

Form No.(J2)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
IN APPEAL FROM AN ORDER PASSED
IN ITS CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

Present :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

A N D

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

APO NO. 421 of 2017
WP NO: 431 OF 2014
M/s. SWAMINA INTERNATIONAL PRIVATE LIMITED & ANR.
VS.
INCOME TAX SETTLEMENT COMMISSION (IT&WT) & ORS.

Mr. J. P. Khaitan, Sr. Adv.
Ms. Anupa Banerjee, Adv.
Mr. Sagnik Basu, Adv.
Ms. Nidhi Bahal, Adv.
Mr. Shivam Pathak, Adv.
...For the Appellants

Mr. P. K. Bhowmik, Adv.
Mr. A. Bhowmick, Adv.
...For the respondents

Heard on : 09.12.2021

Judgment on : 09.12.2021

T.S. SIGAGNANAM, J. : This appeal is directed against the order passed in a writ petition filed by the appellant in WP 431 of 2014 dated 17th August 2017. The said writ petition was filed challenging the order passed by the Settlement Commission under the

provision of the Income Tax Act, 1961 (the Act in brevity). The writ petition has been dismissed and the order passed by the Settlement Commissioner has been affirmed. The appellant is aggrieved by the said order and urged before us by way of this appeal.

The brief factual background would be necessary before we proceed to deal with the contentions raised before us by either side.

The appellant is a company incorporated under the provisions under the Indian Companies Act during 1976 and engaged in business of electrical maintenance and contract jobs, erection of power plants etc. The appellant company has undertaken job works for several public sector undertakings throughout the country. The assessee approached the Settlement Commission on account of deficiencies in the final account which were filed and that return filed by the company did not reflect the true state of affairs, and, therefore, the application dated 31st May 2007 was filed under Section 243C of the Act. This application was allowed to be proceeded in terms of Section 245D(2A) as the appellant had filed the same on 31st May, 2007 and the additional tax and interest thereupon was paid before 31st July 2007. The Settlement Commission took up the matter for consideration and a report in terms of Rule 9 of the Settlement Commission Procedure Rules was filed on 7th February 2008 and taking into consideration of the said report the Commission proceeded to decide the matter. On going through the order passed by the Commission we find that the commission has referred a communication sent by the assessing officer to the Commissioner of

Income Tax dated 27/30th December 2013 and referred the same as a report which have been filed before the Commission on 15th January 2014, the date on which the application was finally heard by the Commission. The assessee appears to have filed their objection / response to the said communication vide letters dated 14.2.2014 and 24.2.2014 contending that the said communication dated 27/30th December, 2013 cannot be taken as a report, at best it can be only a communication. Apart from that assessee had also raised certain issues on the merits of the matter which had been pointed out in the said communication. It may not be necessary for us at this juncture to go into the other factual details since the primary ground on which the writ petition came to be filed is on the ground that the order passed by the Settlement Commission violates provisions of the Act and causes prejudice to the appellant/assessee. The learned Single Judge was of the view that the scope of the interference by a Court exercising powers under Article 226 of the Constitution are clearly circumscribed and disputed question of fact cannot be gone into and the Settlement Commission had called for a report under Rule 9 of the said rules and considered the additions and there cannot be any illegality in the said order for the Writ Court to intervene. The appellant is aggrieved by the dismissal of the writ petition.

Mr. J.P. Khaitan, learned Senior Counsel appearing for the appellant submitted that gross procedural irregularity has been committed by the Commission, and the provisions of the Act has been violated thereby putting the assessee to a great prejudice. It is

submitted that the addition of Rs.6.97 crore to the income of the assessee for the assessment year 2001-2002 was made contrary to the provisions of the Act and without considering or dealing with any submission made by the assessee on facts as well as on law. Further the learned Single Bench committed an error in holding that the appellant's case was a report under Rule 9 should have been called for in respect of the said sum of Rs.6.97 crore when such was never the case of the appellant. Further it is submitted that the sum of Rs.6.97 crore was not referred to any report of the Principal Commissioner or Commissioner under Sub Section 2B or sub Section 3 of Section 245D and as such could not be added as income in the order passed under sub Section 4 of Section 245D. Further, it is submitted that if the commission was desirous of passing an order by settling the case under Section 245, it should have ordered for an investigation under sub Section 3 and call for a report from the commissioner in respect of the sum of Rs.6.97 crores, should afford an opportunity to the assessee to deal with such report and make submissions and such procedure was not followed by the Commission. Further, it is submitted that the assessee's consistent case was that the said sum of Rs.6.97 crores was a balance sheet item and was not a matter covered by the Settlement Commission in respect of which assessee had offered itself to be assessed and mere mentioning of the statement of fact about the treatment of the said Act in the revised amount filed by the assessee before the Commission did not make a matter covered by the application for settlement.

Further it is submitted that the learned Writ Court ought not to have seen that the assessee had stated before the Commission that the said advances of Rs.6.97 crore has become time barred. It was factually incorrect and has also made factual and legal submissions in respect of such submission and to demonstrate that the said advances unilaterally transferred to reserve and surplus on March 31, 2000 had no tax implication for the assessee. Further the communication sent by the assessing officer dated 27/30th December, 2013 was an internal communication between the assessing officer and the Commissioner of Income Tax with regard to the issues on which investigation under Section 245(3) of the Act should have been sought for by the revenue before the Commission and, therefore, the said communication dated 27/30th December, 2013 is not a report called for by the Commission. Further it is contended that the order passed by the commission is a non speaking order, without having due regard to the submissions made by the assessee more particularly the objections which they have filed to the Rule 9 report itself apart from not considering the response filed by the appellant/assessee to the communication sent by the assessing officer dated 27/30th December 2013. It is further submitted that the Settlement Commission had not taken into account the relevant fact that the assessed net profit rate in the assessee's case for the assessment year 2003-04 after examination of its books of accounts was 2.93% and as such the company's offer on the basis of six years average rate was 3.69 per cent which should have been accepted rather than to fix an

ad hoc percentage of 8% which was adopted by the assessing officer for the assessment year 2001-02 which assessment is a subject matter of appeal before the Commissioner of Income Tax (Appeals). Further it is submitted that the Commission has not given any independent reasons as to why the rate offered by the assessee at 3.69% was not acceptable and this fact was also not considered by the learned Single Bench. Further it is submitted that when the assessee had pointed out serious illegality in the decision making process by the Commission, the learned Writ Court ought not to have dismissed the writ petition. With regard to the scope of interference of this Court under Article 226 of the Constitution of India against an order of Settlement Commission reliance was placed on the decision in the case of Major Metals Ltd. Versus Union of India & Ors. [2013] 359 ITR 450 (Bom). Mr. Bhowmick learned standing counsel appearing for the respondent has drawn our attention to the statement of fact as recorded in the Settlement application dated 31st May, 2007 filed under Section 245(C) of the Act. Further for completion of fact the learned standing Counsel had referred to the report submitted under Rule 9 dated 7th February, 2008 and the findings recorded by the Commission and contended that learned Writ Court after taking note of the fact that the Commission had considered the materials as well as the report and rendered a finding, rightly dismissing the writ petition finding that there is nothing to be interfered by a Writ Court. With the aforestated submission learned standing counsel sought to sustain the order passed in the writ petition.

We have elaborately heard the learned Counsel for the parties, carefully considered the materials perused and referred to. First, we need to take note of the legal position of the scope of this Court under Article 226 of the Constitution to interfere with the orders passed by the Settlement Commission. This issue is no longer a *res integra* and one of the decisions in the case of Jyotendrasinhji Vs. S.I. Tripathi reported in [1993] Vol 201 ITR 611 (SC), wherein the Hon'ble Supreme Court emphasized that the only ground upon which an order passed by the Settlement Commission can be interfered with is that the order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the assessee. That apart the other ground should be that of bias, fraud or malice.

In the said decision the Hon'ble Supreme Court referred to the decision in R.B. Shreeram Durga Prasad & Fatechand Nursingh Das Vs. Settlement Commission (IT and WT) reported in [1989] 176 ITR 169 (SC) wherein it was observed that Court should be concerned with the legality of procedure followed and not with the validity of the order and that the judicial review is concerned not with the decision but the decision making process. Thus it was held that the power exercised by the Court while examining the correctness of the order of the Settlement Commission cannot be equated to an appellate power. In Union of India Vs. Ind-Swift Laboratories Ltd. [2011] 40 VST 1(SC) the Hon'ble Court held that an order passed by the Settlement Commission should be interfered with only if the said order is found to be contrary to any provisions of the Act and so far as the findings of

fact recorded by the Commission or question of facts are concerned the same is not open for examination either by the High Court or by the Supreme Court. In N. Krishnan Vs. Settlement Commission [1989] 180 (ITR) 585 (Karn) it was held that the Settlement Commission may be interfered broadly under two circumstances firstly if there is a gross procedural defect such as the violation of the mandatory of procedural requirements of the provisions of Chapter XIX and/or violation of the principles of natural justice and secondly there is no nexus between the reasons given and the decision taken by the Settlement Commission. It was pointed out that the Court under Article 226 would not interfere with an error of fact alleged to have been committed by the Settlement Commission. Those decisions were noted in Major Metals Ltd.(supra). By keeping the above legal principles in mind if we examine the order passed by the Settlement Commission we have no hesitation to hold that the order violates the provisions of the Act and causes grave prejudice to the appellant/assessee. We support such conclusions with the following reasons;

In terms of Section 245D(3) of the Act, the Settlement Commission 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 caused to be made such further enquiry of 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 the Commissioner shall furnish a report within a period of 90 days of the receipt of the communication from the Settlement Commissioner. In terms of the above provision the Commission is empowered to not only consider the matter which is covered by an application by directing further enquiry or investigation but also any other matter relating to the case. Thus if the commission is to venture into any other matter relating to the case or in other words a matter not covered by the application then the prerequisite is an enquiry or investigation is required to be done. Thereafter on receipt of the report, the assessee/application is entitled for an opportunity to be heard in terms of sub Section 4 of Section 245D of the Act. The three issues namely the addition of about Rs.6.97 crores, the rate of profit adopted by the Commission at 8% and the increase of the turnover are all matters which are not covered in the application. Thus if the Commission had to venture into this aspect merely because it was made as a statement of fact in the application or it was part of Rule 9 report, unless and until the procedure which is stipulated under the Act has been followed such a conclusion or a finding could not have been rendered by the Settlement Commission more particularly when those issues did not form part of this application. In fact, we could very well elaborate on the factual aspect in to the matter but we refrain from doing so as what we have called upon to decide is to whether there was an error in the decision making process and we are not concerned about the

decision. This procedural violation goes to the root of the matter rendering the order of the Commission wholly unsustainable in violation of the provisions of the Act and causing grave prejudice to the assessee. The consequence would be that the order has to be treated as an order in violation of principles of natural justice and to a certain extent beyond jurisdiction. Those are all grounds which are very much available to a Court exercising jurisdiction under Article 226 to interfere with the said order. One more aspect which we had noted is the observation made by the Commission in paragraph 7 of its order dated 28th February, 2014. In the said paragraph the Commission records that they have heard the rival submissions and gone through the “latest report” of the CIT dated 27/30th December, 2013 filed before the Commission on 15th January, 2014. To be noted that 15th January, 2014 was the date on which the Commission heard the application finally before reserving orders. More importantly what is required to be seen is whether the communication dated 27/30th December, 2013 is a report which has to be construed as such in terms of Section 245D(3). On a perusal of the said letter we find that is not a report but is an internal communication sent by the assessing officer to his Commissioner of Income Tax and on reading of the communication it is clear that the assessing officer has requested his commissioner to allow him to enquire and investigate the whole case through principals/beneficiaries and obtain correct picture of the business activities and interest income and factual position of assets of transparency and find out the income accurately. Further the

assessing officer qualifies the communication by stating that the submission furnished is in the form of a report based on records without cross-checking or verification.

Furthermore, the assessing officer states that due to lack of fairness on the part of the assessee in disclosing income, the Settlement Commissioner may reject the application. Thus by reading the said communication dated 27/30th December, 2013 it is clear that is not a report in terms of sub Section 3 of Section 245D which mandates that Commission should direct the Commissioner to submit a report which has never been done by the Commissioner. All those which we have pointed out above would go to show that the order passed by the Commissioner flows from serious illegality and irregularity calling for interference. That apart the alleged report dated 27th December, 2013 as admittedly been filed only on 15th January, 2014, the date on which the application was finally been heard by the Commission and orders were reserved. The assessee had stated that on 14th February 2014 and 24th February, 2014 they have filed their objection to the said letter which has not been dealt with by the Commission not even referred to by the Commission. Thus we can safely hold that there has been serious violation of principles of natural justice. On all the above grounds we are fully satisfied that the order passed by the Commission calls for interference and consequently we are required to interfere with the order passed by the learned Single Judge dismissing the writ petition.

In the result, the appeal is allowed. The order passed in the writ petition is set aside and the order passed by the Settlement Commission is quashed and the assessment is relegated back to the assessing officer to get assessment in accordance with law after effective opportunity to the assessee and not being influenced in any of the these observations made in any of the letters and in any of the reports and any observation made by the Settlement Commission which order has been set aside by this Judgment.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)