

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 23.01.2017
Pronounced on: 15.05.2017

+ **W.P.(C) 5185/2016**

SH. VISHWA NATH GUPTA

..... Petitioner

Through : Sh. C.S. Aggarwal, Sr. Advocate with
Sh. Prakash Kumar, Advocate.

versus

**PRINCIPAL COMMISSIONER OF INCOME TAX CENTRAL,
KANPUR AND ANR.**

..... Respondents

Through : Sh. Zoheb Hossain, Sr. Standing
Counsel with Sh. Deepak Anand, Jr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner seeks a direction to quash the order of 03.05.2016, passed by the Income Tax Settlement Commission, Additional Bench -II, New Delhi (hereinafter referred to as "Settlement Commission" or "ITSC") under Section 245D(2C) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). The said order had rejected the petitioner's application under section 245C(1) of the Act. The petitioner also claims a writ of mandamus directing the ITSC to treat the application under Section 245 C (1) as valid and commence the proceedings before it from the same stage as on 03.05.2016 and also consequential and appropriate directions to restrain the

income tax authorities from taking any action under the Act, till disposal of its application by the ITSC.

2. The brief facts are that a search and seizure operation was carried out under Section 132(1) of the Act against M/s. Rotomac and Anand/Dolphin Developers Group on 25.06.2014. The search was conducted at the business premises of those companies and their directors, associates, etc. After the search, the cases of all such assesseees were centralized with the office of the Assistant Commissioner of Income Tax, Central Circle-II, Kanpur by order dated 29.07.2014 passed by Principal Commissioner of Income Tax-II, Kanpur. An assessment order dated 31.03.2016 under Section 148/143(3) of the Act was made by the Assistant Commissioner of Income Tax, Central Circle-II, Kanpur in the case of M/s. Dolphin Developers Ltd. (one of the group companies). Notices under Section 153A were issued by the Assessing Officer (situated at Kanpur), to the companies as well as individuals directors/partners for A.Y. 2009-10 to 2013-14. Returns in response to the said notices were filed by the respective parties. In the backdrop of these developments, the petitioner filed an application under Section 245C of the Act before the Income Tax Settlement Commission, Additional Bench-II, New Delhi.

3. On 18.03.2016, after considering the parties' submissions, the ITSC passed the an order allowing the settlement application to be proceeded with, after recording that it was *prima facie* maintainable, under Section 245 D(1) of the Act. The ITSC observed, *inter alia*, that:

"6. During the course of hearing, the learned Authorized representative explained the pendency position, manner of earning undisclosed income in this case and background of filing the Settlement Application. The Ld. AR has submitted that

the application filed by Shri Vishwa Nath Gupta, in the status of 'specified person' - is covered within the meaning of clause (i) of proviso to sub-section (1) of Section 245C of the Income Tax Act as the tax payable exceeds Rs.50 Lacs. The intimation to the AO in Form No. 34BA has been made on 10.03.2016 complying with the requirements u/s 245C(4) of the Income Tax Act.

7. *The Ld. A.R. submitted that additional income has been declared on the basis of compilation of the seized material printouts taken from the Hard-Disk (HD-33), assessment year wise working of additional income which has been tested and cross checked by "Net Asset Method" has been offered for taxation. Accordingly, as the figure arrived at by 'net assets' method is more, that figure has been offered as income.*

8. *It was pointed out by the Bench that in schedule-II of 'Income-Outgoings' for F.Y. 2008-09 the opening balance has been whereas in para 28 of SOF (Page 92) and elsewhere it has financial affairs of the applicant are 'in continuation' with the earlier years. It was also brought to the notice of the applicant that in the 'compilation certificate' on page 160 of SOF, the applicant's C.A has stated, inter-alia, that "there are variations in the opening balances as are appearing in the ledger accounts for the F.Y. 2008-09 (under reference) as compared to the closing balances of the preceding year i.e. F.Y. 2007-08.". It was brought to the notice of the A.R., that the complete information in this regard i.e. the quantum of difference in the closing balance and opening balance has not been disclosed by the applicant. It was further pointed out by the Bench that in the 'Incoming and Outgoing' statement no narration or description is provided in the report of the outgoings because of which the Bench is unable to appreciate whether an outgoing is for business purpose or if it is merely on application of money or an investment. The A.R. fairly admitted the deficiencies/discrepancies pointed out to him on the above noted issues. He under took to provide clarification/information on these two aspects during section 245D(2C) proceedings, to make the issues clear.*

9. *After considering the facts on record and submissions of the Ld. AR, we are satisfied that the applicant, prima-facie, fulfills the conditions prescribed u/s 245C(1) of the I.T. Act. The issues arising, without prejudice, would be considered at the subsequent stage of proceedings. Accordingly, the Settlement Application is allowed to be proceeded with."*

4. During the proceedings, a report was submitted by the Principal Commissioner under Section 245D(2B) of the Act, on 13.04.2016. This report suggested that the claim made by the applicant that the amount declared by him to belong to an entity, was unsubstantiated and that the moneys were unaccounted sums collected by the other assessee who were subjected to search. The ITSC considered the submission of parties, and by the impugned order rejected the petitioner's application. It held, in the impugned order, that:

"We have considered the arguments and written submissions made by both the sides. The main issue that emerges out of the above discussion, for our consideration, is whether the additional income declared before the Settlement Commission belongs to Sh Vishwanath Gupta the applicant or to various companies of Dolphin Group as per the stand taken by the Pr. CIT in his report under Section 245D(2B) of the I.T. Act dated 13.04.2016. It is quite apparent that the key person behind the whole group is Shri Vishwanath Gupta. It is also a fact that a number of companies, belonging to the group, were promoted for the purposes of acquisition, development and sale of real-estate as their main objective. These companies are separate legal entities who have undertaken 23 projects towards the furtherance of the objectives of real-estate development. Besides M/s Dolphin Developers Ltd., these companies are M/s Gam Builders, M/s Pragati Structure Pvt. Ltd, M/s Dolphin Infra Project Ltd., M/s Dolphin Structures Ltd., M/s Illec Trading Pvt. Ltd. and M/s Ashwariya Coloniser Pvt. Ltd. These

are separate entities carrying out their activities as mandated by their Articles of Association and are assessed to tax as independent tax payers.

7.1 On the other hand, M/s ABC (of which Mr. Vishwanath Gupta claims to be the controlling person) appears to be an amorphous entity, and certainly not a legal entity. The transactions appearing on seized papers particularly the hard disc marked as HD-33, and the excel sheet forming a part of these accounts, clearly show that the unaccounted monies received are against a particular property in a particular project against each buyer. No evidence has been brought before us to substantiate the claim of the applicant that the unaccounted money related to "special and specific requirements of the customers/investors in the projects". This being so, the cash components paid by the investors has only gone towards the cost of the individual flats and is a part of the total cost of the flat. As this money relates to a particular project/property of a particular company it should form part of its accounts as each company is a separate taxable entity for income tax purposes. The accounts of such receipts might have been kept at single place for convenience of the main person handling the affairs of these companies. Keeping all such accounts at one place for the sake of convenience cannot by any stretch of imagination, be considered as relating to, and belonging to the person maintaining it. This fact only leads to the conclusion that money under consideration has been received by the said group companies and any resultant profit or loss arising out of any subsequent transactions rightfully belong to the company concerned.

7.2 In this background, the claim made by the applicant that the entire income, accounted and unaccounted, in fact belongs to him and not to the various recognized and separate legal and taxable entities whose names figure in the seized papers, appears to farfetched, and lacks credibility.

7.3 After careful consideration of the above facts and in this circumstances of the case, we hold that additional income declared in the settlement application filed by Sh. Vishvvanath Gupta does not rightfully belong to him and therefore, the same cannot be considered in his hands for the settlement of income u/s 245D(4) of the I.T. Act. It is, therefore, held that the applicant has failed to make full and true disclosure of his income. Besides the manner of earning of such income in his hands remains unexplained. Thus the applicant fails on both vital parameters, as laid down, in the section 245C. Accordingly, we hold that Settlement Application filed by the applicant in prima-facie 'invalid', and therefore, cannot be allowed to be proceeded with further."

5. The Petitioner argues that the Settlement Commission erred in holding his application to be invalid by erroneously holding that he failed to make full and true disclosure of his income and that, the manner of earning such income in his hands remains unexplained. The petitioner contends that he made full and true disclosure of his income before the Settlement Commission and further he has also explained the manner of earning such income. In this context it is stated that the said disclosure of the sum of ₹10.80 Crores is supported by statement of affairs drawn from the seized material (i.e. print out from HD-33) duly certified by the chartered accountants compiling the same. The said statement of affairs have been summarized in paras 34, 35 and 36 of Annexure-II filed before the settlement commission. It is further submitted that in the order dated 18.03.2016 under Section 245D(2B) of the Act the ITSC specifically required the petitioner to explain the said statement of affairs on the basis of which he disclosed sums aggregating to ₹10.80 Crores.

6. The petitioner submits that the Settlement Commission also erred in holding that the manner in which the income was earned was not explained. It is submitted that the petitioner had duly explained the manner in which the income has been earned. In fact, the petitioner had furnished detailed information in Annexure-I and Annexure-II, filed before the Settlement Commission. The sources of funds received in cash by the Petitioner in his proprietary concern M/s. ABC, which were recorded in the books of account/ excel sheet found from the Hard Disk (HD-33) found from the computer during the search of the premises at 7/71A, Tilak Nagar, Kanpur are as under:

- (i). From Flat Buyers, i.e. end users
- (ii). Investors who are not end users
- (iii). Refunds along with returns from the amounts advanced

7. The petitioner also argues that as stated above, he was instrumental in setting upto 8 business entities. The said business entities had undertaken 23 projects from time to time, and execution of such projects was spread over a span of a number of years. Besides, there are other projects also, execution of which was in progress as on date of search and seizure action and continued thereafter also. In order to provide ancillary services to the customers and investors, the petitioner on his own devised a model in the name of "Anand Builders Co." ("ABC" for short) and evidence to that effect is available in the seized material (printouts taken from hard disc under seizure marked as "HD-33") and other information available in the computer. It is argued that the seized material also discloses that ABC had been making

investments in the properties acquired by various "business concerns" in relation to which projects were yet to be launched.

8. Learned senior counsel for the petitioner, Mr. C.S. Agarwal, argued that the seized material (printouts taken from HD-33) showed that very frequently, the Petitioner had been receiving funds from investors for bulk bookings in the projects that were being run by various business entities of VNG group of which the Petitioner is a key person, as he was the repository of faith of the said persons (investors). Sometimes the deals proposed by them had matured and many a times there were cancellations too. The funds so provided by them were utilized by the Petitioner in its venture "ABC". The funds available with M/s. ABC as reflected in the seized material was in the nature of sinking fund kept ready to meet contingency in the execution of various Projects. Counsel pointed out that the Petitioner's Chartered Accountants compiled the statement of affairs for the financial year 2008-09, 2009- 10 and 2010- 11. All these aspects, submitted learned senior counsel, were erroneously overlooked by the ITSC.

9. The counsel for the petitioner argued that the Commission's findings with respect to the income disclosed additionally not belonging to the petitioner was an invalid consideration; it was argued that this was not a legally sustainable finding. It was emphasized that under the scheme of Chapter XIX-A of the Income Tax Act, the basic criteria or objective is revenue recovery, in respect of undisclosed income. In doing so, the idea of the settlement is to move away from a rigid insistence on the form and letter of the law but rather to ensure that the tax net yields substantial recovery of tax. This essential or basic consideration was entirely overlooked by the ITSC in the facts of this case. It was lastly argued that in the absence of any

specific provision under Section 245 D prescribing the conditions to hold that an application is invalid, in the present case, the petitioner could not have been denied relief, more so because the Principal Commissioner in his report and had not alleged that the application did not satisfy the requirements of law. In fact, there was full and truthful disclosure of all material facts and the findings of the commission to the contrary are unsustainable.

10. The revenue, in its counter affidavit and by the submission of its counsel Mr. Zoheb Hossain, argues that merely because an order was made under Section 245D the petitioner could not claim a vested right to relief. The settlement commission, or its counsel is under a duty to consider the revenue's report under Section 245D (2B) of the Act. As a matter of fact, the report is the first opportunity given to the revenue to explain its position before the Commission. The ITSC has the opportunity and the right to declare any application invalid on the basis of such a report after duly considering it.

11. The revenue argues that in the facts of this case, the Commission was justified in rejecting the petitioner's application. It is asserted that a comparison of the material, especially the account books and the hard disk HD 33 containing waste materials was found and seized from the offices of Dolphin Developers P. Ltd which contained details of month-wise payments made by its customers during three years. A comparison with the details verified from the books of ABC matched the undeclared amounts, that tallied with the customers of Dolphin Developers Ltd. Clearly, therefore, the inference was that the amount declared by the petitioner, in fact belongs to that company and not his concern ABC. It is highlighted that the petitioner in

fact admitted in the submissions before the Commission that such books seized, contained the transactions not only relating to M/s. Dolphin Developers Ltd, but also to the 23 projects launched by the 8 group concerns. Having, therefore, admitted that these amounts were received towards sale of flats in projects of different group companies, the petitioner could not have in the same breath urged before the Commission that the monies were his own undisclosed income. It is argued, therefore, that the impugned order of the ITSC is in conformity with the law declared by the Supreme Court in *Ajmera Housing v Commr of Income Tax* 2010 (8) SCC 739.

12. Under Section 245-C of the Act, any assessee can, at any stage of an assessment, apply for settlement in a prescribed form which would require a full and true disclosure to be made by him of his income which has not been disclosed before the Assessing Officer and the manner in which such income has been derived. While processing such application under section 245-D of the Act it would be open for the Settlement Commission to reject an application for settlement, if it is found that the applicant has not made true and full disclosure of his income in the application for settlement. In the context of these provisions, the Supreme Court had an occasion to examine the issue of true and full disclosure and the stage where the same must be made in the case of *Ajmera Housing Corporation* (supra). In that case, the assessee applied for immunity under section 245C(1) of the Act disclosing additional income of ₹ 1.94 crores (rounded off) for the assessment years 1989-90 to 1993-94 which was in addition to income declared in the return filed before the AO. The Commissioner opposed the disclosures made by the assessee as not being true and full disclosures and suggested that the income of the group assesseees should not be settled at less than ₹ 223.55 crores. The arguments on the question of

whether the Settlement Commission should allow the application to proceed further were concluded and order was reserved at which stage, the assessee filed revised settlement application declaring additional income of ₹ 11.41 crores. The Settlement Commission passed an order on 17.11.1994 deciding to proceed with the application of settlement. The Commission directed the revenue to furnish a further report. The further report stated that the income disclosed by the assessee should not be treated as true and correct. According to it, the assessee's total unaccounted income was substantially higher. After hearing started, the assessee disclosed further unaccounted income of ₹ 2.76 crores. Ultimately on 29.01.1999, the Settlement Commission passed a final order determining total income of the assessee for the said assessment years at ₹ 42.58 crores. That order was challenged by the revenue before the Bombay High Court. Aggrieved by the order of the High Court, the assessee had approached the Supreme Court. The Supreme Court remanded the matter back to the Bombay High Court for fresh consideration upon which the Bombay High Court passed an order remitting the matter back to the Settlement Commission against which the applicants- assessee approached the Supreme Court. It was in this background that the Supreme Court observed as under:

“26.....It is plain from the language of sub- section (4) of Section 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 Commissioner under sub- section (1) of sub-section (3) of the said Section. A “full and true” disclosure of income which had not been previously disclosed by the assessee, being a pre-condition for a valid application under Section 245C(1) of the Act the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No. 11 of the form. Moreover, if an assessee is permitted to revise his

disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. In this regard, Section 245C(3) of the Act which prohibits the withdrawal of an application once made under sub-section (1) of the said Section is instructive 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-section (3) of Section 245C of the Act otiose and meaningless. In our opinion, the scheme of the said Chapter is clear and admits no ambiguity.”

“31. We are convinced that, in the instant case, the disclosure of Rs. 11.41 crores as additional undisclosed income in the revised annexure, filed on 19th September, 1994 alone was sufficient to establish that the application made by the assessee on 30th September, 1993 under Section 245C(1) of the Act could not be entertained as it did not contain a “true and full” disclosure of their undisclosed income and “the manner” in which such income had been derived. However, we say nothing more on this aspect of the matter as the Commissioner, for reasons best known to him, has chosen not to challenge this part of the impugned order.”

13. It is evident from the above narrative that the petitioner is aggrieved by the rejection of his application. He contends that the total unaccounted amount declared (over ₹ 10 crores) should have been accepted. The revenue had successfully opposed the application, contending that the assessee had not made full disclosure and that the amount declared had never belonged to him, but rather to M/s. Dolphin Developers Ltd, who had accepted cash but not declared it. This was accepted by ITSC. The petitioner has given his explanation and version as to why such rejection was unjustified and how such amount belonged to him. However, this court is of the opinion that the petitioner's contentions are entirely factual. Unless there is a manifest unreasonableness or perversity in the ITSC's order, the court cannot substitute

its reasoning with that of the said body. The ITSC's findings here are based upon an analysis of the facts such as that the ABC's identity was unknown and that there was a certain degree of amorphousness in its functioning. Furthermore, the clear linkages between the amounts disclosed before the ITSC and the amounts declared by M/s. Dolphin Developers Ltd. was discernable.

14. The judgments of the Supreme Court in *R.B. Shreeram Durga Prasad v. Settlement Commission*, (1989) 176 ITR 169; *Jyotendrasinghi v. S.I. Tripathi & Ors.*, (1993) 201 ITR 611 and *Kuldeep Industrial corporation v. ITO*, (1997) 223 ITR 840 delineate the scope of the High Court, while considering whether to interfere with the orders of the ITSC. In *Jyotendrasinghi* (supra), the correct legal position was explained as follows:

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“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 the Commission itself chooses to give reasons for its order. Even if it gives reasons in a given case, the scope of inquiry 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 alterant partem) has been incorporated in section 245D 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, apart from ground of bias, fraud and malice which, of course, constitute a separate and

independent category has it prejudiced the petitioner/ appellant.”

Furthermore, this court cannot review or second guess the findings of fact as would an appellate court. Given these parameters, the inference of facts having regard to the totality of circumstances, this court is of the opinion that the findings of fact which the ITSC rendered cannot be set aside or interfered with. The writ petition has to fail and is, therefore, dismissed.



**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

MAY 15, 2017