

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.02.2020

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.No.3706 of 2019  
and WMP Nos.4084 and 4087 of 2019  
and WMP Nos.10425 and 10426 of 2019

M/s.Hitachi Power Europe GmbH  
Represented by the Authorised Signatory  
of its Project Office, Chennai  
Mr.Pravesh P. Jain

...Petitioner

Vs.

- 1 Income tax Settlement Commission  
Additional Bench Chennai Ministry of  
Finance Department of Revenue 640 Anna  
Salai Nandanam Chennai-35
- 2 Dispute Resolution Panel-2  
Office of the Dispute Resolution Panel 7th  
Floor Income Tax Office BMTC Building 80  
Feet Road Koramangala Bengaluru- 560 095
- 3 Deputy Commissioner of Income Tax  
International Taxation - 1(1) Chennai  
121 M.G.Road Nungambakkam Chennai-34
- 4 Deputy Commissioner of Income Tax  
International Taxation-2(1) Chennai  
121 M.G.Road Nungambakkam Chennai-34
- 5 Deputy Commissioner of Income Tax  
International Taxation- 1(2) Chennai  
121 M.G.Road Nungambakkam Chennai-34
- 6 Deputy Commissioner of Income Tax  
Transfer Pricing Officer 2(1)  
5th Floor BSNL Building Tower-I  
Greens Road, Chennai-06

.. Respondents

Prayer: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus , calling for the records of the 1st Respondent

contained in the impugned order u/s. 245D (2C) of the Income Tax Act 1961 bearing TN/ CN- INTL.TAX/ 2018-19/ 23/ IT dated 09 January 2019 and to quash the same as arbitrary unjust and illegal and to consequently direct the 1st Respondent to pass a fresh order under Section 245D (2C) of the Income Tax Act 1961 admitting the application filed by the petitioner in accordance with law.

|                |                                                      |
|----------------|------------------------------------------------------|
| For Petitioner | : Mr.P.S.Raman, S.C.<br>Mr.R.Sivaraman               |
| For Respondent | : Mrs.Hema Muralikrishnan<br>Senior Standing Counsel |

ORDER

Heard the detailed submissions of the petitioner represented by Mr.P.S.Raman, learned Senior Counsel for Mr.R.Sivaraman, learned counsel and the respondents represented by Mrs.Hema Muralikrishnan, learned Senior Standing Counsel

2. The petitioner has challenged an order passed by the Income Tax Settlement Commission (SC/Commission) in terms of Section 245D(2C) of the Income Tax Act, 1961 (Act) dated 09.01.2019.

3. The petitioner is a company incorporated under the laws of Germany engaged in the design and construction of fossil-fired power plant as well as supply of key components, such as utility steam generators, and other ancilliary equipment. During June, 2010, the National Thermal Power Corporation (NTPC) had invited bids under international competitive bidding for the supply and installation of 11\*660 MW steam generators at five locations in India. A bid was successfully submitted by one BGR Energy Systems Limited (BGRE), a company incorporated in India and engaged in providing turnkey solutions for coal based thermal power plants.

4. I desist from advertng to the specifics of the contracts themselves or the manner in which the work has been apportioned and allocated by NTPC/BGRE to other parties, since it is not entirely necessary to decide the legal issue that has been raised in this Writ Petition. Suffice it to say that BGRE had sub-contracted a portion of the scope of work under three contracts to its joint venture company BGR Boilers Private Limited (BGRB), which, in turn, sub-contracted a portion of the same to the petitioner.

5. One of the contentions raised by the petitioner on merits was that the scope of work under each of the contracts is separate and distinct in all respects including the delineation of the work itself, the modes of execution of the contract and the payments therefor. For this reason, the petitioner had taken the stand that the income from offshore supplies would not be liable to tax in India and this stream of revenue thus did not figure in its return of income or accompanying financials.

6. Returns of income had thus been filed by the petitioner in respect of Assessment Years (AY) 2015-16, 2016-17, 2017-18 and 2018-19 offering to tax the income from onshore supply and services only.

7. The contention of the Revenue on merits is that the scope of work entrusted to the petitioner remains indivisible and that the bifurcation of the same between offshore supply on the one hand and onshore supply and services on the other was artificial and solely for the purpose of reduction of income tax liability.

8. The petitioner has earlier filed an application under Section 197 of the Act on 16.11.2018 seeking a determination of the liability by way of tax deduction in respect of income from all three revenue streams, namely, offshore supply, onshore supply and onshore service. This aspect of the matter is mentioned solely for the purpose of ascertaining disclosure of the petitioner of all relevant facts before the Department.

9. A Survey came to be conducted in the project office of the petitioner on 12<sup>th</sup> and 13<sup>th</sup> of October, 2017 wherein certain materials appear to have been found, indicating to the Department that the transaction as between itself and BGRB was a single, indivisible transaction. The Department thus, being of the view that tax ought to have been remitted on the income from offshore supply as well, issued a show cause notice containing the aforesaid proposal. The petitioner states that no opportunity was granted to it to respond to the notice and an order of draft assessment under Section 144C of the Act was passed on 31.12.2017. This was assailed by way of Writ Petition in W.P.No.1248 of 2018 before the Madras High Court. Though an interim order was granted on 22.01.2018 staying all further proceedings in relation to A.Y.2015-16, the petitioner withdrew its Writ Petition on 24.10.2018 and instead approached the Dispute Resolution Panel (DRP) by way of objections filed on 05.11.2018.

10. At that stage, the petitioner approached the SC by way of an application under Section 245C of the Act. The application was taken up for admission and an order passed on 26.11.2018 after hearing only the petitioner and at a stage anterior to receipt of the Departments' report on the application filed.

11. At paragraph 4.1.5 of order dated 26.11.2018, the Commission notes the submissions of the petitioner in regard to the non-taxability of income from offshore supply. It also notes the specific submission that further and detailed submissions in that regard would be made in the course of subsequent proceedings. Again, at paragraph 6 reference is made to the transaction in relation to offshore supply and the taxability of the same. It was also specifically noted that no additional income has been offered along with the application in this regard. The decision to admit the matter for further hearing is in the following terms:

'7. On examination of the SOF and related material and on thoughtful consideration of the facts as discussed during the course of hearing, we find that technical parameters in the Application with regard to pendency of assessment proceedings, tax liability exceeding the threshold limit, payment of application fee of Rs.500/- and intimation to the Assessing Officer have been duly fulfilled by the applicant. The applicant has also explained the manner in which the additional income is derived in the SOF. On the basis of the material placed before us we are of the view that at present, there is prima facie no material which warrants the conclusion that true and full disclosure has not been made by the applicant or it has not disclosed the manner of earning such income. Hence, all the requirements laid down u/s 245C(1) have been fulfilled by the applicant. We accordingly hold that the above application is fit to be allowed to be proceeded with further. This order is being accordingly passed and is without prejudice to the finding that may be given in the later stage of proceedings.

8. In view of the above, we allow the above Settlement Application to be proceeded with further u/s 245D(1) of the I.T.Act.'

12. A report on the application was thereafter filed by the Commissioner in terms of Section 245 D(2B) of the Act. Thereafter, the matter was listed for decision on the aspect of 'validity' or otherwise of the application. The report of the Commissioner deals with the aspects of correctness and adequacy of the additional taxes and interest remitted as well as compliance with the requirement under Section 245C(4) of the Act.

13. As regards full and true disclosure of income, the Commissioner reiterates the stand of the Revenue in the draft assessment order to the effect that the division of the contract between offshore and onshore components is but an artificial bifurcation, and the contract is composite, liable to be construed as one whole, with the entirety of the income being offered to tax in India.

14. The petitioner, in the application for settlement, has framed the following issues for resolution:

'2.1 Whether the Applicant is taxable in India on account of income earned from offshore supply of goods?

2.2 Determination of the total income of the Applicant for each of the AYs, being AY 2015-16 to AU 2018-19 as per the provisions of the Act.

2.3. Determination of the total tax liability of the Applicant for each of the four assessment years under consideration.

2.4 Any other issue that may be considered fit by the Hon'ble Settlement Commission in the interest of justice or to make the settlement effective'

15. Thus the question of whether the contract is divisible or indivisible is a matter laid before the Commission for consideration and what the Commissioner has done in his report is only to reiterate the stand of the Department that the contracts are, in fact, and in his opinion, indivisible.

16. The SC however, in considering the 'validity' or otherwise of the application proceeds to delve into the merits of the matter even at that stage, concluding that the contract was composite and indivisible and hence the applicant, i.e., the petitioner herein, had failed to make a full and true disclosure of income.

17. In my considered view, this tantamounts to putting the cart before the horse. Certainly, if the Commission decides adverse to the petitioner in final hearing, holding that the contract and transactions were composite and indivisible, there would be an additional tax liability upon the petitioner. This demand however can be raised only once a decision has been rendered in terms of Section 245D(4) by the Commission on the issues posed before it, the first of which is, whether at all the income from offshore supply is liable to tax in India. The question of full and true disclosure and the discharge of tax liability at all stages prior to final hearing, should be seen only in the context of the issues offered for settlement and the remittances of additional tax thereupon. Issues decided by the Commission and liability arising therefrom, will be payable only at the stage of such determination, which, in my considered view, is the stage of final hearing under Section 245D(4).

18. In fact, Section 245D (6) clarifies this point, as follows:

'245D. Procedure on receipt of an application under section 245C

(6) Every order passed under sub-section (4) shall provide for the terms of settlement including any demand by way of tax, penalty or interest], the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective and shall also provide that 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.'

19. Thus a final order passed by the SC will provide for the terms of settlement that can include any demand by way of tax, penalty or interest as well. Evidently, this demand raised after final settlement, can only refer to such issues as has been decided by the Commission over and above the additional income disclosed and tax paid by the assessee at the time of filing of application. This been envisaged and provided for in the statutory scheme of settlement under the Act.

20. The scheme of Chapter XIX A is to provide a wholistic resolution of issues that arise from an assessment in the case of an assessee that has approached the Commission.

21. Throughout Chapter XIX A, the words 'case', 'assessment', 'matter' and 'proceedings' have been used interchangeably with 'case' being defined under Section 245A(b) as follows:

245A. In this Chapter, unless the context otherwise requires, -

(b) "case" means any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which an application under sub-section (1) of section 245C is made.

22. A three Judge Bench of the Supreme Court in the case of Commissioner of Income Tax V. Express Newspapers Limited (206 ITR 443) considered the scope and width of proceedings before the SC in a case that travelled to the Supreme Court from the Madras High Court. At paragraph 9, the Bench states as follows:

'9. For a proper delineation of the jurisdiction of the Commission, it is necessary to bear in mind the language of sub-section (1) of Section 245-C. It provides that at any stage of a case relating to him, an assessee may make an application to the Commission disclosing fully and truly income which has not been disclosed before the Assessing Officer. He must also disclose how the said income has been derived by him besides certain other particulars. This means that an assessee cannot approach the Commission for settlement of his case with respect to income already disclosed before the Assessing Officer. An application under Section 245-C is maintainable only if it discloses income which has not been disclosed before the Assessing Officer. The disclosure contemplated by Section 245-C is thus in the nature of voluntary disclosure of concealed income. Unless the income so disclosed exceeds Rs 50,000, the application under Section 245-C is not maintainable. It is equally evident that once an application made under Section 245-C is admitted for consideration (after giving notice to and considering the report of the Commissioner of Income Tax as provided by Section 245-

D) the Commission shall have to withdraw the case relating to that assessment year (or years, as the case may be) from the assessing/appellate/revising authority and deal with the case, as a whole, by itself. In other words, the proceedings before the Commission are not confined to the income disclosed before it alone. Once his application is allowed to be proceeded with by the Commission, the proceedings pending before any authority under the Act relating to that assessment year has to be transferred to Commission and the entire case for that assessment year will be dealt with by the Commission itself. The words "at any stage of a case relating to him" only make it clear that the pendency of proceedings relating to that assessment year, whether before the Assessing Officer or before the appellate or revisional authority, is no bar to the filing of an application under Section 245-C so long as the application complies with the requirements of Section 245-C.'

23. Thus, once an assessee has approached the Settlement Commission at the appropriate stage (in the case of this petitioner, there is no dispute on this score) all issues in relation to the assessment for that assessment year are at large before the SC. This is evidently to ensure that a single forum, a high powered one at that, will take into account the submissions of both parties and arrive at a decision on all issues that arise from such case/proceeding, in a comprehensive manner.

24. I may also make useful reference to a decision of the Delhi High Court that had had occasion to consider the case of a re-assessment in Omaxe Ltd. V. Assistant Commissioner of Income Tax ((2012) 25 Taxmann.com 190). In that case, the assessee had approached the Settlement Commission on various counts. After an order of settlement was passed, a notice under Section 148 had been issued calling upon the petitioner to file a return of income in regard to the alleged escapement caused by a claim of deduction under Section 80IB(10) of the Act. The assessee resisted the notice on the ground that the assessment for that year had become final by virtue of the order of the SC. The defence of the Department was that no additional income had been offered in regard to the deduction under Section 80IB(10) as it constituted an issue not covered by the order of the Settlement Commission. The stand of the revenue was negated on the ground that income from the unit in respect of which deduction was

claimed as well as the claim of deduction were duly reflected in the return of income and this issue thus also stood encompassed by the final order of the Commission.

25. The plenitude of powers that the Settlement Commission enjoys has been long settled by the Supreme Court in R.B.Shreeram Durga Prasad V. Settlement Commission (176 ITR 169), Jyotendrasinghji V. S.I.Tripathi (201 ITR 611) and Kuldeep Industrial Corpn. V. ITO (223 ITR 840) and there can thus be no question that the Commission is empowered to both adjudicate upon as well as settle issues arising from a 'case' in respect of which an Application is made.

26. The revenue relies on a decision of this Court in the case of Abdul Rahim V. ITSC ((2018) 96 Taxmann.com 571). The facts in that case are different and distinguishable from the one before me. A preliminary order of admission under section 245D(1) was passed on the application of the assessee therein. The Commissioners' report however brought to light certain materials including a pen drive and compact discs that had not been duly disclosed by the petitioner in his application. Thus when the matter was taken up for admission by the Commission, it was contested by the Revenue on the ground that there was no full and true disclosure by the petitioner. This was accepted by the Court in the light of the patent non-disclosure by the assessee therein to have disclosed the pen drive and compact discs, rendering the application 'invalid', a term that has not been defined, but in respect of which one would have to assign its natural meaning, as used in common parlance.

27. In the light of the discussion as above, I am of the categorical view that the impugned order of the Settlement Commission is beyond the scope of Section 245D(2C) having been passed on the merits of the issue raised and set aside the same. This Writ Petition is allowed. No costs. Connected Miscellaneous Petitions are closed.

28. The matter will be now taken up for final hearing by the Settlement Commission in terms of Section 245D(4) of the Act. Let the petitioner appear, for this purpose, before the Settlement Commission on Monday, the 02<sup>nd</sup> of March, 2020 or on a date as proximate to the aforesaid date as may be convenient to the Settlement Commission to be fixed by issue of prior notice. The Commission will hear both parties on merits, consider all materials before it or that may be placed by the parties before

it and pass orders within a period of twelve (12) weeks from date of first hearing, in accordance with law.

Sd/-

Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

- 1 The Income tax Settlement Commission  
Additional Bench Chennai Ministry of  
Finance Department of Revenue 640 Anna  
Salai Nandanam Chennai-35
- 2 The Dispute Resolution Panel-2  
Office of the Dispute Resolution Panel 7th  
Floor Income Tax Office BMTC Building 80  
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- 6 The Deputy Commissioner of Income Tax  
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+1cc to M/s.Hema Murali Krishnan, Advocate Sr.No.13357

AKM/28.02.2020 /10P-8C/

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