

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.09.2020

CORAM :

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Judgment Reserved On 24.08.2020	Judgment Pronounced On 04.09.2020
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Writ Appeal No.581 of 2020
and
C.M.P.No.8178 of 2020

1. Deputy Commissioner of Income tax,
International Taxation - 1, Chennai,
121, M.G.Road, Nungambakkam,
Chennai-600 034.
2. Deputy Commissioner of Income tax,
International Taxation, Circle - 2, Chennai,
121, M.G.Road, Nungambakkam,
Chennai-600 034.
3. Deputy Commissioner of Income tax,
International Taxation - 1(2), Chennai,
121, M.G.Road, Nungambakkam,
Chennai-600 034.
4. Deputy Commissioner of Income Tax,
Transfer Pricing Officer-2,
5th Floor, BSNL Building Tower-1,
Greens Road, Chennai-34. ... Appellants/Respondents 3 to 6

-vs-

1. M/s.Hitachi Power Europe GmbH,
A Company Incorporated under the Laws of Germany
and Rep., by the Authorized Signatory of
its Project Office, Chennai,
Mr.Pravesh P. Jain,
Amara MLS Business Centre,
6th Floor, No.148, Room No.601 A & B,
616 & 618, Acropolis,
Dr.Radhakrishnan Salai, Mylapore,
Chennai-600 004. ... Respondent/Petitioner

2. Income tax Settlement Commission,
Additional Bench, Chennai,
Ministry of Finance, Department of Revenue,
640, Anna Salai, Nandanam,
Chennai-600 035.

3. Dispute Resolution Panel-2,
Office of the Dispute Resolution Panel,
7th Floor, Income tax Office,
BMTC Building, 80 Feet Road,
Koramangala, Bengaluru-560 095.

.. Respondents/Respondents 1 & 2

Writ Appeal under Clause 15 of the Letters Patent to set aside the order dated 17.02.2020 made in W.P.No.3706 of 2019, which was filed for the issuance of Writ of Certiorarified Mandamus to call for the records of the 1st respondent contained in the impugned order under Section 245D(2C) of the Income Tax Act, 1961 bearing TN/CN - INTL.TAX/ 2018-19/ 23/ IT dated 09.01.2019 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 Appellants : Ms.Hema Muralikrishnan,
Senior Standing Counsel
: assisted by
Mr.Prabhu Mukunth Arunkumar

For 1st Respondent : Mr.P.S.Raman,
Senior Counsel
: assisted by Mr.R.Sivaraman

JUDGMENT

T.S.Sivagnanam, J.

This appeal by the Revenue is directed against the order in W.P.No.3706 of 2019 dated 17.02.2020, filed by the 1st respondent-Company seeking to quash the order passed by the the 2nd respondent, Income Tax Settlement Commission (for brevity "the Settlement Commission"), dated 09.01.2019 and to direct the Settlement Commission to pass a fresh order under Section 245D (2C) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), by admitting the application filed by the 1st respondent/writ petitioner. The writ petition was allowed by

the impugned order and aggrieved by the same, the Revenue is on appeal before us.

2.We have elaborately heard Ms.Hema Muralikrishnan, learned Senior Standing Counsel, assisted by Mr.Prabhu Mukunth Arunkumar, learned counsel for the appellant-Revenue; and Mr.P.S.Raman, learned Senior Counsel, assisted by Mr.R.Sivaraman, learned counsel appearing for the 1st respondent/writ petitioner.

3.The 1st respondent/writ petitioner is a Company incorporated under the Laws of Germany engaged in the design and construction of fossil - fired power plant as also supplying key components such as utility steam generators, environmental engineering equipments, turbines etc. During June, 2010, the National Thermal Power Corporation Limited (NTPC) invited bids under International Competitive Bidding from eligible bidders for supply and installation of 11*660MW steam generators at five places in India. The 1st respondent/writ petitioner is stated to have worked as sub-contractor to BGR Energy Systems Limited (BGRE), who have been selected by NTPC as a contractor for execution of the projects. The other finer details pertaining to the scope of the project may not be very relevant for the purpose of arriving at a decision in this appeal.

4.The project office of the petitioner was subjected to survey by the 1st appellant during October, 2017 pursuant to which, the 1st respondent/writ petitioner received a show cause notice calling for details pertaining to offshore supplies made by them and they were given three days time to respond by 29.12.2017. According to the 1st respondent/writ petitioner, since their German Head Office was closed from 23rd December, 2017 till 1st January, 2018 for Christmas, the 1st respondent/writ petitioner submitted details to the extend available with them on 29.12.2017. The 2nd appellant passed a draft assessment order dated 31.12.2017 under Section 144C of the Act. The 1st respondent/writ petitioner filed a writ petition in W.P.No.1248 of 2018 challenging the same, inter alia contending that there has been gross violation of principles of natural justice. The writ petition was entertained and an order of interim stay was granted on 22.01.2018. However, the 1st respondent/writ petitioner took a decision to withdraw the writ petition and submitted their objections to the draft assessment order before the Dispute Resolution Panel (DRP). Further, the 1st respondent/writ petitioner is stated to have taken a decision to approach the Settlement Commission, since they wanted to avoid protracted litigation. Accordingly, an application under Section 244C of the Act was submitted to the Settlement Commission on 16.11.2018. The Settlement Commission by order dated 26.11.2018, passed under Section 245D(1) of the Act,

allowed the application to be proceeded with. Consequently, the Commissioner of Income Tax (International Taxation), Chennai, (CIT) filed his report dated 27.12.2018 under Section 245D(2B) of the Act. The Settlement Commission fixed the date of hearing as 08.01.2019 for considering the application in terms of Section 245D(2C) of the Act and in the said hearing, the Authorized Representative of the 1st respondent/writ petitioner appeared and reiterated the stand taken in the settlement application that they had fully and truly disclosed all facts and that the manner in which income was earned by the 1st respondent relating to the assessment years 2015-16 to 2018-19. The Settlement Commission by order dated 09.01.2019, held that the application was not maintainable, not allowed to be proceeded with and is treated as 'invalid' under Section 245D(2C) of the Act. Challenging the said order dated 09.01.2019, the 1st respondent/writ petitioner filed the writ petition, which has been allowed by the impugned order.

5.Ms.Hema Muralikrishnan, learned Senior Standing Counsel appearing for the appellant-Revenue strenuously contended that the learned Writ Court ought to have noticed the distinction between Section 245D as it stood prior to 2007 and as it stands as on date. In terms of the unamended provision, the Settlement Commission was required to issue notice to the Commissioner regarding the application made by an assessee and thereafter, within one year, pass an order either to reject or allow the application. If the application was admitted, the relevant facts will be called for and if necessary, investigation will be ordered and final orders will be passed under Section 245D(4) of the Act. However, under the amended Section 245D, the decision of the Settlement Commission to allow the application to be proceeded with or rejected under Section 245D(1) is an order that is passed after hearing the applicant alone. On being satisfied that the application can be allowed to be proceeded with, notice is sent to the Commissioner for his report and the Settlement Commission can consider the validity of the application under Section 245C of the Act and precisely that was done by the Settlement Commission after affording opportunity to the 1st respondent/writ petitioner. Therefore, the learned Writ Court ought not to have interfered with the order passed by the Settlement Commission.

6.It is submitted that the learned Single Bench had relied on the decision of the Hon'ble Supreme Court in the case of CIT vs. Express Newspapers Limited [(1994) 206 ITR 443 (SC)], which decision was rendered in the context of Section 245D, as it stood then. However, after the amended provision in 2007, providing for three stages to the applicant to prove the validity of their application, the said decision cannot be applied to the facts and circumstances of the 1st respondent/writ

petitioner's application.

7..The learned Senior Counsel placed reliance on the decision of the High Court of Delhi in Omaxe Ltd., vs. ACIT [(2012) 25 taxmann.com 190] and submitted that the decision taken by the Settlement Commission is in consonance with the law laid down in the said decision. Further, it is submitted that the learned Single Bench ought to have followed the decision relied on by the Revenue in the case of Abdul Rahim vs. ITSC [(2018) 96 taxmann.com 571] wherein, it is held that if the Commission is fully satisfied that there is suppression of materials and there is no valid and true disclosure of income, even while hearing the matter at the stage of Section 245D(2C), is empowered to reject the application.

8.Reliance was placed on the decision in Mr.Hassan Ali Khan vs. Settlement Commission [(2008) 299 ITR 127 (Bombay)] wherein, it was held that the Commission must be satisfied from the report of the CIT that the application is not invalid under Section 245D(2C). The learned counsel took us through the order passed by the Settlement Commission, the report filed by the CIT and the other materials placed in the typed set of papers and submitted that the scope of interference with the order passed by the Commission is very limited and the learned Writ Court ought not to have interfered with the same.

9.Per contra, the learned Senior Counsel appearing for the 1st respondent/writ petitioner submitted that the order impugned in the writ petition passed by the Settlement Commission was not sustainable in law, as the 1st respondent in their application before the Commission had clearly disclosed as to what are the aspects, which need to be settled, which were in the following terms:-

"2. Particulars of issues to be settled:-

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 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."

10.To take a decision on the above issues, an adjudication process is required to be adopted and the application filed by the 1st respondent/writ petitioner could not have been thrown out at the stage of 245D(2C) of the Act. Further, by referring to the factual details, it is submitted that there were no failure on the part of the 1st respondent/writ petitioner to disclose fully and truly any of the facts or particulars of the income and the application ought to have been allowed to be proceeded under Section 245D(2C). It is further submitted that in terms of sub-Section (4) of Section 245D, the Commission is entitled to adjudicate the matter and pass orders as it deems fit on the matters covered in the application. Thus, it is submitted that the learned Single Bench rightly considered the scheme of Section 245D and allowed the writ petition.

11.On the merits of the matter, the learned Senior Counsel submitted that the Settlement Commission without appreciating the scope of the contracts, arrived at the conclusion that the contracts are composite in nature. To demonstrate that this finding is incorrect, the learned counsel had referred to Annexure-D, Item-4 of the application and submitted that there is no artificial splitting up of a contract and the bids invited and the contracts awarded were independent contracts.

12.After elaborately hearing the learned counsels for the parties, we are of the considered view that the learned Single Bench was right in interfering with the order passed by the Commission and allowing the writ petition. We support such conclusion with the following reasons.

13.The application filed by the 1st respondent/writ petitioner was allowed to be proceeded with by the Settlement Commission under Section 245D(1) of the Act. In terms of Section 245D(2), the copy of such order passed under sub-Section (1) of Section 245D will be sent to the applicant and to the CIT and in terms of sub-Section (2B) of Section 245D, the Settlement Commission shall call for a report from the CIT, who shall furnish the report within a period of thirty days' of the receipt of the communication from the Settlement Commission. On receipt of the report, the Commission will proceed to take a decision under sub-Section (2C) of Section 245D of the Act within a period of fifteen days' from the date of receipt of the report by an order in writing declaring the application in question as invalid and before doing so, afford opportunity of being heard to the applicant. The application filed by the 1st respondent/writ petitioner was declared to be invalid on the ground that there is no true and full disclosure of the income of the assessee.

14.The argument of the Revenue is that full opportunity has

been given to the 1st respondent/writ petitioner to make their submissions before the Commission before an order was passed under sub-Section (2C) of Section 245D and therefore, the learned Writ Court ought not to have interfered with the order and the order attempts to re-write Section 245D of the Act.

15. We do not agree with the said submission, as it is important to take note of the legislative intent and scope of power vested with the Settlement Commission under sub-Section (2C) and sub-Section (4) of Section 245D. For better appreciation, these two sub-Sections are quoted hereinbelow:-

"Section 245D(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] 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.

Section 245D(4):-

(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.

16. The power to be exercised by the Commission under sub-Section (2C) of Section 245D is within a period of fifteen days' from the date of receipt of the report of the CIT. This provision gives power to the Settlement Commission to declare an application as invalid after affording an opportunity of hearing to the applicant. Under sub-Section (4) of Section 245D, the Commission after examination of the records and report of the CIT under sub-Section (2B) or sub-Section (3) of Section 245D and after affording an opportunity to the applicant and to the CIT to be heard either in person or through Authorized Representative 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 the Act, pass such order as it deems fit on the matters covered by the application or any other matter relating to the case not covered by the application, but referred to in the report of the CIT. Thus, the procedure to be adopted by the Settlement Commission while exercising powers under sub-Section (2C) of Section 245D is summary in nature. No doubt, the applicant is given an opportunity of being heard.

17. The plain reading of sub-Section (2C) of Section 245D of the Act does not spell out an adjudicatory process. Therefore, if in the opinion of the Commission, based upon the report the issue needs to be adjudicated, the application cannot be declared as invalid. Therefore, each case, which comes before the Commission has to be decided on its own facts.

18. In several cases, where search and seizure operations are conducted, where contraband is involved, where there is fraudulent practice adopted, the assessee approaches the Commission. Even in those cases, if the Commission allows an application to be proceeded with under Section 245D(1), yet upon receipt of the report, the application can be declared invalid under sub-Section (2C) of Section 245D. In fact, the decision in Abdul Rahim (supra) is one such case.

19. We have referred to the four issues, which the applicant wanted to be settled by the Commission, which have been stated above and, the first among the four issues is with regard to the income earned from offshore supply of goods. The Commission was largely guided by the report of the CIT, who reported that the composite contract of offshore and onshore services are

artificial bifurcated. The Settlement Commission held that the contention of the 1st respondent/writ petitioner that it is not a composite and it was a separate composite and the same was done by NTPC was held to be not fully true. In other words, the Settlement Commission appears to have accepted the fact that the contracts were bifurcated by NTPC, the entity which invited the tender, but the Commission would state that the bifurcation done by NTPC was only for financial reasons. The question is whether such a finding could lead to an application being declared as invalid under Section 245D(2C) on the ground that the 1st respondent/writ petitioner has failed to make full and true disclosure of income. In our considered view, the answer to the question should be a definite no, as this issue could not have been decided without an adjudication.

20.To decide whether a contract is a composite contract or separate contracts, a deeper probe in to the factual scenario as well as the legal position is required. If such is the fact situation in the case on hand, the application of the 1st respondent/writ petitioner could not have been declared as invalid on account of failure to fully and truly disclose its income. Thus, what was required to be done in the instant case was to allow the application to be proceeded with under Section 245D(2C) and take up the matter for consideration under Section 245D(4) and take a decision after adjudicating the claim.

21.The argument of the appellant-Revenue that the learned Writ Court has re-written the statutory provision is an incorrect submission. The marked distinction with regard to the exercise of power of the Settlement Commission at the (2C) state and (4) stage is amply clear from the wordings in the statute. The Commission can declare an application to be invalid at the (2C) stage. Such invalidation cannot be by a long drawn reasoning akin to a decision to be taken at the stage of Section 245D(4). This is so because, sub-Section (4) of Section 245D gives ample power to the Commission to examine the records, the report of CIT received under sub-Section (2B) or sub-Section (3) or the provisions of sub-Section (1), as they stood immediately before their amendments by Finance Act, 2007. The Commission is required to give an opportunity to the applicant, the CIT, they are entitled to be represented by an Authorized Representative and after hearing them 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 the Act, pass such order as it deems fit. Therefore, the scope of enquiry is not confined to the statements made in the application, the response filed by the applicant to the report of the CIT, but also the submissions made during the personal hearing and any further evidence as may be placed before it by the applicant or obtained by the Settlement Commission in

exercise of its power and then proceed to pass orders as it deems fit. Therefore, the procedure at the (2C) stage is undoubtedly summary in nature and the application filed by the 1st respondent/writ petitioner could not have been declared as invalid at the said stage, as the issue requires adjudication, which can be done only when the application is decided under Section 245D(4) of the Act.

22.The decision relied on by the Revenue in the case of Mr.Hassan Ali Khan (supra) would, in fact, support the conclusion, which we have arrived at in the preceding paragraph. It has been held that the Settlement Commission can treat the application as invalid meaning thereby non est, if the applicant is not made a full and true disclosure and further must disclose how the income has been derived. The expression "invalid" will have to be given a meaning of "non est", in other words, as if not made on and from the inception. If on the material, it arrives at a conclusion even prima facie that there was no true and full disclosure, it has then a right to declare the application as 'invalid'. As rightly pointed out by the Hon'ble Division Bench, there is a prima facie opinion formed by the Commission at the (2C) stage and this can never substitute an order under sub-Section (4) of Section 245D. The issues, which were requested to be settled by the 1st respondent before the Commission qua, the report of the CIT cannot obviously be an issue for a prima facie decision at the (2C) stage.

23.For all the above reasons, we find that the appellant-Revenue has not made out any ground to interfere with the order passed by the learned Single Bench.

24.Accordingly, the appeal filed by the appellant-Revenue is dismissed. The learned Single Bench fixed an outer time limit of twelve weeks for the Commission to pass orders. After the writ petition was allowed, the CIT had filed a report in terms of Rule 9 of the Income Tax Rules on 11.03.2020. Thereafter, on account of the Nationwide lockdown and the lockdown announced by the State of Tamil Nadu, the matter appears to have not proceeded further and the 1st respondent/writ petitioner approached the learned Single Bench by filing W.M.P.No.10334 of 2020 to extend the time period of twelve weeks' prescribed in the order or fix some reasonable time. The Court taking note of the situation prevailing and also the fact that the Revenue intended to prefer a writ appeal against the order in the writ petition, directed the Settlement Commission to keep the matter in abeyance by interim order dated 25.06.2020. Now, that we have dismissed the appeal filed by the Revenue, we direct the Settlement Commission to proceed in accordance with law and take a final decision in the matter after affording opportunity of hearing to the 1st respondent. We are not inclined to fix any

time frame for the Settlement Commission to act and leave it to the Commission to decide the matter as expeditiously possible. Consequently, there will be no necessity for any further orders in W.M.P.No.10334 of 2020, which appears to be still pending. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. Income tax Settlement Commission,
Additional Bench, Chennai,
Ministry of Finance, Department of Revenue,
640, Anna Salai, Nandanam,
Chennai-600 035.
2. Dispute Resolution Panel-2,
Office of the Dispute Resolution Panel,
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4. Deputy Commissioner of Income Taxation,
Circle - 2, Chennai,
121, M.G.Road, Nungambakkam,
Chennai-600 034.
5. Deputy Commissioner of Income Taxation - 1(2),
Chennai, 121, M.G.Road, Nungambakkam,
Chennai-600 034.

Pre-delivery Judgment made in
W.A.No.581 of 2020

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