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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **W.P. (C) 8513/2016**

PR.COMMISSIONER OF INCOME TAX (CENTRAL)-1 ..... Petitioner
Through: Mr Ruchir Bhatia, Senior Standing Counsel

versus

INCOME TAX SETTLEMENT COMMISSION & ANR. ..... Respondent
Through: Mr M.S. Syali, Senior Advocate with Mr Mayank Nagi, Advocates for R-2 – Global Energy Private Ltd.

CORAM: JUSTICE S. MURALIDHAR
JUSTICE NAJMI WAZIRI

O R D E R
% **18.04.2017**

1.By way of this petition, the Petitioner - Principal Commissioner of Income Tax (Central)-I seeks the setting aside of the order dated 18th February, 2015 passed by the Income Tax Settlement Commission ('ITSC') whereby it was directed that upon the Respondent No.2- Global Energy Private Ltd. ('GEPL') making payment of the tax, as offered by it, in 3 equal instalments, it would be granted immunity in terms of Section 245-H(1) of the Income Tax Act, 1961 ('the Act') apart from immunity from prosecution and imposition of penalties.

2. The background facts are that GEPL is engaged in the business of generation of electricity, providing power advisory services, etc.

Proceedings under Section 133A were conducted at the Goa and New Delhi offices of GEPL on 23rd and 24th January 2012. An application was filed by GEPL on 19th September, 2013 under Section 34AB of the Act with ITSC, Additional Bench-II, Mumbai for the Assessment Years (AYs) 2011-2012 to 2013-2014 disclosing additional income.

3. On 27th September, 2013, the application was admitted under Section 245D (2C). By a subsequent order dated 21st November 2013, ITSC, Additional Bench-II, Mumbai allowed the application to be proceeded with under Section 245D (2C) of the Act. A statement of facts (SoF) filed by GEPL was forwarded to CIT (Central), New Delhi to 26th November, 2013 to enable it to file a detailed report under Rule 9A of the Income Tax Rules within 45 days thereof. However, under covering letter dated 16/17th January, 2014, the CIT (Central)-I sent a report under Rule 9. In the absence of the Assessee furnishing any books of accounts for verification, the CIT expressed inability to comment on the adequacy of the disclosure in terms of income offered, expenditure claimed and *suo moto* disallowance computed by GEPL. *Inter alia*, the CIT submitted that Applicant's claim of "incidental expenses" amounting to Rs.344.02 crores, supposedly paid as consultancy fees/professional charges, required to be verified in the absence of ‘any contracts, correspondence or reports entered into/received from the service providers’.

4. A copy of the Rule-9 report of the CIT was forwarded to GEPL by letter dated 20th January, 2014, followed by subsequent reminders dated 04th March, 2014 and 2nd July, 2014. In its order dated 27th August, 2014, CIT

noted that till then GEPL's reply had not been received. In the meanwhile, CIT sought directions for further investigation under Section 245D (3) of the Act qua the contracts of GEPL the aforementioned persons to whom payments had been made.

5. In para 8 of the said order dated 27th August, 2014, ITSC noted that the above issues require to be investigated. It was further observed that "In this regard/ the commission has noted the lack of cooperation from the applicant/ in failing to file a reply to the Rule 9 report/ even more than six months after receiving the copy thereof". The ITSC further directed that the CIT should undertake further investigation into the above issues in respect of GEPL for all the AYs and submit a report within 90 days.

6. Following this, on 3rd December 2014, the CIT (Central) - I forwarded to the ITSC a copy of the report dated 24th November, 2014 under Section 245D (3) of the Act. From the said report, it transpired that summons were issued to the persons to whom expenses had been paid by GEPL. 26 persons and 5 parties attended the proceeding and confirmed the payment of the said expenses/fees to them. Neither party filed written submissions whereas 12 parties neither attended nor filed their written submissions.

7. In the impugned order dated 18th February 2015, ITSC noted that GEPL had submitted its detailed comments to the aforementioned report of the CIT which it set out in the impugned order. ITSC then examined the said reply and rendered the following findings:

> "We have carefully gone through the above detailed submissions made by the CIT as well as the submissions of the applicant. It is

noted that the applicant has justified necessity of paying charges/ incidental charges in view of the complexity of the business spread all over various geographical locations of India as discussed in detail in submission dated 20.01.2015. The applicants have submitted that all the said payments have been made through regular banking channels after deduction of TDS and due compliance of service tax as submitted at page 2 to 5 of the submissions. It has also been pointed out during the course of hearing that the recipients of the facilitation charges have duly shown the amounts in their respective return of income including, the case of M/s SMC Power Generation Ltd. where amount of Rs.11,03,00,000 has been paid in AY 11- 12. It has been argued by the A.R. that none of the parties who attended before the AO or who filed written submissions before the Assessing Officer have denied receipt of the said facilitation charges. It has also been pointed out as mentioned above in its submissions by the applicant that no adverse material/ inference {in any) has been confronted by the Department to the applicant. On the other hand, the departmental representative Sh. Haque was asked whether there is any evidence to indicate the payments made by the applicant are not genuine. The CIT {DR) merely relied on the report under rule 9. No evidence has been place before us with reference to the allegation at para 24(iv) of the 245D{3} report submitted on 3.12.2014 that the recipients later withdrew cash and after deducting their commission the recipients paid back each to the applicant company.

We observe that if the submission of the department that these facilitation charges were merely accommodation entries is true then it will be equally true that no business man will leave a sum of Rs.277 crores with those parties and ultimately the sum should come back to the applicant. The department has carried out survey on the applicant and they did not find an iota of evidence that even a single rupee has come back to the applicant. More importantly a search and seizure action was carried out by the department on the SMC Group consequent to which the survey was carried out on the applicant even in the search action also no evidence has been found that any amount has gone back to the applicant from the SMC group."

8. The impugned order referred to the letter dated 6th February, 2015

submitted by GEPL offering to make a further addition of Rs. 5 crores to the income disclosed 'in the spirit of settlement'. ITSC then observed in the impugned order as under:

> "The offer the applicant of additional income of Rs.2.5 crores for AY 11-12 and Rs.2.5 crores for AY 12-13 in addition to the additional income of 2,34,70,802 and 2,76,44,873 already offered in the SOF is accepted and the issue settled accordingly."

9. The prayer for waiver of interest was rejected. The request for capitalization was also not acceded to. The working of the settled income was as per Annexure-A to the order. It was then directed that the amount of tax would be paid in 3 equal instalments by 25th March, 2015, 25th April, 2015 and 25th May, 2015 and that failure to pay tax with the prescribed period would result in the immunity granted under Section 245H(1) standing withdrawn. Then in paras 15 to 17 of the impugned order it was observed as under:

> "15. The applicant has prayed for immunity from prosecution and imposition of penalties under various provisions of the Income Tax Act. Considering the facts and circumstances of the case and the cooperation extended to the Commission during hearing, immunity is granted from prosecution and penalty imposable under the I. T. Act in relation to the issues arising from the application and covered by this order.
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> 16. Further, the immunity granted to the applicant may, at any time, be withdrawn if the Commission is satisfied that the applicants had, in the course of the settlement proceedings, concealed any particular material or had given false evidence and thereupon the applicant may be tried for the offence with respect to which the immunity is granted or for any other offence of which the applicant appears to have been guilty in connection with the settlement and the applicant shall also become liable to the imposition of any penalty under the Act to which the applicant would have been liable had such immunity not been

granted.

> 17. This order shall be void, if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts."

10. This Court has heard the submissions of Mr Ruchir Bhatia, learned Senior Standing Counsel appearing for the Petitioner and Mr M.S. Syali, learned Senior Counsel appearing for the Respondent No.2 – GEPL.

11. At the outset, Mr Syali points out that the impugned order was fully complied with by GEPL and at this stage no interference was called for. He pointed out that while the impugned order of the ITSC is dated 18th February, 2015; the present writ petition was filed only sometime in 13th May, 2015 and thereafter no steps were taken by the Petitioner to get the defects rectified and the writ petition listed after registration. That happened for the first time on 23rd September, 2015 i.e. after the writ petition was re-filed on 19th September, 2016, after removal of defects. He accordingly raised the plea of laches.

12. Mr Ruchir Bhatia, learned Senior Standing Counsel had no valid explanation to offer for the failure by the Petitioner to cure the defects and to file the petition in good time. He submitted that since there was no period of limitation as such, the counsel who at that moment was handling the cases on behalf of the Petitioner failed to take steps in good time to have the defects cured.

13. In any event, the Court does not find the explanation to be very convincing. In a petition of this nature, the delay in bringing up the writ

petition for hearing before the Court after curing the defects can defeat the very purpose of the writ petition since in the meanwhile the beneficiary under the impugned order would have acted in accordance therewith and altered its position. That is what has happened in the present case. The writ petition was listed for the first time on 23rd September, 2016, after it was re-filed on 19th September, 2016. There was no valid explanation offered for the inordinate delay i.e. between 13th May, 2015 (when the petition was first filed) and 19th September, 2016 (when it was re-filed) for the Petitioner taking steps. The Court, therefore, considers that the plea of GEPL that the writ petition is barred by laches, to be a justified one.

14. There are other issues that disentitle the Petitioner to any relief. As pointed out by Mr Syali one of the grievances raised by the Petitioner is that ITSC did not give it any further opportunity of undertaking a detailed investigation. However, from the record, it transpires that the CIT was given sufficient opportunity to undertake a detailed investigation. The report has been discussed extensively by the ITSC.

15. Mr Bhatia tried to deal with the merits of the matter and submitted that the Rule 9 report of the CIT was not properly discussed by the ITSC. In this connection, he made a reference to grounds D, F and G in the writ petition. Having perused the said grounds, the Court finds that these are only broad general sweeping statements about the failure by ITSC to evaluate the facts 'correctly'. There is no ground as to any specific document or statement that was failed to be examined by the ITSC.

16. It was then contended by Mr Bhatia that there was no justification for

ITSC to have granted a complete immunity from prosecution and this part of the impugned order is without reasons or justification. Reliance is placed on the decision of this Court in ***Commissioner of Income Tax v. BDR Builders and Developers Ltd. (2016) 385 ITR 111 (Del)***.

17. The Court has examined the above order whereby the Court remanded the matter back to ITSC for fresh determination on the aspect of granting of immunity from prosecution. However, in the present case, as pointed out by Mr Syali, apart from the fact that there was cooperation extended by GEPL as noted in para 15 of the impugned order, what weighed with the ITSC were the facts and circumstances themselves where GEPL had offered an additional sum of Rs.5 crores for tax. That GEPL had made a full and true disclosure of all material facts is apparent from the reading of the entire impugned order of the ITSC. In the circumstances of the case, the grant of immunity from prosecution as ordered by the ITSC cannot be said to be erroneous.

18. No grounds have been made out for interference with the impugned order dated 18th February, 2015 passed by the ITSC. The writ petition is accordingly dismissed, but in the circumstances with no order as to costs.

S. MURALIDHAR, J

NAJMI WAZIRI, J

APRIL 18, 2017/*rd*