Petitioner has received the share capital from Enn Vee Holdings Pvt. Ltd. (*hereinafter referred to as 'Enn Vee'*) which in turn has received the entire share holding from bogus/non-existent/paper/briefcase companies. The relevant portions of the report are set out as under:

“It was alleged that M/s Radico NV Distilleries Maharashtra Ltd. has received substantial amount of share-capital from bogus/ nonexistent companies. Perusal of the list of allottees of M/s Radico NV Distilleries Maharashtra Ltd. shows that it has received Share capital from M/s Enn Vee Holdings Pvt. Ltd., in the following manner:

F.Y.	Shares Issues	Amount Received (Rs. \ Lacs)
2007-08	5000	400
2008-09	320000	320
2009-10	880000	880
2009-10	544000	544
Total	1749000	2144

It has been found that M/s Enn Vee Holdings Pvt. Ltd. has received entire shareholding from bogus/ non-existent/ paper/ briefcase companies and is in fact the unaccounted money utilized by the assessee itself. Further, M/s Enn Vee Holdings Pvt. Ltd. is not carrying out any business activities and is just a conduit for transfer of unaccounted money received through a channel of Entry operator companies. Thus, the entire receipt of Rs. 21.44 crore in the form of share-capital by M/s Radico NV Distilleries Maharashtra Ltd. from M/s Enn Vee Holdings Pvt. Ltd. is unaccounted investment. However, it would be pertinent to bring on record that M/s Enn Vee Holdings Pvt. Ltd. is a group company of the NV Group of cases which too was covered in the search and has already moved to the Settlement Commission separately.”

6. The report concludes that a total of Rs.104,10,90,845/- was the total additional income as disclosed by the Petitioner and all the other applicants. However, according to the CIT, the total of the undisclosed income under different heads as per seized documents is Rs.105,57,12,727/-. Thus, the CIT reported that there was a failure by the Petitioner to make a full and true disclosure of its income before the ITSC as also a failure to disclose the manner in which the income was derived and the additional amount of income tax payable on such income.

7. Pursuant to this report, the ITSC passed the impugned common order dated 3rd April, 2013 rejecting the applications of the Petitioner as also that of M/s. Radico Khaitan Ltd. The reasons for rejection are recorded as under:

“1. Applicant has not filed reply to questionnaire till date even though the questionnaire was issued to him by the A.O. several months back. The learned Counsel for the applicant when asked to explain the reasons for not giving a reply even after lapse of several months merely stated that as the information sought was routine the reply was not given. In our view if the information sought was routine there should not have been any reason for the applicant to furnish the same without delay.

2. Applicant has taken contradictory stand regarding whether it is a successor company or a new set up to explain the sale of assets claiming that it is a successor company but regarding issue of fresh share capital it was stated that it was in the process of set up.

3. In Directors report at page 47 of Radico Khaitan Paper book filed on 01.04.2013 it is mentioned that the Directors are trying to strengthen the financial position of Enn Vee Holdings Ltd. This reflects

adversely on the capacity of Enn Vee Holdings Ltd. to advance a sum of Rs. 21.44 Crores to the applicant group. At page 64 of the Paper Book it is noted that in the year 2009 Enn Vee Holdings Ltd. had Nil income and in the year 2010 it had income of just Rs. 1.08.

4. Regarding joint venture agreement filed by the applicant company at page 1 of the written submission filed on 01.04.2013 a joint venture and share holders agreement is claimed to have been entered into in which the applicant and Enn Vee Holdings Ltd. amongst others are parties but at page 67 in the Auditors report under the column relating to joint venture it is mentioned as 'Nil'. Obviously this contradicts the stand of the applicant of having entered into a J.V. The learned Counsel informed that this is due to mistake by the statutory auditor, it is seen from page 1 of CIT's report dated 18.03.2013 that the applicant had received share capital worth Rs. 21.44 crores from Enn Vee Holdings Ltd. which is a company having poor financial health as admitted by their Director's report at page 47 of the Paper Book filed on 01.04.2013 by the applicant where it is mentioned that the directors are trying to strengthen the financial position of Enn Vee Holdings Ltd. This reflects adversely on the capacity of Enn Vee Holdings Ltd. to advance a sum of Rs. 21.44 Crores to the applicant group. At page 64 of the Paper Book it is noted that in the year 2009 Enn Vee Holdings Ltd. had Nil income and in the year 2010 it had income of just Rs. 1.08. Obviously, such a company having poor resources could not have advanced a sum of Rs. 21.44 crores to the applicant and as such the Commission is of the view that this amount should have been declared by the applicant in the Settlement Application.

5. The applicant had entered into an agreement regarding bottling with N.V. Distilleries and Breweries Pvt. Ltd. on 12.04.04 on stamp paper. However, an

amendment to this agreement dated 12.04.2004 was made on 01.06.2004 stating that it will come into effect from 01.04.2004, which is even before the date of main agreement signed on 12.04.2004. It is also note worthy that the amending agreement dated 01.06.2004 is on letter head of the applicant and not on stamp paper. The agreement to amend apparently has no legal validity and cannot be accepted as the genuine agreement. In view of this the out of book sales of Rs.3,81,56,000/- as worked out by CIT at page 4 of his report dated 18.03.2013 should have been declared by the applicant as its income but it has failed to do so and consequently has not made a full and true disclosure.”

8. This order has been impugned in the present writ petition on several grounds including (a) That the ITSC does not have the powers of reviewing its earlier order (b) that there was no failure by the Petitioner to make full and true disclosure of its income & (c) The application of Enn Vee against whom the allegation has been made, that it had received the bogus shares and that it is a conduit, is also currently pending before the ITSC and therefore, the Petitioner's case be also taken up along with the case of Enn Vee by the ITSC itself. Before this Court, the first issue is not pressed or argued.

Submissions of the Petitioner

9. The main argument of Mr. Ajay Vohra, learned Senior Advocate appearing on behalf of the Petitioner is that the application of Enn Vee for settlement of its case is pending before the ITSC and since the Petitioner has been non-suited on the ground that the Enn Vee had received the bogus shares, it would be appropriate for the ITSC to consider both the

applications i.e. of the Petitioner and of Enn Vee together. Mr. Vohra has relied upon the Joint Venture and Shareholding Agreement to submit that the predecessor in interest of the Petitioner was Shetkari Baliraj Sugars Ltd. (*hereinafter referred to as 'Shetkari'*) in which another entity Ridhi Sidhi Shares Pvt. Ltd. (*hereinafter referred to as 'Ridhhi Sidhi'*) had 100% of the shareholding. By this agreement, the shareholding of Ridhhi Sidhi was being diluted to 32% and the remaining investments were to be made by Enn Vee and other entities. Shetkari is now the Petitioner's company.

10. According to Mr. Vohra, the audited accounts of both the companies i.e. the Petitioner and Enn Vee reflected the investment made and thus there was no failure by the Petitioner to make a full and true disclosure to the ITSC. He specifically relied upon the balance sheet dated 31st March, 2009 which lists Radico Khaitan, Ridhi Sidhi and Enn Vee as the companies which are contributing to the share capital of Shetkari - i.e., the Petitioner. Similarly, Mr. Vohra relies upon the audited accounts of Enn Vee to show that Enn Vee's investment in the Petitioner company is also duly reflected. Mr. Vohra then submitted that the Revenue does not dispute that the application filed by Enn Vee is also pending before the ITSC and hence it would be appropriate that the ITSC considers both the applications together so that the interest of the Revenue is also protected. Mr. Vohra relies upon the judgment of this Court dated 17th May, 2017 passed in W.P.(C) 5424/2016 (*Bindlas Duplux Ltd. v. Principal Commissioner of Income Tax (Central) Delhi-3 & Ors.*) to submit that under a similar situation this Court had observed that “*It was, therefore, not possible to examine the state of affairs of any one company of the group in isolation of the entire group.*”

Submissions of the Revenue

11. Mr. Rahul Chaudhary, learned Senior Standing Counsel appearing on behalf of the Revenue submits that the powers of the ITSC to review its order are not in dispute in the present case as the Petitioner is not pressing the same. In any event, as per the submission of Mr. Chaudhary the ITSC has full powers to review its own order.

12. Insofar as the merits of the case are concerned, Mr. Chaudhary submits that there was a failure by the Petitioner to make a full and true disclosure. He specifically relies upon the contradictory stand taken by the Petitioner which is recorded as reason no. 2 in the impugned order. He further submits that the AO had asked several questions to the Petitioner which were not answered by it. Mr. Chaudhary relies upon how on the one hand the Petitioner claims depreciation of the assets of the company and on the other hand the Petitioner also claims that the company was in the process of being set up. These two are completely contradictory and hence the ITSC, according to Mr. Chaudhary, has rightly rejected the applications of the Petitioner. He submits that the purpose with which the Joint Venture Agreement was entered into was merely to transfer manufacturing licenses issued by the Government of Maharashtra for operating the distillery. He, thus, submits that the Petitioner did not satisfy the threshold requirement of the full and true disclosure.

Analysis and Findings

13. The reasons given by the ITSC for rejection of the application that have been canvassed before the Court are primarily threefold. First that the

questionnaire issued by the AO was not answered. Secondly, there was a failure to make a full and true disclosure and thirdly that the Petitioner was taking contradictory stands.

14. Insofar as the first reason is concerned, once the ITSC proceeds with the settlement application, as per Section 245D (4), the proceedings before the AO comes to a standstill. This is clear from a reading of Section 245F (2) of the Act. Thus, no adverse inference can be drawn from the fact that the questionnaire issued by the AO was not answered.

15. Insofar as the second reason i.e. full and true disclosure is concerned, even the report of the CIT does not point to a great variance in the income disclosed. The difference between the two amounts as disclosed by the Petitioner and as deduced by the CIT from the documents seized is approximately Rs 14,621,882/- which constitutes less than 1.5% difference in the amount disclosed and the amount computed by the CIT. It is possible that the said amount can be reconciled before the ITSC if the application is proceeded with and heard finally. The difference is too minimal when compared to the total amount disclosed, to constitute a failure to make full and true disclosure of the income.

16. Coming to the main plank of Mr. Chaudhary's submission that the Petitioner had taken a contradictory stand, reason no.2 given in the impugned order reads as under:

“Applicant has taken contradictory stand regarding whether it is a successor company or a new set up to explain the sale of assets claiming that it is a successor

company but regarding issue of fresh share capital it was stated that it was in the process of set up.”

17. A perusal of the above reveals that the ITSC appears to have proceeded on a wrong premise. There is no doubt that Shetkari is an earlier avatar of the Petitioner. The Joint Venture Agreement clearly shows that 100% of shareholding of Shetkari was owned by Ridhi Sidhi and that was intended to be diluted with investments from the other companies including Enn Vee. The application of Enn Vee is pending before the ITSC. The primary ground for rejection is that Enn Vee is a conduit and that it has received the substantial amount of share capital from bogus/non-existent companies. If this is so, it would have consequences for Enn Vee as well. The dismissal of the Petitioner's applications by the ITSC would result in a failure to examine the matter comprehensively and in entirety. Even if what is contained in the report is indeed true which would become clear after the proceedings at the ITSC are concluded, appropriate orders can be passed by the ITSC in accordance with law in respect of such bogus companies, if any. The rejection of the applications of the Petitioner cannot be done on this sole ground and in fact it would be appropriate if the Petitioner's case is heard and decided along with case of Enn Vee.

18. Finally, the contradiction which has been highlighted in reason no.2 above appears to misunderstand the situation. It is not in dispute that the Petitioner company was undergoing restructuring. The restructuring of the shareholding is different from a company being newly setting up. The term 'process of setup' is merely a misdescription by the Petitioner of the restructuring process, in its response dated 1st April 2013, to the notice of

the ITSC dated 8th February 2013. The ITSC appears to have borrowed this terminology from the said document and has non-suited the Petitioner on that ground. What indeed is clear from the facts is that the shareholding pattern of the Petitioner company was being restructured/changed and it was not an establishment of a new company. While the shareholding of any company is being changed, there is no bar on depreciation being claimed as permissible in law. Thus, this could not be a ground for rejection of the Petitioner's applications.

19. In view of the above facts and following the decision in ***Bindlas Duplux (supra)*** this Court deems it appropriate to set aside the impugned order of the ITSC. It is clarified that this Court has not examined the merits of the dispute which shall be examined by the ITSC in accordance with law. The applications filed by the Petitioner shall be proceeded with and considered by the ITSC along with the application filed by Enn Vee.

20. The writ petition is allowed in the above terms. The pending stay application also stands disposed of.

PRATHIBA M. SINGH, J

S.MURALIDHAR, J

OCTOBER 09, 2017

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