THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 02.07.2013

\+ **WP(C) NO. 1609/2013**

COMMISSIONER OF INCOME TAX ... Petitioner

versus

INCOME TAX SETTLEMENT COMMISSION & ORS. ... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Kamal Sawhney, Adv. with Mr. Shashank Singh, Adv.
For the Respondent : Mr Mukul Rohtagi, Ms Prem Lata Bansal, Sr. Advs. with Mr Saurabh Kirpal, Mr Mahesh Agarwal, Mr Akshay, Mr Ankit Shah, Ms Manasi, Advs. for the Respondents 2 to 5

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED, THE ACTING CHIEF JUSTICE
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, ACJ

1. This writ petition is directed against the order dated 24.01.2013 passed by the Income Tax Settlement Commission, Principal Bench, New Delhi under Section 245D(2C) of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act'). By virtue of the impugned order dated 24.01.2013, the Income Tax Settlement Commission (hereinafter referred

to as 'the Settlement Commission') held the settlement applications of the Respondent Nos. 2 to 5 to be "not invalid" and were therefore allowed to be proceeded with inasmuch as the said settlement applications had, in the view of the Settlement Commission, *prima facie*, fulfilled all the conditions prescribed under Section 245C(1) and 245D(2C) of the said Act. The petitioner (Commissioner of Income-tax) is aggrieved by the said order dated 24.01.2013 inasmuch as according to the petitioner, the settlement applications filed on behalf of the respondents 2 to 5 ought not to have been proceeded with and ought to have been held as "invalid" because the settlement applications failed to satisfy the pre-requisites stipulated in Section 245C of the said Act. Those pre-requisites being, full and true disclosure, the manner in which the undisclosed income had been derived and the additional amount of income tax payable.

2. On behalf of the petitioner, it was sought to be contended that as there was no true and full disclosure by the respondents 2 to 5 in their applications for settlement, the Settlement Commission ought not to have proceeded with their applications and ought to have passed an order under Section 245D(2C) holding the applications to be invalid. It was also contended that the manner of deriving the undisclosed income had not been indicated by the respondents 2 to 5 and, therefore, on this ground also, the order under Section 245D(2C) passed by the Settlement Commission ought to have been one holding the settlement applications to be invalid. Strong reliance was placed by the learned counsel appearing for the petitioner on the Supreme Court decision in the case of

***Ajmera Housing Corporation v. Commissioner of Income Tax*: 326 ITR 642 (SC)** to contend that where there was an established case of absence of full and true disclosure on the part of the applicant, the settlement application ought to be rejected at the threshold by the Settlement Commission.

3. In this backdrop, the learned counsel for the petitioner sought to argue on the merits of the matter and to establish that there was in fact substance in his contention that the respondents 2 to 5 had not made a full and true disclosure and that they had also not indicated the manner in which the undisclosed income had been derived. At the threshold itself, the learned counsel appearing on behalf of the respondents 2 to 5 took serious objection to the maintainability of the present petition. It was contended on behalf of the respondents 2 to 5 that the writ petition challenging the order dated 24.01.2013 passed under Section 245D(2C) of the said Act as also the earlier orders dated 30.11.2012 and 28.12.2012 passed under Section 245D(1) of the said Act was not maintainable inasmuch as those orders were merely orders of 'admission'. Reliance was placed by the learned counsel for the respondents 2 to 5 on a decision of the Supreme Court in the case of ***Commissioner of Income Tax v. K. Jayaprakash Narayanan*: 184 Taxman 85 (SC)**. Reliance was also placed on a decision of a Division Bench of this Court in the case of ***Commissioner of Central Excise, Vishakapatnam v. True Woods Private Ltd.*: 2006 (199) ELT 388 (Del)** as also on a decision of the Bombay High Court in the case of ***Union of India v. Customs and***

***Central Excise Settlement Commission, Mumbai*: 2009 (234) ELT 634 (Bom)**. The learned counsel for the respondents 2 to 5 emphasized that the impugned orders were only orders of admission and only indicated a prima facie view. It was open for the Settlement Commission to alter that view in the course of further proceedings till the final order was passed under Section 245D(4) of the said Act. It was therefore contended that there is no cause for concern on the part of the Department at this stage as the matter is still under examination by the Settlement Commission and a final decision has not been taken by it. It was also contended that the writ petition would not be maintainable as this Court, in judicial review, is not concerned with the merits of the matter, as it would be, had it been exercising an appellate jurisdiction. It is only the decision making process which can be challenged and can be the subject matter of judicial review in a writ petition. Since there is no allegation of any procedural violation or lack of jurisdiction, the present writ petition which is essentially aimed at a look into the merits of the matter, would not be maintainable. It was also contended that the impugned order dated 24.01.2013 itself records that the issues raised by the Commissioner of Income Tax would be open during the course of proceedings under Section 245D(4) of the said Act and that the settlement applications were held to be not invalid only upon a prima facie view that the respondents 2 to 5 had fulfilled the conditions prescribed under Section 245C(1) and 245D(2C) of the said Act. It was submitted that an order of admission, such as the order impugned herein, does not foreclose any argument or any contention of the Department even with regard to the "true and full

disclosure" and "the manner in which the income has been derived". As such, there is no occasion, according to the learned counsel for the respondents 2 to 5, to interfere with the proceedings pending before the Settlement Commission.

4. Before we examine the submissions made by the learned counsel for the parties, it would be appropriate to set out some of the facts. Respondents 2, 3 and 4 had filed settlement applications under Section 245C(1) of the said Act in respect of the Assessment Years 2006-07 to 2012-13 on 16.11.2012. The applications filed by respondents 3 and 4 who are the parents of respondent 2 were rejected by the Settlement Commission by an order dated 23.11.2012 on the ground that the applicants had not paid the full amount of the additional tax and interest which was payable on or before the filing of the applications. It was therefore held by the Settlement Commission that the said applications of respondents 3 and 4 could not be allowed to be proceeded with and accordingly the applications were rejected. On the very same day, i.e. on 23.11.2012, the respondents 3 and 4 submitted fresh applications under Section 245C(1) after allegedly paying the amount of additional tax and interest that was payable prior to the filing of the settlement applications. Subsequently on 17.12.2012, the respondent 5 (wife of respondent 2) submitted her settlement application for the above mentioned assessment years. The settlement applications were allowed to be proceeded with by virtue of an order dated 30.11.2012 in respect of respondents 2 to 4. A similar order was passed in respect of respondent 5 on 28.12.2012. Those

orders were passed under Section 245D(1) of the said Act and had not been challenged by the Revenue. Even in the present writ petition, the Commissioner of Income-tax had initially not challenged the said orders dated 30.11.2012 and 28.12.2012 passed under Section 245D(1) of the said Act. It is only by way of the amended writ petition which has been filed subsequently that the petitioner also seeks to challenge the said orders dated 30.11.2012 and 28.12.2012.

5. After the passing of the orders under Section 245D(1), reports were called from the Commissioner of Income-tax under Section 245D(2B) of the said Act on the validity of the settlement applications. That report was received by the Settlement Commission on 09.01.2013 and the applications were heard in the context of Section 245D(2C) of the said Act by the Settlement Commission on 21.01.2013. Thereafter the impugned order dated 24.01.2013 was passed in respect of the four settlement applications. The petitioner being aggrieved by the said order as also the earlier orders passed under Section 245D(1) is before us by way of the present writ petition.

6. It must also be pointed out that in the report submitted by the Commissioner of Income-tax under Section 245D(2B) of the said Act, it was contended that the settlement applications should not be held to be valid as the applicants had neither disclosed their full and true income nor the manner in which such income had been derived. In response to the said report, a write-up had been submitted on behalf of the respondents 2

to 5 seeking to clarify each of the allegations of the Department and the gist of the same has been extracted in the impugned order dated 24.01.2013 which we need not elaborate inasmuch as we do not intend to examine the merits of the matter. After examining the report and the counter arguments of the respondents 2 to 5, the Settlement Commission held that all the four applicants had fulfilled the conditions prescribed under Section 245C(1) as, in its view, there was no adverse material on record to suggest otherwise. The Settlement Commission noted and observed that the issues raised by the Commissioner of Income-tax in his report dated 08.01.2013 would be open for the Bench during the course of proceedings under Section 245D(4). By virtue of the impugned order dated 24.01.2013, the Settlement Commission also directed that the confidential part of the application should be forwarded to the Commissioner of Income-tax who would have an opportunity to examine the same during the course of proceedings under Section 245D(4) of the said Act. The Settlement Commission reiterated that:-

> "The decision to hold these SAs 'not invalid' is without prejudice to initiation of penalty and launching of prosecution proceedings, if required, on facts available on the records at the relevant time in subsequent proceedings by the Commission."

It was further clarified that the settlement applications were held to be not invalid and were allowed to be proceeded with inasmuch as the Settlement Commission was of the view that the applicants had "*prima*

facie" fulfilled the conditions prescribed under Section 245C(1) and 245D(2C) of the said Act.

7. We shall now briefly examine the scheme of the said Act insofar as it is relevant for our purposes. Under section 245C of the said Act, an assessee is entitled to make an application for settlement. The application has to be made in such form and such manner as may be prescribed. The application must contain (i) a full and true disclosure of the assessee's income which has not been disclosed before the assessing officer; (ii) the manner in which such income has been derived; (iii) the additional amount of income tax payable on such income; and (iv) such other particulars as may be prescribed. Furthermore the assessee is also required to pay the additional amount of tax and interest thereon, on or before the date of making the application and the proof of such payment should be attached with the application. Section 245C(1) stipulates that when such an application is received by the Settlement Commission for having the case settled, the same is to be disposed of in the manner as indicated in the said Act.

8. Section 245D of the said Act sets out the procedure which is to be adopted by the Settlement Commission on receipt of an application under Section 245C. Section 245D(1) stipulates that on receipt of an application under Section 245C, the Settlement Commission is required to, within seven days from the date of receipt of the application, issue a notice to the applicant requiring him to explain as to why the application

made by him be allowed to be proceeded with. Thereafter on hearing the applicant, the Settlement Commission is required to, within a period of 14 days from the date of the application, by an order in writing, reject the application or allow the application to be proceeded with. The proviso to Section 245D(1) stipulates that where no order is passed within the above mentioned period by the Settlement Commission, either allowing the application or rejecting the application, the application shall be deemed to have been allowed to be proceeded with.

9. Sub-section (2B) of Section 245D of the said Act stipulates that the Settlement Commission shall call for a report from the Commissioner and the Commissioner shall furnish the said report within 30 days of receipt of the communication from the Settlement Commission. Section 245D(2C) of the said Act prescribes that where a report of the Commissioner, which has been called for under sub-section (2B), has been furnished within the specified period, the Settlement Commission may, on the basis of the report and within a period of 15 days of receipt of the report, by an order in writing, declare the application in question as invalid and in such eventuality, the Settlement Commission is enjoined to send a copy of such order to the applicant and the Commissioner. The first proviso to Section 245D(2C) ensures that an application shall not be declared invalid by the Settlement Commission unless an opportunity has been given to the applicant of being heard. The second proviso thereto stipulates that where the Commissioner has not furnished the report

within the specified period, the Settlement Commission is enjoined to proceed further in the matter without the report of the Commissioner.

10. Under Section 245D(3), the Settlement Commission, inter alia, in respect of an application which has not been declared invalid under Section 245D(2C) of the said Act may call for the records from the 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 Commissioner to make or cause to be made such further enquiry or investigation and to furnish a report on the matters covered by the application and any other matter relating to the case. The Commissioner is required to furnish the report within a period of 90 days of receipt of the communication from the Settlement Commission. It is further provided that where the Commissioner does not furnish a report within the said period of 90 days, the Settlement Commission may proceed to pass an order under sub-section (4) without such report.

11. Under Section 245D(4) of the said Act, the Settlement Commission, after examination of the records and the report of the Commissioner, if any, received under, *inter alia*, sub-section (2B) or sub-section (3) and after giving an opportunity to the applicant as also to the Commissioner to be heard, may pass such order as it thinks, in accordance with the provisions of the said Act, on the matters covered by

the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner.

12. Section 245D(6) is also of some importance. It provides that every order passed under sub-section (4) of Section 245D is to provide for the terms of settlement including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement is to be paid and all other matters to make the settlement effective. It is specifically provided that the terms of settlement are to indicate that the settlement would be void if it was subsequently found by the Settlement Commission that it had been obtained by fraud or misrepresentation of facts. As a corollary to sub-section (6), sub-section (7) of Section 245D provides that where a settlement becomes void under sub-section (6), the proceedings in respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the income tax authority concerned, may, notwithstanding anything contained in any other provision of the said Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement became void.

13. From the above provisions, it is apparent that the settlement application passes through several stages before the final order providing for the terms of settlement is passed by the Settlement Commission. The first stage is under Section 245D(1). This is followed by the next step

under Section 245D(2C) and finally by the order passed under Section 245D(4). In the present case, the final order under Section 245D(4) is yet to be passed. The orders under Section 245D(1) and 245D(2C) are not final orders and they are subject to the final orders that may be passed under Section 245D(4). It is, therefore, clear that the issue of full and true disclosure on the part of the applicants and the manner in which the undisclosed income was derived is still open for discussion and debate and the Settlement Commission would have to give its final decision on these aspects before an order of settlement is passed under Section 245D(4) of the said Act. Therefore, on a plain reading of the provisions, it is apparent that the submission made by the learned counsel for the respondents 2 to 5 merits acceptance insofar as it was contended by him that the entire issue remains open and at any stage of the proceedings till the order under Section 245D(4) is passed by the Settlement Commission, the issue with regard to full and true disclosure and the manner in which the undisclosed income had been derived would be open and can be raised by the Revenue. In fact, it was clarified by the learned counsel for the respondents 2 to 5 that the said respondents do not even contend that once an application has been proceeded with under Section 245D(1) and has not been held to be invalid under Section 245D(2C), the validity of the same in terms of the requisite conditions stipulated in Section 245C(1) cannot be gone into at the subsequent stages up to the passing of the order under Section 245D(4) of the said Act.

14. Before we examine the case law on the subject, it would also be appropriate if we refer to the provisions of Section 245F of the said Act. The said section deals with the powers and procedures of the Settlement Commission. Sub-section (1) stipulates that in addition to the powers conferred on the Settlement Commission under the said Act, it would also have all the powers which are vested in an income tax authority under the said Act. Sub-section (2) of Section 245F further stipulates that where an application under Section 245C has been allowed to be proceeded with under Section 245D, the Settlement Commission shall, until an order is passed under sub-section (4) of Section 245D, have, subject to the provisions of sub-section (3) of that section, exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the said Act in relation to the case. We must also notice the proviso to Section 245F(2) which makes it clear that where an application has been made under Section 245C on or after the first day of June, 2007, the Settlement Commission shall have exclusive jurisdiction from the date on which the application was made. In the present case, we find that all the four applications made by the respondents 2 to 5 had been made after the first day of June, 2007 and therefore it is the aforesaid proviso which would apply. In other words, in the present case, the Settlement Commission had exclusive jurisdiction in respect of the cases of respondents 2 to 5 from the dates on which the applications under Section 245C were made by the said respondents. We have specifically referred to this proviso, because the learned counsel for the petitioner had made an argument that if an application under Section 245C is allowed to

be proceeded with by virtue of an order under Section 245D(1) or under Section 245D(2C), the Settlement Commission would have exclusive jurisdiction and the ongoing investigation, which the income tax authorities were conducting insofar as respondents 2 to 5 were concerned, would be stultified. We find that this argument is not available to the Department inasmuch as in the present case, it is not the passing of the order under Section 245D(1) or under Section 245D(2C) which would enable the Settlement Commission to have exclusive jurisdiction in relation to the case but, because of the proviso to Section 245F(2), it would be the date on which the application is made under Section 245C which would trigger the Settlement Commission's exclusive jurisdiction insofar as the case of the applicant is concerned.

15. For the sake of completeness, it would also be appropriate for us to refer to the second proviso to Section 245F(2) of the said Act which, inter alia, makes it clear that where an application which has been made on or after the first day of June, 2007 is rejected under Section 245D(1) or is declared invalid under Section 245D(2C), the Settlement Commission, inspite of such an application, would have exclusive jurisdiction upto the date on which the application is rejected or declared invalid as the case may be. In the present case, the Settlement Commission would have exclusive jurisdiction in relation to the cases on and from the date on which the applications under Section 245C were made by respondents 2 to 5 and not from the dates of the orders passed under Section 245D(1) and 245D(2C) of the said Act. Obviously, as the applications have not

been rejected or declared invalid, the exclusive jurisdiction of the Settlement Commission continues till the Settlement Commission passes the final order under Section 245D(4) of the said Act.

16. The learned counsel for the respondents 2 to 5 had, as pointed out, placed strong reliance on an order passed by the Supreme Court in the case of ***CIT v. K. Jayaprakash Narayanan*** (*supra*). The order was passed on a Special Leave Petition and the same reads as under:-

> "1. Delay condoned. This Special Leave Petition is filed against the decision of the Settlement Commission admitting the application of the Assessee under Section 245D of the Income-tax Act, 1961. It is the case of the Department that the Assessee had failed to make full and true disclosure in the first instance and that the said declaration made at a later date by way of second declaration cannot be the ground for admitting the application under Section 245D. Since this Special Leave Petition is filed only against the order of the Settlement Commission admitting the application of the Assessee under Section 245D, we do not wish to interfere at this stage. However, we make it clear that on the point of maintainability of the Application, it would be open to the Department to raise the contention before the Settlement Commission who would be entitled to examine that question at the final hearing of the matter.
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> 2. The Special Leave Petition is disposed of accordingly."
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> (underlining added)

17. It is apparent that the Supreme Court was considering a matter wherein the decision of the Settlement Commission admitting an application of an assessee under Section 245D of the said Act was in question. One of the specific pleas taken by the Department was that the assessee had failed to make a full and true disclosure in the first instance and that a declaration made at a later date could not be ground for admitting an application under Section 245D. The Supreme Court refrained from interfering with the order passed by the Settlement Commission inasmuch as it was only an order admitting the application of the assessee under Section 245D. The Supreme Court made it clear that even on the point of maintainability of the application, it would be open to the Department to raise the contention before the Settlement Commission which would be entitled to examine that question at the final hearing of the matter. From this, it is abundantly clear that the point of maintainability of an application under Section 245C(1) does not get foreclosed by virtue of the Settlement Commission passing an order under Section 245D(1) or Section 245D(2C) of the said Act and that such an issue could be examined by the Settlement Commission at the final hearing of the matter, that is, at the stage of passing an order under Section 245D(4) of the said Act.

18. The next decision on which strong reliance had been placed by the learned counsel for the respondents 2 to 5 was that of a Division Bench of this Court in the case of ***True Woods Pvt. Ltd.*** (*supra*). Though that was a case pertaining to the Customs and Central Excise Settlement

Commission and was one under the Central Excise Act, 1944, the material provisions are similar and, therefore, the observations and findings would be relevant for our purposes. In that case, the Customs and Central Excise Settlement Commission had, by a majority of 2:1, admitted a settlement application filed before it by the applicant in terms of Section 32D of the Central Excise Act, 1944. A writ petition had been filed by the Revenue assailing the correctness of the said order. The Division Bench noted that the Commission had, by the order impugned therein, simply admitted the applications filed by the applicants. The order was by a majority and took a view different from the one taken by the Chairman of the Commission who was of the view that the applications ought to be rejected on the ground that the applicants had not made a full and true disclosure of their liability as required under Section 32E(1) of the Central Excise Act, 1944 which is equivalent to Section 245C(1) of the said Act. The majority opinion left the issue open on the ground that neither side had conclusively proved its version regarding the filing of the declarations or their genuineness and had reserved liberty for the Revenue to urge the question regarding the genuineness of the applications filed by the applicants or the correctness of the duty liability disclosed by them including the manner in which the same had been determined, at the final hearing. We can immediately notice the similarity in the facts between the present case and the case before the Division Bench in ***True Woods Pvt. Ltd.*** (*supra*). Here, too, the Settlement Commission has not returned a conclusive finding with regard to the issue of full and true disclosure and the manner in which the

undisclosed income had been derived by the applicants. It has left the issue open to be decided at the final hearing of the matter.

19. The Division Bench, in **True Woods Pvt. Ltd.** (*supra*), observed as under:-

> "5. In the light of the above, we find consideration merit in the contention urged on behalf of the respondents that there is no final opinion expressed by the Commission regarding the making of a full and true disclosure of their liability by the applicants. The question whether the applicants are entitled to any relief in terms of Chapter V of the Central Excise Act, 1944 is therefore open to be examined and answered by the Commission while passing a final order on the applications filed before it. The Revenue shall be free to urge that the applicants are not entitled to any relief as the requirement of a full and true disclosure stipulated under Section 32E remains unsatisfied."

20. Then, after referring to the Supreme Court decision in the case of ***Commissioner of Income-tax, Jalpaiguri v. Om Prakash Mittal*, 2005 (184) ELT 3 (SC)**, the Division Bench, in **True Woods Pvt. Ltd.** (*supra*), observed as under:-

> "7. The above passage, argued the learned counsel for the petitioner, makes it incumbent upon the Settlement Commission to record a specific finding to the effect that the applicant has made a full and true disclosure before it can admit the application or take

any further steps on the basis thereof. It was contended that the foundation for settlement before the Commission is an application made by the assessee which must contain a full and true disclosure of the relevant particulars required under the provisions concerned. In the absence of any such finding, argued the learned counsel, the assumption of jurisdiction by the Commission would be wholly uncalled for."

21. The argument referred to in the above extract was rejected by the Division Bench in **True Woods Pvt. Ltd.** (*supra*) in the following words:-

"8. We regret our inability to accept the line of reasoning. It is true that the foundation for settlement is an application from the asessee in which the assessee must make a full and true disclosure as required under the provision of Section 245C of the Income-tax Act or Section 32E of the Central Excise Act, but it is equally true that the requirement of a full and true disclosure need not be examined and authoritatively determined at the threshold of any proceedings initiated before the Commission under Chapter V. There may be cases where it is possible for the Commission to records a finding that the disclosure made in the application is "full and true". There may, however, be situations in which the Commission may not be able to, at the stage of admission of the application, record a finding with any amount of certainty. In any such situation, it will not be legally impermissible for the Commission to keep the question open as it has done in the instant case to be examined at a later stage or at the stage of final disposal of the application. What is important is that there must be full and true disclosure to the satisfaction

> of the Commission before any relief can be granted to the applicants which implies that the requirement of such a full and true disclosure is a continuing requirement that needs to be satisfied from the beginning of the proceedings till the conclusion thereof. The Commission may consequently be justified in throwing out the application at any stage if it comes to the conclusion that the disclosure made by the assessee is either incomplete or untrue. The passage relied upon by the learned counsel for the petitioner simply emphasises the significance of a full and true disclosure but stops short of making such a disclosure or a finding on the satisfaction of that requirement as a condition precedent for the assumption of jurisdiction."
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> (underlining added)

22. From the above, it is clear that in ***True Woods Pvt. Ltd.*** (*supra*), a specific argument had been raised on behalf of the Revenue that it was incumbent upon the Settlement Commission to record a specific finding to the effect that the applicant had made a full and true disclosure before it admitted the application or took any further steps on the basis thereof. This argument was rejected by the Division Bench. The Division Bench was of the view that while the foundation for settlement was an application from the assessee in which the assessee is required to make a full and true disclosure, it was equally true that such requirement need not be examined and authoritatively determined at the threshold of any proceeding initiated before the Commission. Importantly, the Division Bench observed that there may be cases where it is possible for the Commission to record a finding that the disclosure made in the

application is full and true. At the same time, there could also be situations in which the Commission may not be able to, at the stage of admission of the application, record a finding with any amount of certainty. It is in such a situation that it would be permissible for the Commission to keep the question open to be examined at a later stage or at the stage of disposal of the application. As in the case of **True *Woods Pvt. Ltd.*** (*supra*), this is exactly what has happened in the present case. The Settlement Commission has noted the rival contentions of the Revenue and the applicants with regard to the issues of full and true disclosure and the manner of deriving the undisclosed income and has taken a prima facie view in favour of the applicants. It is not a definitive or final view and it is for this reason that the Settlement Commission, in its wisdom, left the issues open to be determined at the stage of final hearing under Section 245D(4) of the said Act. It may very well be that the Settlement Commission, at that stage, may agree with the Revenue on the basis of the material on record and the report submitted by the Commissioner of Income-tax that the applications were not maintainable under Section 245C(1) of the said Act. In fact, the Settlement Commission may, at any stage till it passes a final order under Section 245D(4), examine the issues and if there is sufficient material on record, determine the question of full and true disclosure and the manner in which the undisclosed income was derived conclusively and, depending on such a decision, the applications may be thrown out or they may be proceeded with further.

23. The Division Bench in ***True Woods Pvt. Ltd.*** (*supra*), explained the decision of the Supreme Court in ***Om Prakash Mittal's Case*** (*supra*) as one simply emphasizing the significance of a true and full disclosure but, one which stopped short of making such a disclosure or a finding on the satisfaction of that requirement as a condition precedent for the assumption of jurisdiction. The Special Leave Petition preferred by the Revenue against the decision of the Division Bench in ***True Woods Pvt. Ltd.*** (*supra*) was also dismissed by the Supreme Court by an order dated 10.07.2006.

24. We are of the view that the order of the Supreme Court in ***K. Jayaprakash Narayanan*** (*supra*) and the decision of the Division Bench of this Court in ***True Woods Pvt. Ltd.*** (*supra*) clinch the issue in favour of the respondents. As such, this Court ought not to interfere with the impugned orders. However, we need to examine the decision of the Supreme Court in the case of ***Ajmera Housing*** (*supra*) which has been strongly relied upon by the learned counsel for the petitioner. In fact, the learned counsel for the petitioner went to the extent of submitting that in view of the decision of the Supreme Court in ***Ajmera Housing*** (*supra*), the orders/decisions in ***K. Jayaprakash Narayanan*** (*supra*) and ***True Woods Pvt. Ltd.*** (*supra*) would no longer be good law.

25. In ***Ajmera Housing*** (*supra*), an order had been passed by the Income Tax Settlement Commission under Section 245D(1) on 17.11.1994, allowing the settlement application filed on behalf of the

assessee to be proceeded with. That order was not challenged by the Revenue. The Settlement Commission proceeded with the said settlement application and passed a final order under Section 245D(4) of the said Act on 29.01.1999. That settlement order was challenged by the Revenue before the Bombay High Court which set aside the same on, *inter alia*, the ground that no finding had been returned by the Settlement Commission as to whether there was a full and true disclosure of income on the part of the assessee/applicant. The Bombay High Court also held that the order dated 17.11.1994 passed under Section 245D(1) of the said Act was void and remitted the case to the Settlement Commission for a decision afresh and kept all the questions open. The applicant/assessee, being aggrieved by the said decision of the Bombay High Court, went up in appeal before the Supreme Court which, by an order dated 11.07.2006, set aside the Bombay High Court order and remitted the matter to the High Court for a fresh decision. In the second round, the Bombay High Court again set aside the Income Tax Settlement Commission's order dated 29.01.1999 and remanded the case to the Settlement Commission for fresh adjudication. While doing so, the Bombay High Court observed as under:-

> "In view of the facts and the legal position noted above, even though we find that the respondents had not made full and true disclosure of their income while making applications under Section 245C, it would not be proper to set aside the proceeding. However, at the same time, the Commission appears to have misdirected itself on several important aspects while passing the final order. The Settlement Commission had not supplied the

annexure Dated 19.9.1994 declaring additional income of Rs.11.41crore and thus, due opportunity was not given to the Revenue to place (sic) its stand properly. Huge amount of unexplained expenses, unexplained loans and unexplained surplus, total of which is more than Rs.14 crore, was not taken into consideration while passing the final order. Thirdly, the Settlement Commission has imposed token penalty of Rs.50 lakhs while in its own assessment leviable penalty would be 562.87 (sic Rs.562.87). In fact if the amounts, which were not taken into consideration while assessing the total undisclosed income, are also taken into consideration, the amount of leviable penalty may be much more. Taking into consideration the multiple disclosures and the fact that the respondents had failed to make true and full disclosure initially as well as at the time of second disclosure, we do not find any justifiable reasons to reduce or waive the amount of penalty so drastically.

Taking into consideration all these circumstances, in our considered opinion, it will be in the interest of justice to set aside the final order passed by the Settlement Commission and to remand the matter back to the Settlement Commission for hearing parties afresh and to pass orders as per law. Facts and circumstances noted in respect of writ petition No. 2191 of 1999 are also relevant for the remaining writ petitions and, therefore, it will be necessary that the final orders passed in all these proceedings should be set aside."

(underlining added)

26. The matter was again carried to the Supreme Court by the applicants/assessee. It is at that stage that the decision in **Ajmera**

Housing (*supra*) was rendered by the Supreme Court. At the outset, we may point out that the Supreme Court recorded its disapproval with the view of the Bombay High Court that it would not be proper to set aside the proceedings before the Settlement Commission even though it was convinced that the assessee had not made full and true disclosure of their income while making an application under Section 245C of the said Act.

27. In ***Ajmera Housing*** (*supra*), the Supreme Court considered the provisions of the said Act with regard to settlement. In the context of Section 245C of the said Act, the Supreme Court observed as under:-

> "27. It is clear that disclosure of "full and true" particulars of undisclosed income and "the manner" in which such income had been derived are the prerequisites for a valid application under Section 245-C(1) of the Act. Additionally, the amount of income tax payable on such undisclosed income is to be computed and mentioned in the application. It needs little emphasis that Section 245-C(1) of the Act mandates "full and true" disclosure of the particulars of undisclosed income and "the manner" in which such income was derived and, therefore, unless the Settlement Commission records its satisfaction on this aspect, it will not have the jurisdiction to pass any order on the matter covered by the application."

28. It is clear that it is mandatory for the Settlement Commission to record its findings with regard to the issues of "full and true disclosure" of particulars of undisclosed income and "the manner" in which such income was derived by the assessee. It is also clear that unless the

Settlement Commission records its satisfaction on these aspects, it would not have the jurisdiction to pass any order under Section 245D(4) of the said Act setting out the terms of settlement.

29. The Supreme Court further observed as under:-

> "34. In our opinion, even when the Settlement Commission decides to proceed with the application, it will not be denuded of its power to examine as to whether in his application under Section 245-C(1) of the Act, the assessee has made a full and true disclosure of his undisclosed income. We feel that the report(s) of the Commissioner and other documents coming on record at different stages of the consideration of the case, before or after the Settlement Commission has decided to proceed with the application would be most germane to the determination of the said question."

30. These observations are extremely significant for the purposes of the present case. The Supreme Court has made it clear that even when the Settlement Commission decides to proceed with the application when it passes an order under Section 245D(1) or Section 245D(2C), it would not be denuded of its power to examine as to whether the assessee has made a full and true disclosure of his undisclosed income in the application for settlement. The Supreme Court specifically noted that the report of the Commission and other documents would be coming on record of the Settlement Commission at different stages of the consideration of the case, before or after the Settlement Commission has

decided to proceed with the application, and, all these would be germane to the determination of the said question.

31. In the context of the factual matrix of the case before it, the Supreme Court observed that a disclosure made in a settlement application cannot be permitted to be revised inasmuch as no such revision is contemplated under the scheme of the Act. In this context, the Supreme Court observed as under:-

> "35. It is plain from the language of sub-section (4) of Section 245-D of the Act that the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to in the report of the Commissioner under sub-section (1) or sub-section (3) of the said section. A "full and true" disclosure of income, which had not been previously disclosed by the assessee, being a precondition for a valid application under Section 245-C(1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against Item 11 of the form. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. In this regard, Section 245-C(3) of the Act which prohibits the withdrawal of an application once made under sub-section (1) of the said section is instructive inasmuch as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Therefore, by revising the application, the applicant would be achieving something indirectly which he cannot

otherwise achieve directly and in the process rendering the provision of sub-section (3) of Section 245-C of the Act otiose and meaningless. In our opinion, the scheme of said Chapter is clear and admits no ambiguity."

xxxx xxxx xxxx xxxx xxxx

"37. As aforestated, in the scheme of Chapter XIX-A, there is no stipulation for revision of an application filed under Section 245-C(1) of the Act and thus the natural corollary is that determination of income by the Settlement Commission has necessarily to be with reference to the income disclosed in the application filed under the said section in the prescribed form."

xxxx xxxx xxxx xxxx xxxx

"41. We are convinced that, in the instant case, the disclosure of Rs. 11.41 crores as additional undisclosed income in the revised annexure, filed on 19-9-1994 alone was sufficient to establish that the application made by the assessee on 30-9-1993 under Section 245-C(1) of the Act could not be entertained as it did not contain a "true and full" disclosure of their undisclosed income and "the manner" in which such income had been derived. However, we say nothing more on this aspect of the matter as the Commissioner, for reasons best known to him, has chosen not to challenge this part of the impugned order."

32. It is obvious that revision of a disclosure made in a settlement application would clearly imply that the initial disclosure was neither true nor full. In the case before the Supreme Court, the disclosure had been revised and it is for that reason that the Supreme Court expressed its opinion that the same was neither true nor full. However, the Supreme

Court did not pursue that avenue any further inasmuch as the Commissioner had chosen not to challenge that part of the impugned order. On the facts of the case before it, the Supreme Court refrained from interfering with the remand order passed by the Bombay High Court in the second round even though it had expressed its disapproval with regard to certain observations made by the said High Court as already noticed above. The matter was ultimately remanded because of the fact that an opportunity had not been given to the Revenue to place its stand properly nor were the huge amount of unexplained expenses, unexplained loans and unexplained surplus taken into consideration by the Settlement Commission while passing the final order as also because the Settlement Commission had imposed a token penalty of Rs.50 lakhs while on the assessee's own assumption, penalty would have amounted to Rs.562.87 lakhs. This would be clear from the observations of the Supreme Court set out hereinbelow:-

> "45. Ultimately the High Court observed that:
>
> (i) since the Settlement Commission had not supplied the annexure filed on 19-9-1994, declaring additional income of Rs. 11.41 crores, due opportunity had not been given to the Revenue to place its stand properly;
>
> (ii) huge amount of unexplained expenses, unexplained loans and unexplained surplus, total of which was more than Rs. 14 crores, was not taken into consideration while passing the final order; and
>
> (iii) the Settlement Commission had imposed token penalty of Rs. 50 lakhs while on its own assessment leviable penalty would have been Rs. 562.87 lakhs.

> Further, if the amount which had not been taken into consideration while assessing the total undisclosed income was to be taken into account, the amount of leviable penalty would have been much more.
>
> In the light of these facts, the High Court formed the opinion that it would be in the interest of justice to set aside the final order passed by the Settlement Commission and to remand the case back to it for fresh adjudication on the assessee's application.
>
> 46. Bearing in mind the aforestated factual position, as emanating from the material on record, we find it difficult to persuade ourselves to agree with the learned counsel for the assessee that there was no justification for the order of remand by the High Court and that the order passed by the Settlement Commission should have been affirmed. We are satisfied that under the given scenario, the High Court was correct in making the order of remand and no good ground is made out for interference in exercise of our jurisdiction under Article 136 of the Constitution."

33. After having examined the decision of the Supreme Court in ***Ajmera Housing*** (*supra*) in detail, we do not find anything therein which would run counter to the order of the Supreme Court in ***K. Jayaprakash Narayanan*** (*supra*) or the decision of a Division Bench of this Court in ***True Woods Pvt. Ltd.*** (*supra*). Furthermore, the writ petition was entertained by the Bombay High Court in ***Ajmera Housing Case*** (*supra*) after a final order under Section 245D(4) had been passed. This is not the case before us. Here, as already pointed out above, the proceedings are pending before the Settlement Commission and the final order is yet to be passed by the Settlement Commission under Section 245D(4). All the

conclusions made by the Settlement Commission up till now, in the present case, are only prima facie conclusions and do not foreclose the issues raised by the Revenue in the present proceedings. We have already noted that the Supreme Court in ***Ajmera Housing*** (*supra*) itself has observed that even when the Settlement Commission decides to proceed with the settlement application, it is not denuded of its power to examine as to whether the said application is in accord with the conditions stipulated in Section 245C(1) of the said Act including the conditions of the applicant making a full and true disclosure of his undisclosed income as also the manner in which the said undisclosed income was derived by him.

34. The learned counsel for the petitioner had also taken a point that the settlement applications of respondents 3 and 4 had been rejected for failure to pay the additional tax and therefore the subsequent applications of the said respondents 3 and 4 filed on 23.11.2012 ought not to have been entertained. In our opinion, the learned counsel for the respondents 2 to 5 has given a complete answer to this argument. He has referred to Section 245K(2) of the said Act which stipulates that where a person has made an application under Section 245C on or after the first day of June, 2007, and if such application has been allowed to be proceeded with under Section 245D(1), such person shall not subsequently be entitled to make an application under Section 245C. It was contended by the learned counsel for the respondents 2 to 5 that this bar from making another application under Section 245C would only apply if the earlier

application had been allowed to be proceeded with under Section 245D(1). But, in the present case, the earlier applications filed by respondents 3 and 4 had not been allowed to be proceeded with under Section 245D(1) and had been rejected at the threshold for want of payment of the full amount of the additional tax and interest due. *Prima facie*, we are in agreement with the submission made by the learned counsel for the respondents. However, since we are not inclined to interfere with the impugned orders, we feel that this issue can also be left open to be decided by the Settlement Commission at the time of further proceedings till the order under Section 245D(4) is passed. For all these reasons, we agree with the learned counsel for the respondents 2 to 5 that this is not the stage at which this Court ought to interfere with the impugned orders and the proceedings pending before the Settlement Commission. The writ petition is accordingly dismissed. We make it clear that we have not expressed any opinion on the merits of the issues as to whether the respondents 2 to 5 had made a full and true disclosure and had indicated the manner in which the undisclosed income had been derived. Those and related issues on merits are for the Settlement Commission to decide. There shall be no order as to costs.

BADAR DURREZ AHMED, ACJ

R.V.EASWAR, J

JULY 02, 2013
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