IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14.10.2022

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

WP.No.28019 of 2019 and
WMP.Nos.27631 & 27638 of 2019

The Principal Commissioner of Income Tax,
Central-1, Chennai,
Investigation Wing, Room No.301,
3rd Floor, New No.46, Mahatma Gandhi Road,
Chennai-600 034. ... Petitioner

Vs

1.The Income Tax Settlement Commission,
Additional Bench,
640, Anna Salai, Nandanam,
Chennai-600 035.

2.M/s.Apollo Hospital Enterprise Ltd.,
Rep. By its Chairman,
No.19, Bishop Garden, Raja Annamalaipuram,
Chennai-600 028. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records on the file of the 1st Respondent in Settlement Application No.TN/CN/51/2016-17/77-IT dated 28.06.2018 and quash the same as illegal and contrary to the provisions of the Act.

For Petitioner : Mr.A.P.Srinivas

For Respondents : Mr.Ajay Vohra, Senior Counsel
for Mr.R.Sivaraman (for R2)

R1 – Settlement Commission

O R D E R

This writ petition has been filed at the instance of the Income Tax Department challenging an order passed by the Settlement Commission in respect of an application filed by the respondent assessee (in short and hereinafter referred to as 'assessee') for the period 2009-10 to 2016-17.

2. The premises of the assessee was searched under Section 132 of the Income Tax Act, 1961 (in short 'Act') on 05.01.2016, simultaneous with a survey. Notices under Section 153A were issued, returns filed, and proceedings for assessment were taken up.

3. For one of the years i.e. AY 2009-10, notice under Section 148 had also been issued proposing re-assessment of income. Pending assessment and re-assessment proceedings, the assessee moved an application for settlement before the first respondent offering additional income of an amount of Rs.154.86 crores (approx.)

4. Inter alia, the assessee had, in the additional income offered,

factored in an adhoc disallowance of a sum of Rs.14 crores spread over three assessment years i.e. 2013-14, 2014-15 and 2015-16, to address probable omissions in the computation of the additional income and supply deficits, if any that arose in the proceedings before the Commission.

5. The settlement application was admitted to be proceeded with, a report in Rule 9 called for from the Principal Commissioner of Income Tax, the response of the assessee sought, and final orders, as impugned in this writ petition were passed on 28.06.2018.

6. In the affidavit filed in support of the writ petition, the revenue has raised grounds challenging the difference of Rs.4.3 crores in the offer made and accepted by the first respondent towards inflation of purchases in pharmacy division, the computation of book profit under Section 115JB and the disallowance of expenditure relatable to exempt income in computing Minimum Alternate Tax. Apart from the same, an omnibus ground has been raised to the effect that no full and true disclosure has been made within the meaning of Section 245C.

7. In the course of submissions, Mr.A.P.Srinivas, learned Senior Standing Counsel, who has represented the matter on behalf of the Income Tax Department has also assailed certain other conclusions arrived at by the

Commission.

8. While Mr.Ajay Vohra, learned Senior Counsel appearing for the assessee does point out that not all the submissions made by the revenue have been raised as part of the grounds, he does not very seriously press the aforesaid submission but would allow the matter to run its own course, responding to all submissions advanced by the revenue.

9. On the maintainability of the writ petition itself, the assessee would outline the scope of judicial review, which in matters such as these, challenging orders passed by the Settlement Commission, is rather restricted. The Hon'ble Supreme Court and several of the High Courts including this Court, have been of the consistent view, that judicial intervention in such challenges must be limited.

10. This proposition would be applicable equally in the case of challenges put forth by the assessee as well as the revenue, as the participation of both parties in the proceedings before the Settlement Commission, is in the spirit of amicable settlement, co-operation and with a view to seek finality upon the issues that arise. Thus, in either case, intervention by the Courts would not be liberal, restricted to the decision making process rather than the decision itself.

11. The procedure before the Commission involves calling for the comments of the Income Tax Department, soliciting the response of the assessee and hearing both parties in detail. It is only thereafter that, bearing note of the submissions made by both parties and consideration of the offer made by the assessee, that the Commission arrives at a decision.

12. In *Jyotendrasinhji v. S.I.Tripathi* (201 ITR 611), the Hon'ble Apex Court considered a challenge to an order of the Settlement Commission and settled the position that has been applied repeatedly over the years, to the effect, that intervention by Courts must be only to the procedure followed by the Commission if found contrary to that prescribed under the Act.

13. Reference is made to the earlier judgment in the case of *Sri Rant Durga Prasad v. Settlement Commission* (176 ITR 169) and the Bench states at paragraph 15, as follows:

> *'15. It is true that the finality clause contained in Section 245-I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this court under Article 32 or under Article 136, as the case may be. But that does not mean that the jurisdiction of this Court in the appeal preferred directly in this court is any different than what it would be if the assessee had first approached the High Court under Article 226 and then come up in appeal to this court under Article 136. A party does not and cannot gain any*

advantage by approaching this Court directly under Article 136, instead of approaching the High Court under Article 226. This is not a limitation inherent in Article 136; it is a limitation which this court imposes on itself having regard to the nature of the function performed by the Commission and keeping in view the principles of judicial review. May be, there is also some force in what Dr. Gauri Shankar says viz., that the order of commission is in the nature of a package deal and that it may not be possible, ordinarily speaking, to dissect its order and that the assessee should not be permitted to accept what is favourable to him and reject what is not. According to learned Counsel, the Commission is not even required or obligated to pass a reasoned order. Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the commission to make a particular order, unless of course the commission itself chooses to give reasons for its order. Even if it gives reasons in a given case, the scope of inquiry in the appeal remains the same as indicated above viz., whether it is contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (audi alterant portent) has been incorporated in Section 245-D itself. The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same - whether the order of the Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant apart from ground of bias, fraud & malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in Sri Rant Durga Prasad v. Settlement Commission MANU/SC/0429/1989 :

[1989]176ITR169(SC) , which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji, J., speaking for the Bench comprising himself and S.R. Pandian, J. observed that in such a case this Court is "concerned with the legality of procedure followed and not with the validity of the order." The learned Judge added "judicial review is concerned not with the decision but with the decision-making process." Reliance was placed upon the decision of the House of Lords in Chief Constable of the N.W. Police v. Evans [1982] 1 W.L.R.1155. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders' of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. The main controversy in these appeals relates to the interpretation of the settlement deeds - though it is true, some contentions of law are also raised. The commission has interpreted the trust deeds in a particular manner, Even if the interpretation placed by the commission the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be said to be a violation of the provisions of the Income Tax Act. It is equally clear that the interpretation placed upon the said deeds by the Commission does not bind the authorities under the Act in proceedings relating to other assessment years.'

14. The above ratio is to be borne in mind in deciding challenges to orders passed by the Settlement Commission and has also been applied by this Court on several instances including in the matter of *Smt.P.Suman v. Commissioner of Income Tax and another* (WA.No.2005 of 2021 dated

18.08.2021).

15. The settled position thus is that while an error in procedure or decision making process is susceptible to writ jurisdiction, the Courts would not normally intervene on the merits of the conclusions arrived at by the Settlement Commission. My conclusions in the paragraphs that follow, are set against the background and context of judicial review, as noticed above.

16. The assessee had incurred certain capital expenditure and it was the stand of the department before the Settlement Commission, as seen from the report of the Principal Commissioner of Income Tax under Rule 9, that the expenditure was itself liable to be disregarded and the amount represented by such expenditure, added as undisclosed income to the income of the assessee.

17. Per contra, the stand of the assessee was that the expenditure had been incurred through banking channels and there was no infirmity in the methodology adopted in the incurrence of the expenditure. However, the assessee had withdrawn the depreciation claimed in respect of the expenditure claimed, which had come to be accepted by the Commission in the following terms:

'*Inflation of capital expenditure:*

8.1 In the SOF filed with the settlement application, the applicant has disclosed additional income on account of inflated revenue and capital expenditure. While the entire amount of inflated revenue expenditure has been disclosed, in respect of capital expenditure, the applicant has disclosed only the depreciation charged on the inflated capital expenditure. The Pr.CIT is of the view that the methodology adopted by the applicant in respect of capital expenditure is not correct and that the entire capital expenditure incurred needed to be disclosed and not just the depreciation. In the reply under Rule 9A, the applicant has clarified that the payments in respect of capital expenditure in question were made through cheques out of accounted income of the applicant that has already been subjected to tax and the money received back represents applicant's own money taken out of the books and brought in as unaccounted cash. According to the applicant the provisions of sec 68, 69 or 69A are not applicable in this case. The depreciation of Rs.11,96,836 claimed on the inflated capital expenditure has been disclosed by the applicant and vide letter dated 2.1.2017, the applicant has further undertaken to write off the WDV of the inflated assets remaining in the books as on 31.3.2017 from the block of assets so that no further depreciation can be claimed in subsequent years. On a careful consideration, we are of the view that the methodology adopted by the applicant cannot be said to be incorrect. As the payments in respect of the capital expenditure were from explained sources and shown in books of accounts, therefore it cannot be taxed as expenditure or investment from undisclosed source. The only implication of such a transaction on applicant's taxable income can be in the form of depreciation chargeable on the assets procured debited to the profit and loss account. However the applicant has already surrendered such depreciation and has also undertaken to write off the additional WDV at the end of the block period to ensure that no further depreciation may be charted in subsequent years. In view of these facts, we are of the view that there is no justification or scope to make an addition of the entire amount of capital *expenditure to assessee's income. The objection made by the Pr. CIT on this ground is thus rejected. No adverse inference needs to be derived against the applicant on this issue.'*

18. The withdrawal of depreciation has been accepted by the Commission, which has further rendered a finding of fact to the effect that the incurrence of expenditure was beyond question. This finding of fact has neither been challenged by the revenue nor has any material been produced to establish that such finding was erroneous, let alone perverse. I thus see no reason to intervene with the conclusions arrived at in this regard.

19. Yet another argument put forth by the revenue is that there has been no positive income that has been offered on this scope as the offer made is only towards the withdrawal of depreciation. Reliance is placed on a decision of the Hon'ble Apex Court in the case of *Commissioner of Income Tax v. Express Newspapers Limited* (206 ITR 443).

20. The submissions of the revenue have no merit as the withdrawal of depreciation would automatically enhance the income, and such enhancement would suffice for the purposes of maintaining an application before the Settlement Commission. The decision cited does not advance the case of the petitioner in any manner. The discussion as aforesaid would cover the discussion and conclusions at paragraphs 8.1 and 8.3 of impugned

order.

21. The second argument relates to a disallowance under Section 14A r/w Rule 8D that has been dealt with under paragraph 8.7 of the impugned order. At the outset, no perversity is pointed out as regards the conclusion of the Settlement Commission on this issue, and revenue counsel only reiterates and repeats the submissions made before the Commission.

22. The assessee had, in the computation of interest income, excluded investments in group companies, from which no exempt income had been earned. There was some cleavage of opinion between various High Courts as to whether the provisions of Section 14A would at all be attracted in the case of an investment that had generated no dividend, and the issue had been settled by the Hon'ble Apex Court in the case of *Maxopp Investment Limited v. Commissioner of Income Tax* (402 ITR 640). The ratio of the decision was that disallowance of expenditure was to be made from investments towards strategic investments or stock-in-trade.

23.While computing the additional income to be offered before the Settlement Commission, the assessee had admittedly, not reckoned this issue for the purpose of the offer, taking benefit of the decisions that were in its favour. To be noted that the application had been filed on 20.12.2016, whereas this issue had come to be decided finally by the Hon'ble Supreme Court on 12.02.2018.

24.Thus, when the judgement in *Maxopp Investment* was pointed out in the course of proceedings before the Settlement Commission, an additional disclosure of a sum of Rs.5.75 crores (approx.) had been made and additional tax had been remitted at the time of hearing before the Commission, that was duly accepted. In the circumstances as noticed and recorded above, I find no infirmity in the conclusion of the Commission.

25.In fact, no such infirmity or flaw has been pointed out by the revenue in the acceptance of the additional offer, and rightly so, as the offer came about on account of a development subsequent to the filing of the application. The original offer was made based on the position of law as prevailed at the time filing of the application in 2016 and seen in that context, cannot be said to be incorrect or incomplete. The decision of the Commission on this account is confirmed.

26.The next submission relates to computation of Minimum Alternate Tax. As in the other issues that have arisen for consideration, no infirmity is pointed out as regards the conclusion arrived at by the Commission and the revenue would merely reiterate the submissions made earlier.

27.It would suffice to take note of one of the points that have been noticed by the Commission in coming to the conclusion that the issue of MAT computation would have no ramification as far as the income offered before the Settlement Commission was concerned.

28. In fact, if at all the submission of the revenue were to be accepted, it would result in an enhancement of the MAT credit, as a consequence that the income disclosed/offered would have stood reduced. Thus, the argument put forth by the revenue is counter-productive to their interests. This aspect of the matter has been noticed by the Commission at paragraph 8.12 as follows:

> *'MAT Computation:*
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> *8. 12 ……….. The applicant has further clarified that so far as applicant's MAT credit is concerned, it has actually got reduced by Rs.47,01,93,940 or because the tax payable as per book profits for A.Y 2012-13 to 2016-17 and the amount of tax payable u/s 115JB was the same as tax payable as per return of income but the tax payable on account of normal provisions went up substantially due to the disclosure made before the Commission on account of the disclosure made by the applicant.'*

29. The last issue argued relates to alleged inflation in purchases by the pharmacy division, and has been dealt with in paragraph 8.2 of the impugned order. The issue was raised at the time of verification under Rule

9 and upon coming to be informed of the discrepancy, the assessee drew attention to its original offer of a sum of Rs.14 crores, of which Rs.4.3 crores (approx.) would address the discrepancy pointed out in regard to this issue in question.

30.The argument advanced by the revenue in this regard is that any offer of additional income would have to be directed towards a specific purpose. In this case, the offer of Rs.14 crores that had been made in the first instance had only been in general terms, and not specifically directed to the issue of inflated purchases.

31. In my considered view, the above submission is hyper technical. The revenue has accepted both the original adhoc offer of a sum of Rs.14 crores as well as the tax remitted thereupon, not raising any dispute in this regard. It does not thus lie in its mouth to now raise a dispute in regard to the eligibility of the income offered. Having accepted the whole of the income offered at the first instance, there is no justification for the submission made now, in regard to one portion of the income.

32.The adhoc offer of additional income was itself only to provide for contingencies and to provide a buffer for any shortfall that may arise in the computation of income in the course of the proceedings. If at all the revenue was of the view that there is no avenue in settlement proceedings for any adhoc offer to be made, and that the income must relate to specific heads, such objection must be raised at the very first instance.

33. In the present case, the additional income, along with the tax thereon, has been duly accepted in the initial stages and no objection has been raised by the respondents. Thus, the assessee is justified in seeking the benefit of such offer as against subsequent shortfall in income, if, and as and when detected.

34.This writ petition is dismissed in light of the detailed discussion as above. No costs. Connected miscellaneous petitions are closed.

14.10.2022

vs
Index : Yes
Speaking Order

To

The Income Tax Settlement Commision,
Additional Bench,
640, Anna Salai, Nandanam,
Chennai-600 035.

DR.ANITA SUMANTH, J.

vs

WP.No.28019 of 2019 and
WMP.Nos.27631 & 27638 of 2019

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