* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **Writ Petition (Civil) No. 4368 of 2010**

Reserved on: 24th April, 2012
% **Date of Decision: 18th May, 2012**

Gupta Perfumers (P) Ltd. ....Petitioner
Through Mr. O.S. Bajpai, Sr. Advocate with
Mr. V.N. Jha, Advocate.

Versus

Income Tax Settlement Commission & Ors. …Respondents
Through Ms. Rashmi Chopra, Sr. Standing Counsel.

CORAM:
HON'BLEMR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.

In Merchant of Venice, Portia disguised as young law clerk had propounded that the bond only allowed Shylock to remove the flesh, not the blood of Antonio. Further damning Shylock's case, she said that he must cut one pound of flesh, no more, no less; she asserted *"if the scale do turn/But in the estimation of a hair/though diest and all thy goods are confiscate."* The impugned order passed by the Settlement Commission deserves to be upheld for the petitioner herein- Gupta Perfumers (P) Ltd. it is apparent is caught in their own web, which they stoutly and strongly deny. Even now in the writ petition they have

urged and argued that their conduct and actions were bonafide and solely guided by the noble and honourable desire to come clean with their inglorious past. The petitioner claims that they without any motive or intention to help a third person, declared undisclosed taxable income of Rs. 1,36,08,897/-. We record that the undisclosed income has been partly accepted and immunity from penalty and prosecution stands granted, but the "wrong" is checkmated and corrected by the Settlement Commission.

2. To appreciate the controversy, necessary basic facts may be noticed.

3. Gupta Perfumers (P) Ltd., the petitioner is a company that was incorporated on 15th February, 1973. It was engaged in the business of manufacture of perfumery compounds and flavoured essence concentrate also known as industrial fragrance and flavoured concentrates etc. The manufacture and sale as admitted and stated by the petitioner was closed in the year 1987. The petitioner claims that they retained the corporate structure and its business activities remained confined to investment of funds.

4. On 15th May, 2009, the petitioner filed an application for settlement and vide order dated 30th July, 2009 under Section 245D, the application was held to be valid for the assessment years 2005-06,

2007-08, 2008-09 and 2009-2010. The application for assessment year 2006-07 was declared to be invalid. In the application, it was stated that after interval of 14 years, during 2001-02, the petitioner had again resumed their manufacturing activities. The income from manufacture and sale remained at a very low key till 2008-09.Cash book, ledger etc. kept on day to day basis, were misplaced and not available. A summary of sales and figures of receivable was recorded in a memorandum and other loose papers etc., which were in the custody of Virender Kumar Gupta. The profits/income as declared was on the basis of 'net of sales' in the financial year 2008-09. Advances from customers against the sale of goods, were included. Owing to non-availability of necessary proof of acceptability of such advances, an aggregate of Rs.25,38,969/- was surrendered and stated as a part of the undisclosed income declared of Rs.1,36,08,897/-. Receivables of Rs.61,72,021/- (net) were accounted for in the undisclosed income. The total net taxable income declared including the amount declared in the return for the assessment years in question was Rs.2,41,70,205/-.

5. The Settlement Commission by the impugned order dated 28th May, 2010, has accepted the settlement application in part and computed the income of the petitioner as under: -

Asstt. Yr.	Income returned	Income offered	Income

	as per Return of Income (Rs.)	before ITSC (Rs.)	Decided by the ITSC (Rs.)
2005-06	3,54,700	1,84,154	5,38,854
2007-08	3,46,289	70,464	4,16,753
2008-09	3,50,450	12,31,709	15,82,159
2009-10	*1,19,57,396	**66,93,849	1,86,51,245

*As shown in the Computation sheet filed with the return before deduction u/s 80I.
** As shown in the SOF before claim of deduction u/s 80I."

6. The grievance of the petitioner is against the following observations and findings recorded by the Settlement Commission:-

> "No immunity is granted in respect of income contained in the seized papers on the basis of which computation of income has been made in the settlement application and which has been held not to belong to the applicant company by us. The department will be free to initiate penalty and prosecution proceedings in respect of these papers in appropriate hands as per law."

7. The contention of the petitioner before us is that the aforesaid directions/observations should be set aside as they are destructive of the very object, letter and spirit behind settlement provisions and the statutory and salutary purpose enshrined and elucidated in Section 245D(4) and 245-I of the Act. The settlement is contrary to law as the order ceases to be conclusive and final and is uncertain. It was urged that the petitioner does not want that the entire order of the Settlement Commission should be set aside but it was interested and wanted that the aforesaid quoted observations should be struck down and deleted.In the alternative, it was submitted that if the petitioner had failed to make full and true disclosure,it was the duty of the

Settlement Commission to dismiss the settlement application and not accept the undisclosed income declared.

8. We have considered, the contentions raised by the petitioner but as observed above, do not find any merit in the same.

9. On 10th & 11th February, 2009, search and seizure operations were conducted in the case of M/s Gupta & Co. (P) Limited, M/s C.H. Steel (India) Pvt. Ltd., MJI Tech (P) Ltd., VKG Electronics (P) Ltd. and Rita Devi Shanti Sagar Family Welfare Trust. In these operations, several documents were seized from the custody of Virender Kumar Gupta, Gupta and Co. (P) Ltd. etc. Search, however, was not conducted in the case of the petitioner, though a group company. As per amendments made by the Finance Act, 2007 w.e.f. 1st June, 2007, that no settlement application can be filed by the person subjected to search and seizure action. Thus, as on 15th May, 2009, the persons searched could not have moved or filed an application for settlement. The petitioner, however, not being a person subjected to search was competent and had filed the application on 15th May, 2009 for settlement.

10. As per the application, the petitioner was managed by promoter/ Directors; Sudhir Jain, Sharad Jain and Sudha Gupta, w/o of Virender Kumar Gupta. In the application, the petitioner had stated that the companies/entities subjected to search/survey operations were

carrying on their business independently, wholly unconnected with the petitioner. There were no dealings amongst them inter-se, except that other companies/entities had provided financial assistance on interest to Gupta & Co. (P) Ltd. The application referred to several documents seized from the business/ residential premises at the time of search.

11. It was stated and the Settlement Commission has quoted extracts from the application that the petitioner was maintaining financial records in regular course in the form of cash book, ledger with proper supporting material/evidence. The major component of the cost was the labour charges which were by supported by wage sheets maintained on regular basis. Virender Kumar Gupta being an elderly person was acting as an ombudsman of the family and was maintaining a memorandum of record, containing summary of sales etc. The transactions were entered in the cash book and the surplus generated was kept in a pool maintained by the Directors. Due to lack of care on the part of the staff members, accounts relating to the manufacturing activities, cash books etc, were misplaced. However, the summary of sales recorded on day to day basis in the memorandum which were kept in the custody of Virender Kumar Gupta were available and these were made the basis of computation of the undisclosed income.

12. The Commissioner of Income Tax in his response under Rule 9, had raised the following objections:-

a. Undisclosed income offered for tax did not belong to the petitioner and belonged to the companies/others who had been subjected to search.

b. Documents marked Annexures A-3, A-5 and A-6, found at the residence of Virender Kumar Gupta and other documents found and seized from the office of Gupta & Co. (P) Ltd. do not pertain to the petitioner but pertain to undisclosed income of third parties who had been subjected to search. These documents form the basis of income offered for settlement, do not reflect to the income earned by the petitioner.

c. Books of accounts of petitioner for the period 1st April, 2004 to 31st March, 2008, seized from one of the computers do not reflect or show any transaction relating to manufacturing/trading activities. Materials seized do not show or indicate that the petitioner had explicitly or implicitly carried on business activities.

d. Statement of Virender Kumar Gupta, Director of Gupta & Co. (P) Ltd. recorded under Section 132 (4) of the Act, did not

support the claim of the petitioner that the seized documents relate to the business transactions of the petitioner.

e. Virender Kumar Gupta had not stated or claimed that the petitioner was carrying on manufacturing activities.

f. Ashok Kumar Gupta, an employee of Gupta & Co.(P) Ltd. for the last 36 years had categorically stated that the petitioner was in the business of manufacture odoriferous substances upto 1986 but after that no business activities were carried on. Other Directors had also not stated that the petitioner had carried on any business.

g. The alleged manufacturing address namely I-8 DSIIDC Industrial Complex, Nangloi, Delhi did not have water connection or electricity connection. Statements of neighbours do support the contention that manufacturing activities were undertaken at the said address.

h. Benefit under Section 80-I, as claimed should be denied as the auditors had not been able to certify that the conditions stipulated in the said Section had been satisfied by the petitioner.

i. Declaration made with the Assistant Commissioner of Central Excise, Anti Evasion on 23rd September, 2008, did not find place in the records i.e. inward/diary register.

13. The petitioner strongly and assertively contested the said contentions. It was submitted that none of the Directors were asked as to the recent activities of the petitioner company. Ashok Kumar Gupta was an executive of Gupta & Co.(P) Ltd. and had nothing to do with the petitioner. The petitioner enclosed photocopies of some cash memos, affidavits of Mukesh Chand Misra and Anukesh Kapur. It was stated that the manufacturing activities were assiduously kept away from public sight and were carried on at odd hours so as to avoid detection. In these circumstances, enquiries conducted in the neighbourhood should be ignored. The fact that in the material seized there was no indication of business activities of the petitioner was inconsequential as the petitioner was admitting the same, stating that it goes to show that the petitioner was carrying on its activities outside the declared accounts and the same were kept away from the knowledge of public at large. It was asserted that ;-

> "no prudent person would like to own and discharge such a huge liability only for the sake of 'fictional after thought' (quote) as has been alleged by the learned CIT in his report. Further, the plea that the application should be rejected by the Hon'ble Income Tax Settlement Commission, itself is erroneous and the same militates not only against the express provisions of chapter XIXA but also the spirit thereof."

14. The Settlement Commission after considering the various facts, evidence on record including statements of Virendra Kumar Gupta, Ashok Gupta, in a detailed and well reasoned order has reached the following findings:-

a. Statements of Sharad Jain recorded on 19th May, 2009 and 10th May, 2010, do not support the claim of the petitioner that they were carrying on manufacturing activities. The books of accounts stated to be available were not produced, though it was adverted that they shall be furnished. Similarly, the statement of Virendra Kumar Gupta recorded on 21stMay, 2009, did not support the claim of the petitioner that due to lack of care on the part of the staff members, accounts relating to manufacturing activities like cash book, ledger etc. were misplaced. The accounts were in fact were never available as there was no manufacturing activity. The above findings were corroborated by the fact that no material or evidence was found in the search that the petitioner was engaged in manufacture/trading.

b. The plea that the books of accounts have been misplaced was specious and should be rejected.

c. Affidavits of Anukesh Kapoor and Mukesh Chand M[illegible] were not reliable and do not support the contention that the petitioner was engaged in manufacturing activities.

d. It was strange that the petitioner had claimed huge turnover but could not mention and give details of purchasers and sellers except the two persons.

e. Ashok Gupta, an employee for last 36 years, who had categorically stated that no business activity was carried on since 1986 or 1987 merits credence and acceptance.

f. Intimation given to the Central Excise authorities on 23rd May, 2008, did not find place in the records maintained by the Central Excise authorities.

g. Evidence relied by the petitioner that it was carrying on manufacturing activities pertains to the period after the date of search and did not relate to the pre-search period.

h. Field inquiry report of the Inspector enclosed with the report of the Commissioner under Section 245D(3) proves that no manufacturing activities as claimed were undertaken.

i. Few documents relied upon by the petitioner to justify its claim, mention the name of Gupta & Co. (P) Ltd. The link between Gupta & Co. (P) Ltd. and some of the seized papers

was shown. When the documents claimed by the petitioner showed up in the books of the accounts of the Gupta & Co.(P) Ltd. The petitioner stated that the bills issued by Gupta & Co. (P) Ltd. were just used as a cover. The explanation was doubted as in such a case, why would these bills find mention in the books of Gupta & Co.(P) Ltd.

j. As per the amendment brought by Finance Act, 2007 w.e.f. 1.6.2007, no settlement application can be filed by a person subjected to search and seizure action. The apparent reason for the petitioner company owning up the seized papers appears to be to prevent consideration of the seized papers in the rightful hands during the regular search and seizure assessment of that person.

15. The Settlement Commission accordingly held as under:-

> "90. We are, therefore, unable to accept the applicant's contention that the seized papers belong to it. Without entering into the correctness or otherwise of the income offered on the basis of these papers, we hold that the department will be free to take appropriate action in appropriate hands for taxing the income contained in the seized papers referred to in the SOF. We also add that the department will be free to work out the correct income contained in these documents.
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> 91. Section 245C(3) states that an applicant made under sub-section (i) shall not be allowed to be withdrawn by the applicant. Thus, the settlement application filed cannot be allowed to be withdrawn even when it is held that the seized papers on which the applicant has based its computation of income do not belong to it.

> 92. Section 245D(4) empowers the Commission to pass order in accordance with the provisions of the Income Tax Act as it thinks fit. The applicant has persisted till the very end with its claim of carrying on manufacturing activities and specifically stating in para 14 of reply filed on 27.4.10 "the applicant assiduously tried to keep its activities under a cover away from the public sight." It has also been specifically stated that the activities were being carried on at odd hours. In support of his contention the applicant has emphasized payment of Excise duty totaling to Rs.40,72,210/-. Considering all those facts, we accept the income shown by the applicant as such.
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> 93. The applicant has prayed for immunity from penalty and prosecution. No immunity is granted in respect of income contained in the seized papers on the basis of which computation of income has been made in the settlement application and which has been held not to belong to the applicant company by us. The department will be free to initiate penalty and prosecution proceedings in respect of these papers in appropriate hands as per law."

16. As noticed above immunity was granted from penalty and prosecution in respect of income declared for Assessment Years 2005-06, 2007-08 to 2009-10. Deduction u/s 80-IB of the Act was not granted after recording the above facts and also noticing that the petitioner company's own auditors were unable to certify that all conditions prescribed u/s 80IB have been fulfilled. The petitioner had requested that for the AY 2009- 10, deduction of Rs. 28,36,098/- u/s 43B of the Act should be allowed as the excise duty had been paid before filing of the return. The Settlement Commission did not accept the claim on the ground that payment of excise duty was not relatable to the income offered before the Commission (this aspect has not been

argued before us). The immunity granted, it was clarified, ma[illegible] withdrawn at anytime if the Settlement Commission was satisfied that the petitioner has concealed or given false evidence during the course of the settlement proceedings.

17. It is apparent from the impugned order that confronted with the above situation, the Settlement Commission has substantially accepted the surrender of income made by the petitioner and also granted them immunity from penalty and prosecution. In our opinion, the Settlement Commission had rightly observed that no third person can gain from the immunity in case the seized papers relate to the third person. The seized papers can be used and utilized against third persons. The computation of taxable income in the case of the petitioner does not mean that the said papers or seized materials cannot be used if they disclose or relate to income of a third person. The petitioner has substantially succeeded as far as their declaration of the undisclosed income is concerned. In case the seized documents/ material relate to a third person and disclose undeclared income of the third person, the Revenue is certainly entitled to rely and use the evidence and material against the said person. The petitioner is not entitled to and cannot claim immunity for and on behalf a third person. If and when the

Revenue relies upon and refers to a document in the case of a [redacted] person, the said person can contest the charge and explain. The impugned order only clarifies and puts the record straight that the order of the Settlement Commission shall not be a shield in proceedings against a third person. The third person must rely upon and meet the charge on merits. The petitioner has repeatedly stated on oath and asserted that the settlement application was not filed to benefit or secure advantage to a third person, whether related or not. Therefore, the petitioner should not have any grievance and objection to the said observation because they are not affected or prejudiced. The said direction can at best be used against a third person and not against the petitioner.We may, in this regard, reproduce what has been held by the Supreme Court in ***ITO v. Atchaiah, (1996) 1 SCC 417*** :

> **"7.** In our opinion, the contention urged by Dr Gauri Shankar merits acceptance. We are of the opinion that under the present Act, the Income Tax Officer has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By "right person", we mean the person who is liable to be taxed, according to law, with respect to a particular income. The expression "wrong person" is obviously used as the opposite of the expression "right person". Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taking the right person with respect to that income. This is so irrespective of the fact which course is more beneficial to the Revenue. In our opinion, the language of the relevant provisions of the present Act is quite clear and unambiguous. Section 183 shows that where

> Parliament intended to provide an option, it provided so expressly. Where a person is taxed wrongfully, he is no doubt entitled to be relieved of it in accordance with law* but that is a different matter altogether. The person lawfully liable to be taxed can claim no immunity because the Assessing Officer (Income Tax Officer) has taxed the said income in the hands of another person contrary to law. We may proceed to elaborate."

18. The contention of the petitioner that this leaves the order of the Settlement Commission incomplete and non-conclusive is without merit. The order of the Settlement Commission is certainly complete and conclusive as far as petitioner is concerned. The said third persons were not before the Settlement Commission and the Settlement Commission was not examining their application. The impugned order does not become unconclusive or bad for the said reason. Section 245 I is also not violated for there cannot be any reopening in the case of the petitioner, unless fraud etc. has been played. Section 245-I reads as under:-

> "245-I Every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force."

The said Section states that the order of the Settlement Commission under Section 245D(4) shall be conclusive as to the matters stated therein and save and otherwise provided no matter in the said

order shall be reopened in any proceedings. The use of words 'sa... otherwise provided' in this Chapter refers to the reopening of the matters, which are conclusively decided. The conclusiveness attached to the orders of the Settlement Commission relates to the matters stated in the orders of the Settlement Commission. Thus, this does not mean that the Settlement Commission was required to and it was mandatory to decide and go into the question of undisclosed income earned by third parties. It is this aspect which is not decided by the Settlement Commission. The order meets the requirement of Section 245-I and is not contrary to the mandate of the said Section. The conclusiveness is attached to the averments and the findings recorded in the order of the Settlement Commission and Section 245I does not restrict the power and scope of what order should be passed by the Settlement Commission. What order or direction should be given by the Settlement Commission depends upon the facts and circumstances of each case and what is fair, just, equitable and warranted.

19. The argument of the petitioner that the settlement application should have been rejected as the petitioner had not made full and true disclosure, has to be rejected on the principle of approbate and reprobate. It is not the case of the petitioner that they did not make the full and true disclosure and in fact they still insist that they had

made full and true disclosure. The Settlement Commission has accepted that the undisclosed income declared by the petitioner. Immunity has also been granted to the petitioner. The petitioner does not claim that it had tried to protect or had disclosed undeclared income of a third person. It is the case of the petitioner that the papers do not belong to a third person. The Settlement Commission has left that issue open to be decided, if required by the Income Tax authorities in a case of a third person. However, as far as petitioner is concerned,the Settlement Commission has accepted the disclosure made by them and accordingly brought it to tax.

20. Section 254C(1) of the Act reads:-

> **"245C. APPLICATION FOR SETTLEMENT OF CASES.**
>
> (1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided :
>
> Provided that no such application shall be made unless, -
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> (a) The assessee has furnished the return of income which he is or was required to furnish under any of the provisions of this Act; and
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> (b) The additional amount of income-tax payable on the income disclosed in the application exceeds one hundred thousand rupees."

What the Section requires is that the applicant before the Settlement Commission must disclose in the prescribed form "full and true disclosure of his income" and the manner in which the income is derived. The Settlement Commission has accepted the full and true disclosure made by the petitioner, though there is dispute about the manner in which the undisclosed income was earned. The petitioner cannot insist and claim that their application should have been dismissed as they had failed to make disclosure on the manner in which the said income was earned. The Settlement Commission has taken on record the reasoning given by the petitioner for earning the said income and expressed dissatisfaction. Even before us the petitioner insists that it had made fully and true disclosure and also stated the manner in which the said income was earned.The petitioner cannot challenge and question the order of the Settlement Commission being the beneficiary of the order. Revenue has accepted the order. The petitioner should not be permitted to plead and make self destructive submissions. A litigant cannot and should not be allowed to urge reverse of what was pleaded before the statutory form/court (See ***Electronics Corporation of India V/s. Secy. Revenue Dept., Govt. of A.P.*** (1999) 4 SCC 458).In ***Prestige Lights Ltd. v. State Bank of India, (2007) 8 SCC 449*****,** it has been observed that "It is well settled that a prerogative remedy is not a

matter of course. In exercising extraordinary power, therefore, a court will indeed bear in mind the conduct of the party who is invoking such jurisdiction." Moreover as held above, with regard to the seized documents, it has been averred and held by the Settlement Commission that it will be open to the department/Revenue to rely upon same and if they relate to a third person use them to compute undisclosed income of the third person. The petitioner we do not think can question and challenge such finding.

21. In view of the aforesaid, we do not find any merit in the present writ petition and the same is dismissed with costs of Rs.20,000/-.

-sd-
(SANJIV KHANNA)
JUDGE

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(R.V. EASWAR)
JUDGE

May 18th, 2012
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