



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

Decided On: 15.04.2014

+ **W.P.(C) 1451/2013**

M/S OMAXE LTD. AND ANR. Petitioners
Through : Mr. Ajay Vohra with Ms. Kavita
Jha & Mr. Vaibhav Kulkarni, Advocates.

Versus

DEPUTY COMMISSIONER OF INCOME TAX AND ANR.
..... Respondent
Through : Mr. Sanjeev Sabharwal, Sr.
Standing Counsel with Mr. Ruchir Bhatia,
Jr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)
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1. In these writ proceedings under Article 226 of the Constitution, the petitioner challenges a notice issued by the respondents (hereafter called "the Revenue") under Section 153A of the Income Tax Act ("the Act").

2. The petitioner company is engaged in real estate business. Its premises were searched on 22.9.2005, and other dates. It filed its return on 30.11.2006 declaring a net taxable income of



Rs.89,20,76,630/-. The petitioner had earlier been issued separate notice under Section 153-A of the Act, on 19.4.2006. In response to the notice, the petitioner stated that its returns filed for 2000-2006 be treated as reiterated under Section 153A. On 31.5.2007, the petitioner approached the Settlement Commission to settle pending assessments for AY 2000-2001 to 2006-2007 and declared an additional income of Rs.18.75 crores. Initially, after hearing parties, the Commission admitted the application for hearing and disposal. On 17.8.2008, the Commission passed its order under Section 245D(4), finally determining the petitioner's liability, for 2004-05 to 2006-07.

3. The AO issued notice under Section 148, on 30.6.2010 proposing reopening of assessment for 2006-07. The petitioner objected to this on 30.7.2010; those objections were rejected by the AO on 30.10.2010. In this background, the AO passed the final reassessment order on 08.11.2011. This was challenged in WP(C) 7975/2011 filed by the petitioner.

4. In the meanwhile, consequent to search in the premises of one Mr. Surinder Modi in June, 2009, a satisfaction note was recorded by the AO (of Shri Modi) for initiating proceedings under Section 153C of the Act against the petitioner for 2004-05 to 2009-10. The Revenue, consequent to search (in the case of Mr. Modi), issued notices under Section 153C of the Act seeking to reassess the petitioner's income, *inter alia*, for assessment years 2004-05 to 2009-10. Responding to notice dated 26.12.2011 issued under Section 153C of the Act, the petitioner objected to assessment/ reassessment of



income for assessment years 2004-05 to 2006-07 under the said provision since the assessments had already been concluded by the order of the Settlement Commission dated 17.03.2008.

5. This Court by judgment dated 13.07.2012 allowed WP(C) No.7975/2011 and quashed the notice for reassessment under Section 147 of the Act (dated 30.6.2010) for the AY 2006-07.

6. The Revenue rejected the objections of the petitioner preferred against the notice under Section 153C. The petitioner thereafter filed detailed objections to notice dated 26.12.2011 issued under Section 153C of the Act, *inter alia*, objecting to assessment/ reassessment of income for assessment years 2004-05 to 2006-07, particularly in the light of the judgment of this Court dated 13.07.2012. The Revenue issued the impugned order dismissing the said objections. During the course of proceedings under Section 153C, the Revenue also issued notices under Section 142(1) *inter alia* calling for detailed information pertaining to the assessment years in question.

7. It is contended on behalf of the petitioner that by virtue of Section 245I, the finality attached to the Settlement Commission's order in respect of a particular period – in this case AY 2006-07 cannot be disturbed. It is argued that in the previous judgment of this Court – reported as *Omaxe Ltd. & Jai Bhagwan Goel Vs. ACIT & Anr.* 254 CTR 370, the applicability of any other provision of law including Section 148 had been ruled out once an order is made by the Settlement Commission.



8. Counsel argues that upon receipt of application, the Commission forwards it to the Commissioner. Under Rule 44CA (1), the Commission calls for a report under Section 245D(1). Once the Settlement Commission admits an application for final decision, all information in the statements and application filed by the assessee are disclosed and reports are furnished by the Commissioner. Thereafter upon assumption of jurisdiction and the making of an admission order, it is the Settlement Commission alone which has exclusive jurisdiction under Section 245F (2) of the Act to pass orders in respect of the matters and related aspects. For this purpose, it exercises powers and functions of all Income Tax authorities.

9. Learned counsel relies upon the decision of the Supreme Court in *Commissioner of Income Tax v Express Newspapers Ltd.* (1994) 206 ITR 443 and of this Court in *Vatika Farms Pvt. Ltd. v Commissioner of Income Tax* 302 ITR 98 to say that by virtue of Section 245D(4), the orders of the Commission are final and conclusive to the matters stated there and matters covered by it cannot be reopened in any proceedings under the Act. Reliance is also placed upon the Constitution Bench decision of the Supreme Court in *Brij Lal v Commissioner of Income Tax* 328 ITR 477 where it was held as follows :

“..... Consequently, Section 234B, Section 245D(2C) and Section 245D(6A) in Chapter XIX-A operates in different fields. To this extent, we agree with the view expressed in Damani Brothers’ case. Descriptively, it can be stated that assessment in law is different from assessment by way of settlement. If one reads Section



245D(6) with Section 245-I, it becomes clear that every order of settlement passed under Section 245D(4) shall be final and conclusive as to the matters contained therein and that the same shall not be reopened except in the case of fraud and misrepresentation. Under Section 245F(1), in addition to the powers conferred on the Settlement Commission under Chapter XIX-A, it shall also have all the powers which are vested in the income-tax authority under the Act. In this connection, however, we need to keep in mind the difference between “procedure for assessment” under Chapter XIV and “procedure for settlement” under Chapter XIX-A.....” (refer page 500).

10. The Revenue contends that the application preferred before the Settlement Commission and an order related to five issues. The search carried out in the case of Shri Modi was subsequent to its order, i.e., on 19.6.2009. The materials were not part of the settlement and more importantly revealed fresh non-disclosure of facts concerning allotment and transfer of 1.25 lakh sq.ft. area by the petitioner to Shri Modi at Rs.3500/- per sq.ft. Furthermore, an agreement dated 03.10.2006 between the petitioner and one Fantastic Buildcon (P) Ltd. for sale of a hotel project and another letter of 19.3.2009 from the petitioner to the said Fantastic Buildcon (P) Ltd. for payment of balance amount were seized. These pointed to undisclosed income, which clearly were not the subject matter of the settlement proceedings and therefore had not been decided or adverted to. They stood excluded from the proceedings and the Revenue could justifiably proceed under Section 153C of the Act.



11. The Revenue relies on Section 245D(4) of the Act to say that finality attaches itself only in respect of the matters which are “*stated therein*”, i.e., stated in the application and dealt with in the order. Since the subject matter of Section 153 notice and consequent proceedings were not dealt with, there is no question of any finality. Counsel also argues that the exclusive jurisdiction of the Settlement Commission under Section 245F(2) to exercise powers and perform the functions of the IT Authorities was only in relation to the “case”, which, as defined in Section 245A(b) read with proviso (i), refers to any proceeding for assessment pending before an AO when the application for settlement is made, except a proceeding for reassessment under Section 147. Thus, any reassessment attempted to be initiated would not impermissibly interfere with the jurisdiction of the Settlement Commission.

Analysis and Conclusions

12. It is evident from the above discussion that on a previous occasion when the petitioner’s premises were searched, and Section 153A notice was issued, it approached the Settlement Commission. The Commission made its final orders determining the petitioner’s liability. The AO, subsequent to this event, issued a notice on 30.6.2010 under Section 148 proposing reassessment proceedings. On that occasion, this Court was approached. The reassessment notice was quashed in *Omaxe* (supra). The relevant discussion at that stage may be usefully reproduced as extracted below :



“12. A conjoint reading of the aforesaid provisions indicates that the ITSC is a high powered body vested with powers to settle the case of an assessee. The order of settlement is conclusive as expressly stated in Section 245I but the argument of the Revenue is that it is conclusive only with regard to matters stated in the order of settlement and in respect of matters not stated therein, the Assessing Officer has the power to reopen the assessment. It is further submitted that the assessee did not approach the ITSC with regard to settlement of its claim for deduction under Section 80IB(10) of the Act and there was no adjudication of the said claim in the order of the ITSC. It is therefore submitted that the issue relating to deduction under Section 80IB(10) is not a matter covered by the order of the ITSC, and can be reopened by the Assessing Officer.

13. We are afraid that the submission of the Revenue overlooks the fact that in the return the assessee had claimed deduction of Rs.78,99,00,509/- u/s. 80IB (10) and it was only after claiming such deduction that the net taxable income was declared at Rs.89,20,76,630/-. The Assessing Officer issued notices under Section 143(2) and 142(1) on 12.07.2007 but even before the questionnaire was issued the petitioner had approached the Settlement Commission by an application filed on 31.05.2007. Under Section 245F(1), the ITSC, in addition to the powers conferred on it under Chapter XIX-A, shall have all the powers which are vested in an income-tax authority under the Act. By virtue of the provisions of Section 245F (2) once the application for settlement was filed and an order was passed allowing the application to be proceeded with, it was the ITSC which has the exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act relating to the case, till the final order of settlement is passed under Section 245D (4). Thus the moment the application of the assessee was allowed to be proceeded with by the ITSC till the final order of the settlement is passed on 17.03.2008, it



was the ITSC which had exclusive jurisdiction in relation to the assessee's case. Therefore, all matters which could be examined by the Assessing Officer could be examined by the ITSC in these proceedings, including the assessee's claim for deduction under Section 80IB (10). The total income of the assessee for the assessment year 2006-07 has been computed by the ITSC at Rs.89,38,76,630/- which is Rs.18,00,000/- more than the income of Rs.89,20,76,630/- declared by the petitioner, which figure is after the petitioner claimed deduction of Rs.78,99,00,509/- under Section 80IB (10). It is irrelevant that no undisclosed income was offered by the petitioner in regard to the housing project. Again a harmonious reading of the provisions of the statute would show that it does not postulate the existence of two orders, each of a different income tax authority, determining the total income of an assessee for the same assessment year. If the contention of the Revenue is accepted, not only will the finality of the order of settlement be disturbed, but it will also result in different orders relating to the same assessment year and relating to the same assessee being allowed to stand. We have grave doubts whether such a result, which is likely to create chaos and confusion in the tax administration could have been intended. The order of the ITSC can be reopened only in cases of fraud and misrepresentation and in no other case.

19. Thus if the observations made by the Court in the paragraph at page 484 of the report are read as a whole, it would be clear that the Court was dealing with a plea which attributed an active role as an income tax authority to the ITSC even during the pendency of the application till an order under Section 245D (1) was passed and thereafter once an order was passed allowing the application to be proceeded, a role combining the functions of both an assessing authority and an authority settling the case. The Court repelled the plea by clarifying



certain observations made by the Supreme Court in CIT v. Express Newspapers Ltd., (1994) 206 ITR 443. What the learned standing counsel relied upon before us are observations of the Court clarifying the earlier observations made in the case of Express Newspapers Ltd. (supra). The gist and purport of the observations made by the Supreme Court in the case of Damani Brothers (supra), however, is not what the learned standing counsel would like us to accept. These observations of the Supreme Court in Damani Brothers (supra) do not at all support his plea that the matter relating to the deduction under Section 80IB (10) could not have been before the ITSC. The observations of the Supreme Court in Damani Brothers (supra) clarifying the observations of the Court in Express Newspapers Ltd. (supra) only mean that the ITSC does not deal with the disclosed income of the assessee even before it decides to proceed with the case by passing an order under Section 245D (1). It does not however imply that once an order is passed under the aforesaid provision, the ITSC does not deal with both the disclosed and undisclosed incomes of the assessee. On the contrary, it would inevitably follow that once a settlement application is allowed to be proceeded with, the entire case stands transferred to the ITSC and thereafter it is the ITSC alone which shall have exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act in relating to the case, as emphatically stated in sub-section (2) of Section 245F of the Act. In Damani Brothers (supra) the Supreme Court was explaining the position during the pendency of the settlement application till an order is passed under Section 245D (1) allowing the application to be proceeded with. In the case before us, we are not concerned with that position. The question here is what would be the position when an order under Section 245D (4) is passed by the ITSC and whether such an order can be construed as one dealing with the entire gamut of the return filed by the assessee and the issues raised therein.



While opining that the observations of the Supreme Court in Damani Brothers (supra) are not relevant to the factual situation or the legal dispute arising therefrom in the present case, we hold that since the exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority in relation to the case vests with the ITSC after an order is passed under Section 245D (1) till the final settlement order is passed under Section 245D (4), it is not possible to countenance a situation where it can be said that the assessee's claim for deduction under Section 80IB (10) was not the subject matter of the order passed by the ITSC under Section 245D (4). It is further necessary to keep in mind that Section 245B (3) requires that the ITSC shall be manned by "persons of integrity and outstanding ability having special knowledge of, and, experience in, problems relating to direct taxes and business accounts". The provisions of Chapter XIX-A suggest that all matters in relation to the case of the assessee shall be dealt with by the ITSC just as an assessing authority would deal with them while completing an assessment under Section 143 (3) of the Act. If this is the position, it would be difficult to sustain the argument of the revenue that the matter relating to the deduction under Section 80IB (10) was not the subject matter of the final order of settlement. It follows that the Assessing Officer had no jurisdiction to reopen the assessment for the assessment year 2006-07 by issuing a notice under Section 148 of the Act on the ground that the deduction was wrongly allowed.

20. The issue can also be viewed from another angle. Barring the exception of the provisions relating to appeal and revision, the Act does not contemplate or provide for disturbing the finality of an order or proceeding passed or completed by an income-tax authority, by any order or proceeding passed or initiated by a different income-tax authority. An assessment order passed by an Assessing Officer can be rectified or amended under Section 154 or



Section 155 or reopened under Section 148 only by him, and by no other income-tax authority. Similarly, an assessment by way of settlement of a case, which is made by the ITSC, can be reopened only by the ITSC and that too only in certain circumstances. Applying this general principle that runs through the Act, an assessment by way of a settlement order passed by the ITSC cannot be reopened by a different authority, viz., the Assessing Officer. The fact that the ITSC has not been designated as an "income-tax authority" under Section 116 of the Act makes the position "a fortiori". Section 147 of the Act does not employ language that permits him to do so, nor are the powers and orders of the ITSC made subject to the provisions of Section 147. Section 147 does not appear to fit into the general scheme of Chapter XIX-A, which has been held to be a self contained code by the Supreme Court in Brij Lal and Ors. v. CIT, Jalandhar, (2010) 328 ITR 477 (SC).

14. It would be necessary to reproduce Sections 245D and 245I – both of which are relevant for the present purposes. These provisions read as follows:

*“245D. **Procedure on receipt of an application under section 245C** (1) On receipt of an application under section 245C, the Settlement Commission shall call for a report from the Commissioner and on the basis of the materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved therein,⁷⁰ [the Settlement Commission, shall, where it is possible, by order, reject the application or allow the application to be proceeded with within a period of one year from the end of the month in which such application was made under section 245C] :*



Provided that an application shall not be rejected under this sub-section unless an opportunity has been given to the applicant of being heard :

⁷¹*[Provided further that the Commissioner shall furnish the report within a period of forty-five days of the receipt of communication from the Settlement Commission in case of all applications made under section 245C on or after the 1st day of July, 1995 and if the Commissioner fails to furnish the report within the said period, the Settlement Commission may make the order without such report.]*

(1A) ⁷²*[Omitted by the Finance (No. 2) Act, 1991, w.e.f. 27-9-1991.]*

(2) *A copy of every order under sub-section (1) shall be sent to the applicant and to the Commissioner.*

⁷³*[(2A) Subject to the provisions of sub-section (2B), the assessee shall, within thirty-five days of the receipt of a copy of the order under sub-section (1) ⁷⁴[allowing the application to be proceeded with], pay the additional amount of income-tax payable on the income disclosed in the application and shall furnish proof of such payment to the Settlement Commission.]*

⁷⁴*[(2B) If the Settlement Commission is satisfied, on an application made in this behalf by the assessee, that he is unable for good and sufficient reasons to pay the additional amount of income-tax referred to in sub-section (2A) within the time specified in that sub-section, it may extend the time for payment of the amount which remains unpaid or allow payment thereof by installments if the assessee furnishes adequate security for the payment thereof.]*

⁷⁴*[(2C) Where the additional amount of income-tax is not paid within the time specified under sub-section (2A), then, whether or not the Settlement Commission has extended the time for payment of the amount which remains unpaid or has allowed payment thereof by installments under sub-section (2B), the assessee shall be liable to pay simple interest at fifteen per cent per annum on the amount*



remaining unpaid from the date of expiry of the period of thirty-five days referred to in sub-section (2A)].

⁷⁴[(2D) Where the additional amount of income-tax referred to in sub-section (2A) is not paid by the assessee within the time specified under that sub-section or extended under sub-section (2B), as the case may be, the Settlement Commission may direct that the amount of income-tax remaining unpaid, together with any interest payable thereon under sub-section (2C), be recovered and any penalty for default in making payment of such additional amount may be imposed and recovered, in accordance with the provisions of Chapter XVII, by the ⁷⁵⁻⁷⁶[Assessing] Officer having jurisdiction over the assessee.]

(3) Where an application is allowed to be proceeded with under sub-section (1), the Settlement Commission may call for the relevant 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 furnish a report on the matters covered by the application and any other matter relating to the case.

(4) After examination of the records and the report of the Commissioner, received under sub-section (1), and the report, if any, of the Commissioner received under sub-section (3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit 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 under sub-section (1) or sub-section (3).



⁷⁷[(4A) In every application allowed to be proceeded with under sub-section (1), the Settlement Commission shall, where it is possible, pass an order under sub-section (4) within a period of four years from the end of the financial year in which such application was allowed to be proceeded with.]

⁷⁸[(5) Subject to the provisions of section 245BA, the materials brought on record before the Settlement Commission shall be considered by the Members of the concerned Bench before passing any order under sub-section (4) and, in relation to the passing of such order, the provisions of section 245BD shall apply.]

(6) Every order passed under sub-section (4) shall provide for the terms of settlement⁷⁹ including any demand by way of⁸⁰ [tax, penalty or interest], the manner in which any sum due under the settlement⁷⁹ shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.

⁸¹[(6A) Where any tax payable in pursuance of an order under sub-section (4) is not paid by the assessee within thirty-five days of the receipt of a copy of the order by him, then, whether or not the Settlement Commission has extended the time for payment of such tax or has allowed payment thereof by installments, the assessee shall be liable to pay simple interest at fifteen per cent per annum on the amount remaining unpaid from the date of expiry of the period of thirty-five days aforesaid.]

(7) Where a settlement becomes void as provided under sub-section (6), the proceedings with 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 this 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.

⁸²[(8) *For the removal of doubts, it is hereby declared that nothing contained in section 153 shall apply to any order passed under sub-section (4) or to any order of assessment, reassessment or recomputation required to be made by the* ⁸³*[Assessing] Officer in pursuance of any directions contained in such order passed by the Settlement Commission* ⁸⁴*[and nothing contained in the proviso to sub-section (1) of section 186 shall apply to the cancellation of the registration of a firm required to be made in pursuance of any such directions as aforesaid.]*

245I. Order of settlement to be conclusive Every order of settlement passed under sub- section (4) of section 245D shall be conclusive as to the matter 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.”

15. A facial consideration of the above provisions would reveal that the finality which attaches itself to Settlement Commission's order is in respect of the matters referred to it. The Revenue's contention appears to be that the non-disclosure of materials which have a bearing on AY 2006-07, discovered or seized in search proceedings concerning Shri Modi, were not the subject matter of the Commission's deliberations and consequently the subject matter of its order. Attractive though this aspect appears to be, the ruling in *Omaxe* (supra) precludes exercise of authority by the Revenue. Whilst from the Revenue's perspective, every non-disclosure or a fresh discovery of facts which might have a bearing on the assessee's returns, *prima*



facie, stands excluded from what is referred to a Settlement Commission, the fallacy in that argument is the Commission has a full weight and the jurisdiction of *all the authorities under the Income Tax Act* when it is seized of a matter. Concededly in this case, the subject matter before the Commission was the submission of the assessee to its jurisdiction with respect to AY 2006-07. Of course, the Revenue contends that the recovery of material in a third party's premises were not a subject matter of the settlement proceedings, which got concluded on 17.3.2008. However, equally its case can proceed only on the assumption that the assessee was guilty of non-disclosure or suppression of material facts which ought to have been primarily revealed to the Settlement Commission when the application was moved under Section 245D in the first place. The fallacy in the Revenue's argument is that it overlooks the remedy available for the Revenue, i.e to approach the Settlement Commission under Section 245D(6) contending that its previous order of 17.3.2008 ought to be reopened because the non-disclosure amounted to a fraud or misrepresentation. The observations in *Brij Lal* (supra) cited earlier are extremely pertinent in this context. Likewise, in *Express Newspapers Ltd.* (supra), the Supreme Court had earlier stated as follows :

“..... It is equally evident that once an application made under Section 245C is admitted for consideration (after giving notice to and considering the report of the Commissioner of Income Tax as provided by Section 245D) the Commission shall have to withdraw the case relating to that assessment year (or years, as the case may be) from the assessing/appellate/revising authority and deal with the



case, as a whole, by itself. In other words, the proceedings before the Commission are not confined to the income disclosed before it alone. Once the application is allowed to be proceeded with by the Commission, the proceedings pending before any authority under the Act relating to that assessment year have to be transferred to the Commission and the entire case for that assessment year will be dealt with by the Commission itself. The words “at any stage of a case relating to him” only make it clear that the pendency of proceedings relating to that assessment year, whether before the Assessing Officer or before the appellate or revisional authority, is no bar to the filing of an application under Section 245C so long as the application complies with the requirements of Section 245C. (refer page 451 – plac. E/F). (Emphasis supplied).”

The judgments in *R.B. Shreeram Durga Prasad v. Settlement Commission*, (1989) 176 ITR169 *Jyotendrasinghji v. S.I. Tripathi & Ors.*, (1993) 201 ITR 611 *Shriyans Prasad Jain v. Income-tax Officer and others*, (1993) 204 ITR 616 and *Kuldeep Industrial corporation v. ITO*, (1997) 223 ITR 840 are equally conclusive about the plenitude of powers conferred upon the Settlement Commission.

16. It is evident from the rulings of the Supreme Court that orders of Settlement Commission are final and conclusive as to matters stated therein. The “matters” necessarily could comprehend disputed questions, items or heads of income, disallowance, etc. or variants of it, but always with reference to a particular assessment year. In this case, the Settlement Commission was seized of AY 2006-07. Whilst exercising its authority over the application, the Commission concededly exercised the vast plenitude of its power or jurisdiction. The petitioner had made a disclosure in its application – as it was duty



bound to. What is in controversy today is that the subsequent event of search and seizure operation conducted in the premises of Shri Modi – in the contention of the Revenue – have thrown light on material that had been suppressed from the Commission. If such is the case, it would be only logical that the Commission itself should be approached for a declaration that its order of 17.3.2008 is a nullity. Allowing any other authority, even by way of a notice under Section 153C, would be to permit multiple jurisdictions which can result in chaos. After all non-disclosure or suppression of information in respect of what is required to be revealed to the concerned authorities is akin to fraud and if it has a material bearing on the outcome of the assessment, it would most certainly be misrepresentation. During the course of hearing, the learned counsel for the Revenue had voiced apprehensions that the Commission might well be of the opinion that “misrepresentation” has to fall within the four corners of the meaning of such expression under the Contract Act. This Court sees no *rationale* for such apprehension. Misrepresentation has not been defined under the Income Tax Act; importing the definition of misrepresentation or for that matter fraud from the Contract Act in the circumstances would not be appropriate. As one understands, the term “*misrepresentation*” would mean failure to disclose material or facts which are germane and relevant, or suppressing facts and materials which are germane and relevant or holding out a falsehood which gives the rise to an assumption that what is so stated or represented is true or correct. These are only illustrative and by no means conclusive as to what can be misrepresentation. The facts of each case would



throw light on whether the individual or person concerned was guilty of misrepresentation having regard to the totality of the circumstances, given the nature of duty cast on him or her. This interpretation is in consonance with the ruling of the Supreme Court in *Commissioner of Income Tax v Om Prakash Mittal* [2005] 273 ITR 326(SC) where it was held as follows:

“The decision whether the order has been obtained by fraud or misrepresentation of facts is that of the Commission. But it is not a requirement that the Commission must suo motu initiate the action. If the revenue has material to show that the order was obtained by fraud or misrepresentation of facts it certainly can move the Commission for decision on that issue. Otherwise, even if in a given case there is material in abundance to establish that the order was obtained by fraud or misrepresentation of facts, yet the void order would continue to be operative because of the fortuitous circumstance that the Commission does not suo motu initiate the proceeding. Merely because Section 245I provides that the order of Settlement is conclusive it does not take away the power of the Commission to decide whether the settlement order had been obtained by fraud or misrepresentation of facts. Any other interpretation would render sub-section (6) otiose. The Commission had really missed the true scope and ambit of Section 245D(6). If the CIT was able to establish that the earlier decision was void because of misrepresentation of the facts, certainly it was open to the Commission to decide that issue. It cannot be called by any stretch of imagination to be review of the earlier judgment or the subsequent Bench sitting in appeal over the earlier Bench's decision. Further the conclusions of the Commission regarding the genuineness of the loan transactions were arrived at without indicating reasons.”



It only referred to the respective stands and the submissions of the assessee's counsel. That was not the proper way to deal with the matter.

The foundation for settlement is an application which assessee can file at any stage of a case relating to him in such form and in such manner as is prescribed. The statutory mandate is that the application shall contain "full and true disclosure" of the income which has not been disclosed before the assessing officer, the manner in which such income has been derived. The fundamental requirement of the application under Section 245C is that full and true disclosure of the income has to be made, along with the manner in which such income was derived. On receipt of the application, the Commission calls for report from the Commissioner and on the basis of the material contained in the report and having regard to the nature and circumstances of the case or complexity of the investigation involved therein, it can either reject the application or allow the application to be proceeded with as provided in Section 245D(1).

It has to be noted that the Commission exercises power in respect of income which was not disclosed before the authorities in any proceeding, but are disclosed in the petition under Section 245C. It is not that any amount of undisclosed income can be brought to the notice of the Commission in the said petition. Commission exercises jurisdiction if the additional amount of tax on such undisclosed income is more than a particular figure (which at different points of time exceeded rupees fifty thousand or rupees one hundred thousand, as the case may be). The assessee must have in addition furnished the return of income which he is or was required to furnish under any of the provisions of the Act. In essence the requirement is that there must be an income disclosed in a return furnished and undisclosed income disclosed to the Commission by a petition under Section 245C. There is a purpose why the legislature has prescribed the



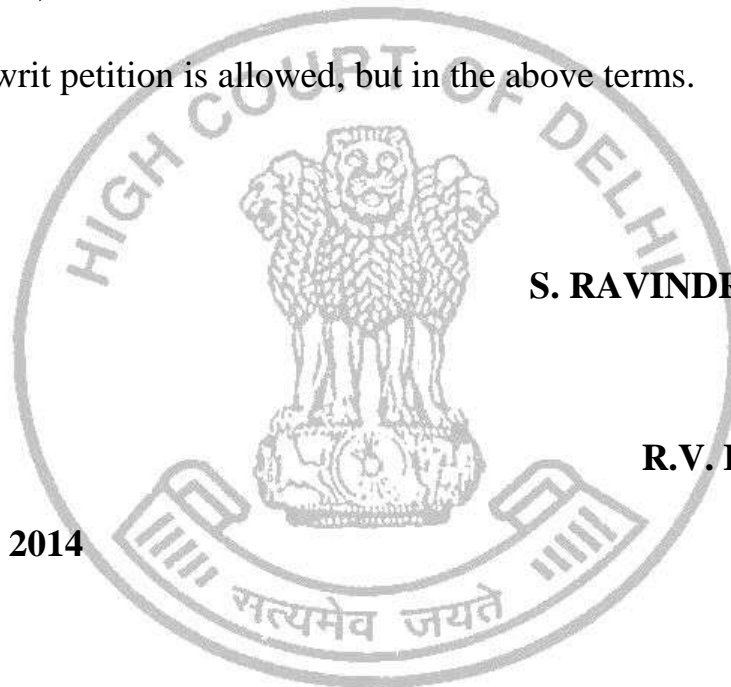
condition relating to declaration of the order void when it is obtained by fraud or misrepresentation of facts. It cannot be said that there has been a true and fair declaration of income which is the pre-requisite for settlement by the Commission. If an order is obtained by fraud or misrepresentation of facts, it cannot be said that there was true and fair disclosure. It was noted here that unlike Section 139 of the Act which provides for filing of revised return, there is no provision for revision of an application made in terms of Section 245C. That shows clear legislative intent that the applicant for settlement has to make a true and fair declaration from the threshold. It is on the basis of the application received that the Commissioner calls for report to decide whether the application is to be rejected or permitted to be continued. The declaration contemplated in Section 245C is in the nature of voluntary disclosure of concealed income, but as noted above it must be true and fair disclosure. Voluntary disclosure and making a full and true disclosure of the income are necessary pre-conditions for invoking the Commission's jurisdiction.”

17. Finally, this Court is not impressed by the argument of the Revenue that the definition of “case” over which the Settlement Commission has exclusive jurisdiction excludes proceedings for reassessment, under Section 245A(i). This is because any reassessment proceedings that are sought to be excluded from the purview of “case” must be in respect of a Section 148 notice sent while the proceedings before the Settlement Commission are ongoing. Once the Settlement Commission has completed proceedings, its order is considered conclusive as regards matters “stated therein” per Section 245I and reopening any proceeding in respect of matters covered in the order would be barred.



18. For the above reasons, it is held that the impugned notice issued to the petitioner under Section 153C cannot be sustained; the said notice and all further proceedings are hereby quashed. It is open to the respondent/Revenue to move the Settlement Commission for appropriate relief of declaration that its previous order under Section 245D (6) is void, setting out the relevant facts and circumstances. In the event the Revenue approaches the Commission with an application for such relief, it shall be decided on its merits in accordance with law.

19. The writ petition is allowed, but in the above terms.



**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

APRIL 15, 2014

skw