

ORDER SHEET
WPO/571/2018
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX, BURDWAN & ANR.
VS
INCOME TAX SETTLEMENT COMMISSION (INCOME TAX AND
WEALTH TAX), ADDITIONAL BENCH AND ORS.

BEFORE:

The Hon'ble JUSTICE MD. NIZAMUDDIN

Date : 24th August, 2022.

Appearance:
Mr. Vipul Kundalia, Adv.
Mr. Anurag Roy, Adv.
...For the Petitioner
Mr. Debajyoti Dutta, Adv.
Mr. Sabyasachi Roy, Adv.
Ms. P. Banerjee, Adv.
...For the respondent

The Court : Heard learned counsel appearing for the parties.

By this writ petition, petitioner Income Tax Authorities have challenged the impugned order of the settlement commission dated 2nd September, 2016 granting partial immunity to the petitioner under Section 245H(1) of the Income Tax Act, 1961 by way of imposing lesser amount of penalty. Learned counsel appearing for the petitioner submits that the impugned order of the settlement commission granting partial immunity to the petitioner under Section 245H(1) of the Act in respect of imposition of penalty is contrary to the spirit of the scheme of settlement commission and particularly under Section 245H(1) of the Act. Petitioner in support of its contention relies on a judgment of the Hon'ble Delhi High Court in the case of Commissioner

of Income Tax (Central) – II vs. Income Tax Settlement Commission & Anr. reported in 2014 SCC OnLine Del 626, particularly paragraph 14 of the said judgment which is quoted hereunder :

“ 14. The aforesaid factual position shows that the assessee took a chance - sat on the fence, so to say – by not coming clean in the settlement application and not disclosing income which it did not disclose before the assessing officer – and when the CIT’s reports exposed its conduct in the proceedings before the ITSC, it was “advised” by the ITSC, “in a spirit of settlement” to offer the entire amount of bogus purchase of Rs. 117.98 crores, which it accepted. We fail to see any spirit of settlement; that spirit ought to have been exhibited by the assessee in the application filed before the ITSC, as the law requires, and it is not enough if it is shown in proceedings before the ITSC after being confronted with adverse reports, to which it had no answer. In Ajmera Housing Co-operation v. CIT, (2010) 326 ITR 642, the Supreme Court held that the fact that the assessee kept revising its application for settlement by disclosing higher income in the revised applications established that it did not make a full and true disclosure of income which it did not disclose to the assessing authority. In the circumstances, the assessee cannot be said to have “co-operated” in the proceedings before the ITSC. It did not voluntarily offer the additional income, being the difference between 117.98 crores and 39.53 crores. It first offered additional income of Rs. 39.53 crores in the settlement application filed under Section 245 – C(1) ; when the ITSC found, pursuant to the report filed by the CIT on

17.10.2012, that by the assessee's own admission, purchase invoices were bogus to the extent of Rs. 43.78 crores instead of Rs. 39.53 crores, the assessee made a further disclosure of Rs. 4.25 crores. After all the reports were examined by the ITSC and after considering the evidence adduced by both the sides, it found that the assessee ought to have offered the entire amount of Rs. 117.98 crores, being the bogus purchases of cement and steel from 5 parties as against Rs. 39.53 crores offered by it. It was only at that stage, when cornered and when it was unable to rebut the evidence and the facts established by the evidence, that the assessee came forward with the additional income of Rs. 78.45 crores, which when added to Rs. 39.53 crores disclosed in the settlement application, aggregated to Rs. 117.98 crores. In other words the assessee waited till the last moment to make the additional offer. This conduct of the assessee far from showing co-operation in the proceedings before the ITSC, shows defiance and an attitude of a fence-sitter. The Member who expressed the minority view rejecting the claim for immunity from penalty and prosecution has pertinently brought out this aspect of the assessee's conduct in the observations quoted hereinabove. We agree with his view that the assessee was all along quite aware that the entire amount of Rs. 117.98 crores, being bogus purchase of cement and steel from 5 parties of Gurgaon and Delhi, was concealed income. There is ample evidence brought on record by the revenue in this behalf. Yet the assessee consciously chose not to offer the aforesaid amount as additional income – i.e. income which was not disclosed

before the assessing officer – in the application filed before the ITSC under Section 245(1). The assessee has thus failed to satisfy the twin conditions of Section 245H(1) and was, therefore, not entitled to the immunity. The majority view expressed by the ITSC, with respect, goes contrary to the evidence on record and fails to take note of the contumacious conduct of the assessee despite an opportunity afforded by Chapter XIX-A of the Income Tax Act to errant assesseees to come clean and turn a new leaf. The spirit of settlement was absolutely lacking; it may not be without justification to say that the assessee was indulging in abuse of a well-intentioned statutory provision. It is certainly open to the ITSC to grant immunity to an applicant from penalty and prosecution. This power, however has to be exercised only in accordance with law i.e. on satisfaction of the conditions of Section 245H(1). We are constrained to observe that the majority view taken by the ITSC in the present case reflects a somewhat cavalier approach, perhaps driven by the misconception that granting of immunity from penalty and prosecution was ritualistic, once the assessee discloses the entire concealed income, ignoring the vital requirement that it is the stage at which such income is offered that is crucial and that the applicant cannot be permitted to turn honest in instalments. When there is unimpeachable evidence of a much larger amount of concealed income, about which there is no ambiguity, then what was disclosed by the assessee in the application filed under Section 245-C1 cannot be regarded as full and true disclosure of income merely because the assessee, when cornered in the course of the proceedings

before the ITSC, offered to disclose the entire concealed income. In as much as the ITSC has ignored this crucial aspect, the majority view expressed by it cannot at all be countenanced.”

Learned counsel appearing for the respondent assessee opposes this writ petition and justifies the impugned order of the settlement commission by contending that the assessee petitioner has fully and truly disclosed his income and the manner in which such income had been derived.

I have perused the impugned order of the learned settlement commission and particularly finding of settlement commission recorded in paragraph 29 relating to partial immunity granted to the petitioner on penalty which is relevant and is quoted as hereunder :

“29. Immunity From Penalty & Prosecution : The applicant has requested for immunity from penalty and prosecution. On careful consideration of the facts, it is evident that the applicant has not come forward with full and true disclosure before us. Substantial evidence in the form of patients registers, admission registers, daily sheets and papers etc. were impounded on the basis of which actual receipts were found considerably higher than disclosed in SA. During the course of hearing also, the A.R. could not reconcile various discrepancies and mismatches. The AR finally admitted the error and stated that a fair view may be taken by the Commission in this regard. For subsequent A. Yrs. Viz., 2012-13, 2013-14 and 2014-15, again the applicant has not disclosed full receipts from the profession. The heavy suppression of income is evident from additions made for various Assessment

Years as per discussion in preceding para. It is also admitted that there is no documentary evidence in support of several cash expenses/payments. The income and expenditure account submitted before the Commission appear to be made with the sole motive to disclose the additional income as per the applicant's convenience. This attitude of the applicant is not acceptable and runs contrary to the spirit of the settlement. The immunity is allowed to the applicant who comes forward cleanly and discloses his affairs and income fully and truly. In our considered view, the applicant does not deserve complete immunity. Levy of some penalty u/s 271(1)(c) of the Act for concealment of income is warranted as the applicant has not disclosed his additional income fully and truly before the Settlement Commission, we consider it fair to levy a lump sum penalty of Rs. 4 lacs in each of the four Asstt. Years. Besides applicant's professional receipts being much higher than the requisite monetary limit, he was statutorily obliged to maintain proper record and books of a/c, as per section 44AA of the IT Act. The applicant has continued with the default of not maintaining books of account in all the four Assessment years. Default in non maintenance of books of account during post survey period indicates that it was deliberate and intentional. Therefore, a penalty of Rs. 25,000/- each is levied u/s 271A of the Act for A. Yrs. 2011-12, 2012-13, 2013-14 and 2014-15. Having considered the facts and circumstances of the case, we are inclined to grant immunity u/s 245H(1) of the Act to the applicant from

prosecution under I.T. Act. However, the same is subject to the provisions of section 245H(1A) of the Act.”

From the reading the recording and finding of the settlement commission in the aforesaid paragraph 29 of the impugned order I find that the learned Settlement Commission itself has recorded that attitude of the assessee respondent was not acceptable to it and that it runs contrary to the settlement scheme and in its order settlement commission also recorded and came to the finding that the assessee’s professional receipts were much higher than the requisite monetary limit and he was statutorily obliged to maintain proper record and books of accounts as per Section 44AA of the Income Tax Act yet the respondent assessee had continued with the default of not maintaining books of accounts of the four relevant assessment years and that such conduct of the assessee respondent was deliberate and intentional. It is strange that in spite of such finding of the learned Settlement Commission how it has granted partial immunity from penalty to the petitioner under Section 245H(1) of the Act which is contrary to the spirit of the settlement scheme.

Section 245H(1) is relevant for adjudication of this issue which is quoted as hereunder :

“245H. Power of Settlement Commission to grant immunity from prosecution and penalty. (1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under Section 245C has cooperated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of

his income and the manner in which such income has been derived, grant to such person, subject to such conditions as it may think fit to impose for the reasons to be recorded in writing immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also (either wholly or in part) from the imposition of any penalty under this Act, with respect to the case covered by the Settlement :

.....”

Considering the submissions of the parties, facts and circumstances as appears from record, relevant provisions of law and judgment relied upon by the petitioner, I am inclined to hold that the impugned order of the Settlement Commission to the extent of granting partial immunity to the petitioner from penalty under Section 245H(1) of the Income Tax Act, 1961 inspite of specifically recording that it was evident to the Settlement Commission that the respondent assessee had not come forward with full and true disclosure before it and that the attitude of the assessee respondent was not acceptable and runs contrary to the spirit of the Settlement Commission and by also recording that default in non maintenance of books of accounts under Section 44AA of the Act was deliberate and intentional on the part of the petitioner, the impugned order of settlement commission is bad, illegal and not sustainable in law and is contrary to the aims and objects of the settlement commission under Chapter XIXA of the Income Tax Act and accordingly the impugned order of the settlement

commission dated 2nd September, 2016 is quashed to the extent it has granted partial immunity from penalty to the assessee respondent and in view of quashing of the impugned order to this extent all legal consequence will follow.

This writ petition being WPO 571 of 2018 stands disposed of by allowing the same to the extent indicated above.

(MD. NIZAMUDDIN, J.)

TR/