IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.10.2022

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.Nos.29165, 29106 & 29128 of 2019 &

WMP.Nos.28915, 28876, 28880, 28914, 28964 & 28965 of 2019

Ashok Kumar Jain ... Petitioner in W.P.No.29165 of 2019

M/s.Laxmi Gold House Pvt. Ltd.
Represented by its Director,
Ashok Kumar Jain,
No.65, NSC Bose Road,
Sowcarpet, Chennai – 600 079. ... Petitioner in W.P.No.29106 of 2019

M/s.Laxmi Jewellery Chennai Private Limited,
Represented by its Director, Ashok Kumar Jain,
No.2/22, Narsingadasari Lane,
No.60-A, NSC Bose Road,
Sowcarpet, Chennai – 600 079. ... Petitioner in W.P.No.29128 of 2019

Vs

1. Income Tax Settlement Comission,
   Additional Bench, Satguru Complex,
   640, Annasalai, Nandanam, Chennai - 600035.

2. The Principal Commissioner of Income Tax (Central -1),
   No.121, Mahatama Gandhi Road, Nungambakkam,
   Chennai 600 034.

3. The Assistant Commissioner of Income Tax,
   No.121, Mahatma Gandhi Road,
   Nungambakkam, Central Circle 1(3),
   Chennai - 600 034. ... Respondents in all W.P.'s

COMMON PRAYER: Writ 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 bearing Nos.TN/CN51/2017-18/66/IT & TN/CN51/2017-18/92/IT, all dated 25/06/2019 and to quash the same as arbitrary, unjust and illegal and to consequently direct the 1st respondent to reconsider the application filed by the petitioner bearing Nos.TN/CN51/2017-18/66/IT & TN/CN51/2017-18/92/IT and to pass fresh orders under Section 245-D(4) of the Income Tax Act, 1961.

(In all W.P.'s)

For Petitioner : Mr.P.S.Raman

Senior Counsel

for Mr.R.Sivaraman

For Respondents : Mr.A.P.Srinivas,

Senior Standing Counsel – R2 and R3

C O M M O N O R D E R

These Writ Petitions have been filed by three assessees under the provisions of the Income Tax Act, 1961 (in short 'Act'), challenging orders passed by the Income Tax Settlement Commission (in short 'Settlement Commission/Commission') under Section 245D(4) of the Act.

2. The petitioner is an individual in W.P.No.29165 of 2019 and a Director in the Companies who are petitioners in W.P.Nos.29106 and 29128 of 2019. There had been proceedings for search initiated under Section 132 of the

Act on 17.02.2016 and 18.02.2016 in the business premises of the companies and other associated entities as well as the residences of connected persons.

3. Notice dated 08.06.2017 had been issued under Section 153A for assessment year 2013-14 upon the company, being the petitioner in W.P.No.29106 of 2019 and under Section 153C, on 03.10.2017 for 2013-14 to 2015-16, upon the individual as well as the company, that is the petitioner in W.P.No.29128 of 2019.

4. In the course of search, a primary set of accounts containing data relating to sales had been found and these accounts formed the basis for framing of the assessments. Pending proceedings for assessment, the companies and individuals filed applications for settlement before the Settlement Commission.

5.A preliminary objection has been raised by the petitioner that, if accepted, would vitiate the very basis of the impugned order. They would point out that the Bench that has passed the impugned orders has been constituted with only two members, contrary to the scheme of Chapter XIXA of the Act that requires, in terms of Section 245BA(2) thereof, for a Bench to be presided over by the Chairman or Vice Chairman and to comprise of two other members.

6. I have had occasion to consider an identical prayer by the petitioners in W.P.Nos.29584, 29590, 29593, 29595 & 29598 of 2019 dated 14.10.2022 and have held as follows between paragraphs 18 and 25 extracted below:

> '18. Before parting, there was also some discussion as to whether the impugned order would be vitiated on the ground that the Bench had been constituted with only two members, contrary to the scheme of Chapter XIXA of the Act that requires, in terms of Section 245BA(2), for a Bench to be presided over by the Chairman or Vice Chairman and to comprise of two other members.
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> 19. Mr.A.P.Srinivas has filed a compilation dated 14.10.2022 pointing out that there was a vacancy of members in the Chennai Bench of the Income Tax Settlement Commission. A request has been addressed by the Vice Chairman sitting at Chennai to the Chairman in this very batch of cases pointing out that on account of the vacancy it had been impossible to constitute a Bench to conduct the 245D(3) proceedings in these cases. He had thus requested that since the applications were getting time barred, a vice Chairman or a member from any other Bench of the Settlement Commission be deputed to complete the proceedings in time.
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> 20. By order dated 05.12.2017, the Chairman of the Income Tax Settlement Commission has deputed one Sri.Sudheerkumar, Vice Chairman of the Income Tax Settlement Commission, Additional Bench-II, Mumbai to discharge the functions of member of the Income Tax Settlement Commission, Additional Bench, Chennai to hear these matters. It is the Bench of the Vice Chairman in Chennai along with the member, who has been deputed from Mumbai, who has ultimately heard and passed these orders.
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> 21. Section 245BA(4) permits the Chairman to authorise the Vice Chairman or other member appointed to a Bench to discharge the functions of the Vice Chairman as well. Sub Section (5) provides as follows:-
>
> *'Jurisdiction and powers of Settlement Commission.*

……….

(5) Notwithstanding anything contained in the foregoing provisions of this section, and subject to any rules that may be made in this behalf, when one of the persons constituting a Bench (whether such person be the Presiding Officer or other Member of the Bench) is unable to discharge his functions owing to absence, illness or any other cause or in the event of the occurrence of any vacancy either in the office of the Presiding Officer or in the office of one or the other Members of the Bench, the remaining two persons may function as the Bench and if the Presiding Officer of the Bench is not one of the remaining two persons, the senior among the remaining persons shall act as the Presiding Officer of the Bench:'

22. Section 245BA(5) states that notwithstanding anything contained in the foregoing provisions, when one of the persons constituting a Bench is unable to discharge functions owing to his absence, illness or any other cause or in the event of the occurrence of any vacancy either in the office of the Presiding Officer or in the office of the members, the remaining two persons may function as the Bench.

23. If the Presiding Officer were not to be one of the remaining two persons, the senior most among the remaining persons shall act as the Presiding Officer of the Bench. Thus, it is very clear to my mind that there is no error that has been occasioned by the constitution of a Bench comprising two members. To be noted that Section 245BD provides that decision is to be by majority and states as follows:

*'[**Decision to be by majority.***

***245BD.** If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and make a reference to the Chairman who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members of the Settlement Commission and such point or points shall be decided according* *to the opinion of the majority of the Members of the Settlement Commission who have heard the case, including those who first heard it:]*

*[**Provided** that the provisions of this section shall not apply on or after the 1st day of February, 2021.]'*

24. The provision states that where the members are equally divided, they should state the point of difference to the Chairman, who shall either hear the points himself or refer the points for decision by another member of the Settlement Commission. The question of members being equally divided would arise only in the case of a two member Bench and thus this view is fortified by the statutory provisions of Section 245BD as well.

25. My attention is drawn to a decision of the Calcutta High Court in the case of Smrithi Properties Private Limited v. Settlement Commission (149 taxmann 386). In that case, the original order had been passed by a Bench of three members. On an application for rectification by the revenue, a two member Bench had rectified the order and that order of rectification was challenged by Smrithi Properties before the Calcutta High Court. The Bench held that since the original order had been passed by a Bench comprising three members, any rectification thereof had also to be undertaken only by a three member Bench. There is nothing in that decision to lead to the conclusion that the scheme of Chapter XIX B requires only a Bench of three members to hear and dispose settlement applications.

7. In this matter as well, the respondents have demonstrated that the constitution of the Bench is proper and the petitioners thus all, but give up this objection. I thus proceed to the merits of the matter. The Commission, by order dated 25.06.2019 passed in terms of Section 245D(4), had directed that the applications be proceeded with under Section 245D(1) of the Act. Thereafter, a Rule 9 report had been filed by the Principal Commissioner of Income Tax to

which the petitioners filed detailed responses and replies on 12.07.2018 and 17.06.2019.

8. The matter thereafter came up for final hearing when the impugned order dated 25.06.2019 has been passed rejecting the applications on the common ground that the disclosure made at the first instance, was not full and true. In arriving at this conclusion, the following are the considerations that have weighed with the Settlement Commission.

9. The first issue relates to percentage of gross profit ('GP') earned in the business. The petitioners had offered GP at the rate of 2.07%, whereas according to the respondents, the GP ought to have been adopted at the rate of 3.06%. It is the submission of the petitioner that, notwithstanding that it contests the conclusion arrived at by the Commission, it would have well been willing to remit the difference, had the difference in GP been put to it for response.

10.This was however not done and the Commission had proceeded to reject the entirety of the Settlement on this score. The operative portion of the order reads as follows:-

> *'3.1 **Issue of GP Percentage:***
>
> *3.1.1 The Department has pointed out that the Demo account, which is the basis of the unearthing of the unaccounted income of the applicant group, clearly gives the entire data – sales, purchase, profit, opening and closing stock (wherever applicable) etc. There is no scope of any further imputation / addition/ deletion and thus the*

applicant group had rightly taken the data from it, during the search and during the post search proceedings and rightly declared Rs.19.44 crores as unaccounted income. The GP was not something that was applied by the Department; it actually emerged from the profit figures available in that demo account. It is only when filing the application before ITSC that the applicant in a bid to reduce the tax liability applied the concept of opening stock in AY 2013-14. Thus it is clear that this was an afterthought and a device to reduce its unaccounted income. The PCIT in his report has clearly pointed out that not only during the statements recorded during the search but all through the post search proceedings the applicants never brought up this concept of opening stock and offered their true profit at 19.44 crores which worked out to be 3.07%. Thus it is felt that the applicants have not come with a clean hand before us and despite being caught with undisclosed accounts, is still resorting to subterfuge to not offer its true income.

3.1.2 In fact the demo account was found for 4 years only and it is not as if the applicant was not doing the same things in other years also. In whatever name and firm (Laxmi Gold house or Laxmi Jewellers) it was doing its business, it is clear that this practice of not accounting its full income must have been there in all other years also. It was incumbent for the applicant group to come forward truthfully for all years and declare income by extrapolation even if data was not found. Then only it can be said to be a true and fair disclosure of income.

3.1.3 Then the artificial splitting of unaccounted profit equally between Laxmi Gold House and Laxmi Jewellery, is unexplainable. Instead of offering any cogent reason the applicants have brushed off this point raised by the PCIT. If at all it had to be done, the logical way would have been to divide the unaccounted profit in the ratio of accounted profit of both the concerns. Thus once again the applicant group falls to satisfy the basic condition of a full and true disclosure. That the applicant group had earned a lot more unaccounted income will be clear from the discussion in the next paragraph.'

11. No reasoning has been set out for the enhancement of percentage of gross profit from 2.07% to 3.06%. However, the petitioners express their

willingness to remit the additional amount by way of difference of percentage of GP and in such an event, learned standing counsel is willing that the matters may be remanded to the Commission for re-consideration after hearing the petitioners.

12.The second issue relates to certain loans that had been availed by the petitioner in W.P.No.29165 of 2019, from two Kolkata based companies. The Settlement Commission concludes, on merits, that the loans constituted hawala transactions, and by not offering these loans as part of the offer made before the Commission, there had been an incomplete and untrue disclosure made at the first instance.

13. The petitioner has, in the submission made on 24.06.2019, recorded by the Commission at paragraph 2.4.6 of the impugned order, pointed out that an addition had been made of the identical amount loaned, in the hands of the Kolkata company by the Income Tax Appellate Tribunal ('Tribunal') by order dated 03.11.2015. As against the order of the Tribunal, a Tax Case (Appeal) is stated to be pending before the High Court as on date.

14. In light of the fact that the aforesaid amounts have been brought to tax in the hands of the lender, the conclusion arrived at by the Settlement Commission is premature, and cannot be said to be conclusive. The aforesaid

position has also been brought to the notice of the Commission despite which the Conclusion rejects the matter at the threashold, in the following terms:

> '3.2 ***Issue of Loans:***
>
> *3.2.1 It is seen that one of the appellant M/s Lakshmi Jewellery, Prop. Shri Ashok Jain has shown receipt of unsecured loans of Rs 28.92 crores in AY 2013-14 from two Kolkata based companies. From the SOF it is seen that the Assessing officer, while making the additions in the hands of the individual family members of the group, has clearly pointed out that the applicant has been routing its unaccounted income earned in the Bullion/ Jewellery business through shell/ bogus companies in Kolkata and bringing them back in books as unsecured loans.*
>
> *3.2.2 A total amount of Rs. 46.97 crores has been brought back in the books of the applicant group out of which, Rs 28.92 crores has been brought in the years before us. The AO has shown the modus operandi of the group in his assessment orders. The individual family members would invest in share capital of these shell companies often at face value (thus investing just a nominal amount say Rs 50,000/- or so) and in the process acquire the company. This company would then raise or would have already raised crores of rupees by selling other shares at premium and/ or may have huge debtors etc. that would then be shown as recovered. In both cases the cash sent by the applicant group through hawala channels to the originators of the shell companies was ploughed back in the companies as share premium and / or debtor recovery etc.*
>
> *3.2.3 The fact of the applicant group sending money through hawala channels was found during the search and the employees of the groups had clearly confirmed that the unaccounted money earned in the bullion/jewellery trade was sent by hawala to Kolkata from where the same was received back by cheque/ RTGS etc. The fact that the applicants (Shri Ashok Kumar Jain and M/s.Laxmi Gold House Pvt.Ltd.) have received loans worth Rs 28.92 crores indicates that the group has earned atleast this much amount of unaccounted money if not more.*

3.2.4 Thus by not offering these loans of Rs. 28.92 crores in AY 2013-14 from Kolkata based paper companies and the additional income declared only at Rs. 1.54 crores in the hands of Shri Ashok Kumar Jain (Prop. Laxmi Jewellery), proves that the applicant has not made a full and true disclosure, which is one of the most essential conditions, if the applicant group wants its case to be settled by ITSC. Taking arguments like the amount is already taxed in the hands of individuals where it has filed appeals and is thus disputing the additions, doesn't help Its case. These types of arguments may be advanced at Assessment levels where one has to suffer a likelihood of penalty and prosecution. In ITSC the applicant wants immunity from all these but is not ready to come clean. This is an opportunity given to applicants once in lifetime with a fond hope that they come totally clean and offer their full and true income. Sadly the conduct of the applicant belies this hope and thus its application cannot be accepted and is hereby rejected.

………'

15.For the reasons adduced as above, this issue is remanded to the file of the Settlement Commission for de novo hearing, subject to the petitioner remitting the difference in the GP prior to the matter being taken up as a pre-condition. The impugned order is set aside to the limited extent as indicated above. Let the applications be disposed by the Settlement Commission within a period of four (4) months from date of receipt of this order.

16. These Writ Petitions are disposed as above. No costs. Connected Miscellaneous Petitions are closed.

14.10.2022

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Index : Yes
Speaking Order

To
1. Income Tax Settlement Commission,
   Additional Bench, Satguru Complex,
   640, Annasalai, Nandanam, Chennai - 600035.

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   No.121, Mahatama Gandhi Road, Nungambakkam,
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