R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1788 OF 2018

Pr. Commissioner of Income Tax (Central), Pune .. Petitioner

Versus

Income Tax Settlement Commission & Ors. .. Respondents

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- Mr. Charanjeet Chanderpal a/w Ms. Pragya Chandra for the Petitioner
- Mr. J.D. Mistri, Sr. Counsel a/w Mr. Madhur Agrawal i/by Atul Jasani for the Respondents

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CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.

DATE : APRIL 4, 2019.

ORAL JUDGMENT (Per Akil Kureshi, J.)

1. This petition is filed by the Income Tax Department to challenge an order dated 30.5.2017 passed by the Income Tax Settlement Commission ("Settlement Commission" for short) under Section 245D(4) of the Income Tax Act, 1961 ("the Act" for short).

2. Brief facts are as under:-

2.1 Respondent Nos. 2 to 4 assessees are Private Limited Companies engaged in the business of real estate development as a part of which, they had undertaken development of township with all amenities and facilities for the residents. The assessees applied to the Settlement Commission on 18.3.2016 to settle their cases for assessment years 2008-09 to 2015-16. The Settlement Commission passed an order dated 29.3.2016 under Section 245D(1) of the Act. Relevant portion of which reads as under:-

> 5.3 In view of the foregoing decisions of the High Courts including the jurisdictional High Court, we are of the considered view that the claim of having made the true and full disclosure of additional incomes and the manner of earning such incomes by the applicants stands fulfilled in the present group of cases, in the background of fulfillment of other technical parameters like payment of tax above the threshold limit, giving of intimation to A.O., payment of filing fees and payment of tax and interest and pendency of assessment proceedings for the years under consideration.
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> 6. Accordingly, we do not find any infirmity in the present application in terms of the provisions of Section 245C(1) of the Act. Accordingly, we hold that the application is maintainable and allow the same to be proceeded with further.

2.2 The settlement applications of the assessees thereafter proceeded before the Settlement Commission. The Department opposed the applications for settlement inter alia on the ground of non disclosure of additional income and lack of true and full disclosures. The Settlement Commission thereupon passed an order dated 10.5.2016 under Section 245D(2C) of the Act. Relevant portion of the order reads thus:-

> "9.4 Various arguments have been advanced on behalf of the Department in order to show that the applicant concerns have not made a clean breast of their affairs with reference to the full and true disclosure of their respective incomes and the manner of earning such incomes before the Commission. The alleged dishonest conduct on part of the applicants engaged in acquisition of lands for Mega City Project at Panvel and at Penn, respectively, have been highlighted with instances of exaggeration of expenditure towards compensation for relinquishment of tenancy rights, service charges paid to sister concerns, and brokerage and commission, legal, consultancy and other development work, without furnishing information regarding the names and identities of the recipient parties, farmers etc. As regards the expenses incurred towards service charges paid by Ms. Valuable Properties Pvt. Ltd. to the sister concerns viz. Ms. Valuable Infrastructure Pvt. Ltd. and M/s. Valuable Technologies Pvt. Ltd. it has been the allegation by the Department that the expenditures in the hands of M/s. Valuable Properties Pvt Ltd. are not commensurate with the services claimed to have been received, and the expenditures set off against such receipts in the hands of M/s. Valuable Infrastructure Pvt Ltd. and M/s. Valuable Technologies Pvt. Ltd. are highly exaggerated, and, in some instances, made towards expenditures the nature of which are not relatable to the business activities of the latter two concerns. The Ld. AR on behalf of the three applicants has valiantly tried to make out a defensible case against such allegations by stating that notwithstanding the fact that a sum of Rs.101 Crores has been debited as bogus compensation expenditure in the hands of M/s.

Valuable Resources Pvt. Ltd. and a few parties may have denied having tenancy rights in respect of the lands for which compensations were allegedly been paid, all the three applicants have made full and true disclosure of their respective incomes and have also satisfactorily explained the manner of earning such income Although there appear to be a few suspicious features in respect of the activities and conduct of all the three applicants in the background of the admission of bogus compensation payment made to M/s. Arion Commercial Pvt Ltd. Kolkata, yet there is no clinching evidence against the applicants, warranting and treating their applications invalid at this stage. **Whatever objections have been raised on behalf of the Department could be examined further in detail later when the matter is carried forward to the next stage.**

9.5 It is pertinent at this juncture to refer to certain judicial pronouncements including that of the jurisdictional Bombay High Court on the issue of acceptability and advancement of an application to the next stage. The Hon'ble Bombay High Court in CIT vs Settlement Commission in 375 ITR 483 held that, "We are not concerned in this case with the merits of the disclosures. We find that once the majority holds that the conditions regarding the threshold limit for the quantum of tax for additional income, payment of tax and interest thereupon and pendency of proceedings all are fulfilled then the application was not liable to be rejected on any technical ground." **In recent judgment dated 8.12.2015 in Principal CIT (Central) Vs. Settlement Commission (2016) Tax Corp. (DT) 05293 (Gujarat) , the Hon'ble High Court held that the question of fulfillment of all material requirements of a valid application for settlement would be still open for the Commission to examine in further enquiry under section (3) of S. 245D before passing of final order under section (4) of S 245D.** The Hon'ble Court made a reference to a judgment of the Hon'ble Delhi High Court - CIT vs Income Tax Settlement Commission (2013) 35 Taxman Com 56 (Delhi) where it was held that "from the Tove provisions, it is apparent that the settlement application passes through several stages before the final order providing for the terms of settlement is passed by the Settlement Commission. The first stage is is u/s. 245D(1). This is followed by the next step u/s. 245D(2C) and finally by the order passed u/s. 245D(4). In this present case, the final order u/s. 245D(4) is yet to be passed. The orders u/s. 245D(1) and 245D(2C) are not final orders and they are subject to the final orders that may be passed under section 245D(4).

10. **In conclusion, we feel that the applicants have successfully rebutted the various averments made on behalf of the Department, and also disclosed the manner of earning the income hitherto undeclared to the Department. Hence, we are of the considered view that in the absence of any evidence which could prove fatal to the respective application of the applicants and render the applications as not being full and true at this juncture, we do not invalidate such applications at this stage, and as such, allow them to be taken to further proceedings u/s. 245D(4).**"

2.3 The Settlement Commission passed its impugned order dated 30.5.2017 under Section 245D(4) of the Act and accepted the assessees' offer of settlement inter alia observing that having regard to the disclosure of the further additional income during the proceedings, the Settlement Commission was satisfied about true and full disclosures. It was observed that the disclosure of additional income of Rs. 18 Crores during the proceedings would not detract from the nature of true and full disclosure made previously. The computation of income was made by the Settlement Commission. Subject to payment of such computed tax with interest, the assessees would get immunity from penalty and prosecution. In such order of assessment, the Settlement Commission had taken into account and dealt with at considerable length the objections of the Department against accepting the settlement applications of the assessees. In the context of lack of true and full disclosure, the Commission observed as under:-

> "14.2 The thrust of the Department's contention emanate from its view that the three applicants, particularly VPPL and VRIL, have not made a clean breast of their affairs in terms of the fullness and trueness of their respective incomes inasmuch as regarding the business activity of aggregation of different parcels of land for launching Mega City projects at Panvel and at Pen, they have tried to weave a complex story of payments to various intermediaries including corporate entities by cheques, receiving back the cheque amounts in cash and then making further payments by cash to landlords, brokers, middle level aggregators, and also persons who claimed false tenancy rights over certain lands, without adducing any cogent evidences in support of such claims. It is the contention of the Department that a major amount of expenditures shown under various heads like purchase of land from various land owners, service charges paid to two companies of the Valuable group, payment for compensation of relinquishment of rights and brokerage and land development charges, have been excessively inflated and major portion of such expenditures have been siphoned off for the benefit of promoters and management personnel and other corporate

companies of the Valuable group and, thus, the incomes shown/declared in their respective settlement applications have been grossly understated.

14.3 On a conspectus of the whole range of issues in the light of the objections raised, and the infirmities pointed out by the Department, we are of the view that notwithstanding the possibility of existence of certain infirmities in the claims of the applicants of having incurred various categories of expenditures of high amounts towards aggregation of lands for the purpose of launching Mega City projects, it needs to be recognized that aggregation of land on the outskirts of a megapolis like Mumbai involves a very uphill and formidable effort and drainage of substantial resources, without which such objective is extremely difficult to achieve, more so, in the politico-economic-social contexts, where there are innumerable hurdles one has to surmount. The applicants have been able to convince us that multiple players have stepped into the process of land aggregation including brokers, petty politicians, wheel dealers and other local musclemen, who have demanded their respective pounds of flesh in order to facilitate the applicants to acquire a homogeneous and single large patch of land possible. Of course, the applicants have not been able to lead full evidences in support of expenditures under various heads, and also their modus operandi of payment to intermediaries in cheques and receipt back of cash from them though appear to be a dishonest practice, yet having regard to the demand of the various stakeholders for cash, payments, such practice can be said to be a prudent one for achieving the objects of the business of aggregation of lands by the applicant. There may have been some leakage of revenue/income by way of inflated claims, yet the Department's plea that the extent of land claimed have been purchased by the applicants cannot be true, is not maintainable, having regard to the furnishing of certain number of sale deed/purchase documents in digital format to the assessing officer [by way of sample copies], and the subsequent furnishing of affidavits declaring therein that the applicants are in possession of the relevant purchase documents relating to the entire patch of land purchased for aggregation and development.

....

14.6 Taking a macro view of the nature of the business activities and the complex issues involved, and having regard to the disclosure of further additional incomes during the proceedings u/s. 245D(4), we are of the considered view that the applicants have been able to satisfy us about the fullness and trueness of their respective incomes, and have also explained the manner of earning the same. However, this disclosure of additional income of Rs. 18 Crores during the present proceedings will not detract from the true and full nature of the income already disclosed in their respective SOFs, and also would not dilute the manner of earning the same. Hence, we hereby settle the cases of the applicants, accordingly."

3. This order of Settlement Commission, it appears that, the Department has challenged mainly on the ground that the Settlement Commission did not pass an order under Section 245D(3) of the Act though repeatedly requested by the Department. The grounds of challenge contained in the petition revolves around this issue. Under this ground, the Department contends that the Settlement Commission ought to have ordered a further enquiry into the transactions of the assessees which were admittedly bogus. The Settlement Commission committed an error in granting immunity against penalty and prosecution without full enquiry. The Settlement Commission failed to pass a speaking order at

245D(3) stage. This deprived the Department an opportunity to submit its report on various issues covered under the settlement applications. It is contended that in Rule 9 report, it was mentioned that certain transactions of the assessees needed to be verified since in the assessment proceedings, proper details were not furnished.

4. On the basis of such material on record, learned counsel Mr. Chanderpal for the Department vehemently contended that the Settlement Commission has committed serious error by passing order under Section 245D(4) without formally disposing of the Department's request for an order under Section 245D(3). Even otherwise, looking to the complexity of the facts and material on record, further enquiry was necessary. By not permitting such further enquiry, the Settlement Commission deprived the Department of an opportunity to rebut the assessees' assertions of true and full disclosures of the undisclosed income.

5. Learned counsel Mr. Mistri for the assessees opposed the petition contending that the enquiry or investigation under sub-section (3) of Section 245D is at the discretion of the Settlement Commission. The Commissioner of Income Tax cannot apply for such order or insist that the Settlement Commission must call for such further enquiry or investigation. The Department was granted fullest opportunity to produce the material before the Settlement Commission to oppose the settlement applications of the assessees. The Commissioner had filed report under Rule 9 of the Income Tax Settlement Commission Rules. Even after crossing the stage of Section 245D(2C), the Commissioner had produced additional reply with accompanying documents which were duly examined by the Settlement Commission before passing order under Section 245D(4) of the Act. Learned counsel relied on the decision of the Division Bench of this Court in case of **CIT Vs. Income Tax Settlement Commission & Anr.**[1] to contend that it is not obligatory on the part of the Settlement Commission to call for further investigation / enquiry as referred to in sub-section (3) of Section 245D of the Act. He further submitted that the Settlement Commission has minutely examined the

1 [2014] 360 ITR 539 (Bom)

material produced by both sides before coming to the conclusion that the assessees had made true and full disclosure. The findings of the Settlement Commission are not even challenged in the petition. In any case, the jurisdiction of this Court to interfere with an order of the Settlement Commission passed on merits is extremely limited. He, therefore, submitted that the petition be dismissed.

6. In order to resolve the controversy, we may peruse the statutory provisions contained in Chapter XIX-A of the Act, which pertains to settlement of cases. As is well known, an assessee desirous of having his case settled may, under sub-section (1) to Section 245C, apply for the same with necessary information and details prescribed therein. The procedure to be followed once such application is filed, is prescribed under Section 245D of the Act; relevant portion of which reads as under:-

> "245D. (1) On receipt of an application under section 245C, the Settlement Commission shall, within seven days from the date of receipt of the application, issue a notice to the applicant requiring him to explain as to why the application made by him be allowed to be proceeded with, and on hearing the applicant, the Settlement

Commission shall, within a period of fourteen days from the date of the application, by an order in writing, reject the application or allow the application to be proceeded with:

Provided that where no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

(2) A copy of every order under sub-section (1) shall be sent to the applicant and to the [Principal Commissioner or] Commissioner.

(2C) Where a report of the [Principal Commissioner or] 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 [Principal Commissioner or] 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 [Principal Commissioner or] Commissioner has not furnished the report within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report of the [Principal Commissioner or] Commissioner.

....

(3) The Settlement Commission, in respect of—

(i) an application which has not been declared invalid under sub-section (2C); or

(ii) an application referred to in sub-section (2D) which has been allowed to be further proceeded with under that sub-section, may call for the records from the [Principal Commissioner or] Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the [Principal Commissioner or] Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case, and the [Principal Commissioner or] Commissioner shall furnish the report within a period of ninety days of the receipt of communication from the Settlement Commission:

Provided that where the [Principal Commissioner or] Commissioner does not furnish the report within the aforesaid period, the Settlement Commission may proceed to pass an order under sub-section (4) without such report.

(4) After examination of the records and the report of the Principal Commissioner or Commissioner, if any, received under—

(i) sub-section (2B) or sub-section (3), or

(ii) the provisions of sub-section (1) as they stood immediately before their amendment by the Finance Act, 2007,

and after giving an opportunity to the applicant and to the [Principal Commissioner or] Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the [Principal Commissioner or] Commissioner.

From these provisions, one can broadly notice the procedure where once an application for settlement is filed by an assessee under Section 245C(1), in terms of Section 245D(1) of the Act, the Settlement Commission within seven days of receipt of such application, issue notice to the applicant requiring him to explain why the application should be allowed to be proceeded with. After hearing the applicant, the Settlement Commission may, within 14 days of the date of the application, pass an order in writing rejecting the application or allowing the application to proceed further. As per the proviso, if no such order is passed within the time prescribed, the application shall be deemed to have been allowed to proceed with.

7. Once this stage is crossed, the Settlement Commission would be required to pass an order under Section 245D(2C). As per said provision, if a report has been received from the Commissioner, the Settlement Commission may within 15 days of the receipt of the report pass an order in writing declaring the application as invalid. In absence of any report from the Commissioner, the Settlement Commission would proceed without such a report.

8. As per Section 245D(3), in respect of an application which has not been declared invalid under sub-section (2C), the Settlement Commission may call for records from the Commissioner and after examination of the records, if the Commission is of the opinion that any further enquiry / investigation is necessary, it may direct the Commissioner to make or to cause such enquiry or investigation and produce the report within the prescribed time. Proviso to Section 245D(3) provides that if the report of the Commissioner is not received within the time prescribed, the Settlement Commission may proceed to pass order under sub-section (4) without such report.

9. After passing through all these stages, the most crucial stage is where the Settlement Commission passes the final order under Section 245D(4) of the Act. As per ths provision, the Settlement Commission would pass the order after examination of the records and the report of the Commissioner if received under sub-section (2B) or sub-section (3). Such order would be passed after giving opportunity of hearing to the applicant as also to the Commissioner and after examining such further evidence as may be placed before it or obtained by it.

10. The above noted provisions would, therefore, make it clear that under sub-section (3) of Section 245D of the Act, it is a discretion of the Settlement Commission after calling for and examination of records, to require the Commissioner to make further enquiry / investigation if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary. First thing, therefore, that can be discerned is that if the Settlement Commission does not intend to exercise such discretion, it is not necessary for the Settlement Commission to pass a formal order under sub-section (3). The order may be necessary if the Settlement Commission desires to have further enquiry or investigation to be carried out by the Commissioner. The insistence of the Department, therefore, for the Settlement Commission to pass a formal order before proceeding further to the stage of Section 245D(4) of the Act was not a valid one. This, however, would not mean that the Department has no stakes in the matter. As a party to the settlement application, it has a right to oppose the application for settlement made by an assessee. It would be within the Department to urge the Settlement Commission, in a given set of circumstances, to exercise the discretion referred to in sub-section (3) and any exercise of discretion by a quasi-judicial body like the Settlement Commission must be on rational basis and for valid reasons. In a give case, therefore, if the Department was able to demonstrate that the Settlement Commission failed to exercise the discretion though the facts of the case so required, it would be open for the Department to contest such a decision of the Settlement Commission, having failed to persuade the Settlement Commission to exercise such discretion. To that limited extent, we do not think that the Department had no locus standi to urge the Settlement Commission to examine the facts and exercise the powers under sub-section (3) of Section 245D or to question the decision of the Settlement Commission whether expressed by speaking order or otherwise, before the Court. We may recall, as per the provisions of the settlement of cases, once an application for settlement is filed and it is allowed to proceed further, the pending assessment stands suspended. Settlement Commission assumes the powers of the Assessing Authority. The powers of the Departmental Authorities to carry out further enquiry or investigation would be severely restricted.

11. The decision of this Court in the case of CIT Vs. ITSC (supra) did touch upon the nature of the powers enjoyed by the Settlement Commission under Section 245D(3) of the Act. In this context, the Court observed that it is evident both from the language of sub-section (3) and the terms of sub-section (4) that the Settlement Commission is not required to in every case to cause an enquiry or investigation to be made under sub-section (3). It was further observed that under sub-section (4), the Settlement Commission besides considering the report, if any, of the Commissioner under sub-section (2B) or sub-section (3) is empowered to examine such further evidence as may be placed before it or obtained by it. Such evidence would include the evidence which may be produced either by the assessee or by the

Commissioner. In the said case, however, the Department had approached the Court where the Settlement Commission was yet to apply its mind whether an enquiry under Section 245D(3) should be ordered. In that view of the matter, the Court was not inclined to entertain the proceedings at that stage. It was, however clarified that during the course of its proceedings, the Settlement Commission would specifically bring to bear its consideration on whether an enquiry under Section 245D(3) should be ordered having regard to the circumstances of the case.

12. Coming back to the facts of the case, we may recall, the Department had not filed any application before the Settlement Commission setting out grounds and reasons why in facts of the case, such enquiry or investigation as envisaged under Section 245D(3) of the Act was necessary. The Settlement Commission had scrutinized the settlement application at two stages, while passing the order under Section 245D(1) and thereafter under Section 245D(2C) of the Act. The first enquiry, of course, would be summary in nature, considering the time constraint, as well as absence of participation by the Department. The second stage enquiry under Section 245D(2C) would be more incisive. In both the orders, the Settlement Commission had been prima facie satisfied about the correctness of the disclosure made by the assessees. In both such orders, the Settlement Commission had deferred its final opinion on such issue at the time of passing the final order. We have reproduced the relevant portion of the final order. The Settlement Commission has discussed the rival contentions at considerable length, adverted to the material on record and come to the conclusion that there was no failure of full and true disclosure. These findings are not under challenge before us. In any case, as per the settled law, the jurisdiction of the Court in examining the correctness of the Settlement Commission's orders in exercise of Writ Jurisdiction is extremely narrow and would be confined to the scrutiny whether the order of the Settlement Commission is in accordance with the provisions of the Act. In fact, in such order, the Settlement Commission had also given reasons why further enquiry on investigation was not necessary.

13. We may recall even in absence of any enquiry or investigation in terms of sub-section (3) of Section 245D, the State Commission while passing the order under Section 245D(4), would look into any further evidence which may be brought on record. As observed by this Court in CIT vs. ITSC (supra), such further evidence may as well be produced by the Commissioner. In the present case, it is undisputed that the Commissioner did produce additional material. It was also looked into by the Settlement Commission.

14. In view of such facts and particularly considering that the Department had neither laid a foundation before the Settlement Commission establishing why further enquiry or investigation ought to have been called, nor led any such grounds before us to demonstrate how the Settlement Commission committed an error in refusing to exercise the discretion, we do not find that the Department had made out a case for interference.

15. Before closing, we may notice a relevant facts. It appears that the Department's representative had orally persisted with the Settlement Commission to pass an order under Section 245D(3) of the Act calling upon further enquiry or investigation by the Commissioner which would enable the Department to verify and establish that the disclosures made by the assessees were not true and full. Since the Settlement Commission did not do so, the Department had earlier filed Writ Petition No. 6347 of 2017. In this petition, the Department had prayed that the Settlement Commission be directed to give opportunity to the petitioner to verify the transactions referred to in objections of the Department contained in the reports under Rules 9 and 9A of the Income Tax Settlement Commission Rules. Essentially, therefore, in such petition, also the Department's case was that the Settlement Commission should have called for or permitted further enquiry or investigation by the Commissioner on the points raised in the reports. It appears that this petition was filed after Settlement Commission passed its final order under Section 245D(4) of the Act. The Department, however, was not aware about the development and seems to have proceeded on the basis that settlement proceedings were still pending. Whatever be the bonafide impression of the Department, this petition came to be withdrawn without any further rider. It is not clear whether the petition was withdrawn after arguments or it was withdrawn because the Department came to know about the dismissal of the settlement proceedings and desired to file a fresh petition in view of such material change. In any case, we have not proceeded on the basis of the Department's earlier petition being withdrawn without permission to file a fresh one.

16. In the result, the petition is dismissed.

[SARANG V. KOTWAL, J.] **[AKIL KURESHI, J]**