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

Reserved on: 28th January, 2014
% *Date of Decision:10th February, 2014*

\+ **W.P. (C) 5262/2013**

COMMISSIONER OF INCOME TAX (CENTRAL)-II
..... Petitioner
Through: Mr. Rohit Madan, sr. standing counsel with Mr Akash Vajpai, Advocate.

versus

INCOME TAX SETTLEMENT COMMISSION & ANR.
..... Respondents
Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr Prakash Kumar and Mr Sheel Vardhan, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

1. In the present proceedings under Article 226 of the Constitution of India, the revenue calls in question the majority view taken in the impugned order dated 8.2.2013 passed by the Income Tax Settlement Commission, Principal Bench, New Delhi, ("ITSC") granting immunity to the respondent No.2 from imposition of penalty and prosecution.

2. Chapter XIX-A of the Income Tax Act, 1961 consisting of sections 245A to 245M was inserted by the Taxation Laws

(Amendment) Act, 1975, w.e.f. 1.4.1976. It provided for settlement of cases. Vast powers were conferred upon the Settlement Commission including the power to grant immunity to the assessee from prosecution and penalty. Once the Settlement Commission is seized of the settlement application, the exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the Act in relation to the case of the applicant became vested in the Settlement Commission until a final order of settlement is passed in terms of section 245D(4). In settling the case of the applicant, the Settlement Commission shall, after granting an opportunity to the applicant and to the Commissioner of Income Tax concerned to be heard, and after examining such further evidence as may be placed before it or obtained by it, pass such order as it thinks fit on the matters covered by the applicant and any other matter relating to the case not covered by the applicant, but referred to in the report of the Commissioner of Income Tax. Under sub-section (5) of section 245D, the materials brought on record before the Settlement Commission shall be considered by the members of the concerned Bench before passing any order of settlement. Under section 245(1), the assessee may, at any stage of a case relating to him, make an application in such form and in such a 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 .....*" and such an application shall be disposed of by the Settlement Commission in the manner provided in the Chapter. Section 245B(3) provides for appointment of members of the ITSC from among "persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts". The power to grant immunity from prosecution and penalty is granted by section 245H(1) and is circumscribed by two conditions as will be evident by the sub-section which is as under :

> ***"Power of Settlement Commission to grant immunity from prosecution and penalty.***
> ***245H.*** *(1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 245C has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also [(either wholly or in part)] from the imposition of any*

penalty under this Act, with respect to the case covered by the settlement :"

xxxx xxxx xxxx

It is important to note that the twin conditions for the grant of immunity are that (1) the applicant has cooperated with the Settlement Commission in the proceedings before it and (2) has made a full and true disclosure of his income and the manner in which such income was derived. There are other provisions in the section providing for withdrawal of the immunity in case it is later found that the same was obtained by concealing any particulars material to the settlement or by giving false evidence or if the applicant fails to comply with the payment schedule prescribed by the Settlement Commission or with any other condition subject to which the immunity from penalty and a prosecution was granted. Section 245-I provides that the order of settlement shall be conclusive as to the matters stated therein and in respect of such matters, the assessee cannot be subjected to reassessment proceedings.

3. On 10.2.2010, a search was conducted under Section 132 of the Act in the business premises of the assessee herein (R-2) as part of the search of the group companies, including the residential premises of its directors. Several incriminating documents, cash and other materials were seized. The incriminating documents are alleged to have contained

evidence to show that the purchase of cement and steel aggregating to Rs.117.98 crores from 5 parties in Gurgaon and Delhi were bogus or false. The assessee filed an application before the Settlement Commission under section 245C(1) on 16.12.2011 in which it admitted that the purchase of cement and steel amounting to Rs.39.53 crores were not genuine and has to be taken as the income of the assessee which was not disclosed before the assessing officer in the block assessment relating to the assessment years 2004-05 to 2010-11.

4. In the course of the proceedings before the ITSC, a report was submitted by the CIT under Rule 9 of the Income Tax Settlement Commission (Procedure) Rules, 1999 on 24.9.2012. In this report the CIT sought a direction from the ITSC to conduct further enquiries and investigation as contemplated by sub-section (3) of section 245D and furnish a report. It would appear that the CIT in his letter dated 2.2.2012 had referred to certain enquiries made which revealed that the parties from whom the applicant had claimed to have made purchases of cement and steel were not trading in those goods at all; it was also pointed out that one Ashok Oberoi, the proprietor of all those concerns had stated on oath to this effect and had also admitted that they had issued bogus bills of steel, cement and TMT bars to the assessee without actually supplying

those materials and that they had charged commission from the assessee at the rate of 10 to 15 paise per hundred rupees for issuing those bills. The report further pointed out that the address of the account holders mentioned in the bank statement of the five firms were found to be fictitious as also the names of the persons who introduced the account holders.

5. Another report was filed by the CIT on 17.10.2012 before the ITSC. The assessee was asked to explain as to how the genuine and bogus bills of the parties were identified, to which the assessee stated that they were separately filed and further submitted that in respect of TMT iron bar invoices claimed as genuine the corresponding *dharam kanta* receipts were also available. The assessee itself filed details in the form of a chart recording the bogus purchases admitted before the ITSC including the purchase invoices of iron bars where *dharam kanta* receipts were not available. This worked out to Rs.43.78 crores. Thus, though the assessee admitted Rs.39.53 crores in the application filed before the ITSC under section 245C(1) as additional income not disclosed before the assessing officer, after the report filed by the CIT on 17.10.2012, the additional income was enhanced to Rs.43.78 cores, thus

making a further surrender of Rs.4.25 crores on account of bogus purchases.

6. In the hearing which took place before the ITSC on 18.10.2012, apparently on the basis of the report filed by the CIT, he was directed to carry out a further enquiry in respect of the bogus purchases and to bring out the facts which are not acceptable to the revenue, after verification from the assessee. Pursuant to this direction, the CIT filed another report dated 10.12.2012 before the ITSC. In this report it was stated that the assessing officer was directed to give an opportunity to the assessee of cross-examining Ashok Oberoi, the main person who was said to have issued the bogus bills. The assessee was not able to cross-examine Ashosk Oberoi and the reasons thereof were also mentioned in the report of the CIT. The CIT further referred to the statement of Ashok Oberoi recorded on 16.11.2012 in which he confirmed his earlier statements and affidavits to the effect that the bills issued to the assessee were bogus bills and no material was in fact supplied against the same.

7. A final report was submitted by the CIT on 8.1.2013 in which it was stated that verification from the road transport authorities revealed that there was no proof that the registration numbers of the vehicles mentioned in the bills were used for transporting the cement and steel; in

some cases, the registration numbers were those of two wheelers which were incapable of transporting the goods and in some cases the registration numbers were found to be of those vehicles registered with the transport authorities later than the relevant period in which they were claimed to have transported the goods. Some of the transport operators also stated, on cross verification with them, that they did not transport any material for the assessee.

8. When the ITSC took up the matter for hearing on 10.1.2013, the applicant was not able to controvert any finding recorded in the reports submitted by the CIT under section 245D(3). When it was asked by the ITSC to support its claim regarding transport of the goods, the assessee expressed its inability to do so on the ground that the matter was old and the records were not maintained. However, the assessee submitted certificates by a chartered engineer and a registered valuer in respect of some of the buildings constructed by it, on the basis of which it was argued that the cement and steel actually consumed in the construction was less than what was shown in the books of account by only 15% and therefore the additional income disclosed by it in the settlement application would cover such excess consumption.

9. After examining the above aspect of the settlement proceedings, the ITSC observed in para 25 of its order (majority view) as under: -

> "*25. After examining the facts of the case and after taking into account the evidences submitted by both the applicant and the Department to substantiate their contentions, the Bench in the spirit of settlement advised the applicant to offer the entire purchase of Rs.117.98 crores of cement and TMT iron bars from 5 parties under consideration as additional income in place of Rs.39.53 offered by it.*"

Thereafter on the last hearing which took place on 15.1.2013 the applicant submitted before the ITSC that it "*has agreed to offer the entire purchase of cement and TMT iron bars from the 5 parties for Rs.117.98 as additional income."* On the question of immunity from prosecution and penalty the ITSC (majority view) observed as under: -

> "*30. The applicant has prayed for immunity from prosecution and imposition of penalties under various provisions of the Income Tax Act. Considering the facts and circumstances of the case and the cooperation extended to the Commission during the proceedings before it, immunity is granted from prosecution and penalty imposable under the I.T. Act.*"

10. The minority view is that the assessee is not entitled to immunity from penalty. It has been stated by the Member, who delivered the lone dissenting opinion, that the facts established that the applicant did not

disclose its true and full income in the settlement application since it cannot be held with certainty that the applicant was not aware of the fact that it had claimed bogus expenditure of Rs.117.98 crores in the books of account. He further observed that the basic intent behind not offering full and true income in the settlement application is to suppress the taxable income. He expressed surprise that: -

> "*the applicant, which was fully aware of the fact that the clinching evidences indicating bogus expenditure claimed in its P & L account were found during search and post-search investigation as mentioned above, had not offered the entire suppressed income/ bogus expenditure for tax either before the search team or the Assessing Officer (AO) or Income Tax Settlement Commission (ITSC). Thus, it cannot be ruled out that there was no attempt by the applicant to evade tax even in its SA where one of the prime conditions for filing application is full and true disclosure of the income. Further, it is evident from the above discussion that the applicant has tried its best till end during the settlement proceedings also to justify its stand, however, the Ld. CIT has demonstrated and establishing that the applicant has claimed bogus expenditure of Rs.117.98 crores in its books of account as against admitted disallowance of Rs.39.58 in its SA. Hence, it can be concluded that the applicant has not offered Rs.78.45 crores voluntarily, however it has done so when it has no option except to do so. Thus, consequential disallowance of Rs.78.45 crores was made.*"

11. The revenue assails the majority opinion expressed by the ITSC on the ground that it is contrary to the parameters laid down in Section

245H(1). It is contended that the ITSC has taken a perverse view of the facts and the evidence brought on record and, therefore, it is permissible for this Court, in writ proceedings, to upstage the majority opinion granting immunity to the assessee from penalty and prosecution.

12. On behalf of the assessee it is submitted that the assessee has made a full and true disclosure of the income which it did not disclose before the assessing officer, in the proceedings before the ITSC and has also co-operated by offering such additional income in the proceedings before the ITSC in a spirit of settlement at the suggestion of the ITSC. According to him this conduct of the assessee satisfied the requirements of Section 245H(1).

13. It seems to us that the criticism levelled by the revenue against the majority opinion of the ITSC granting immunity to the assessee is well-founded. Immunity can be granted only within the parameters of Section 245H(1) which requires full and true disclosure of income and co-operation from the assessee in the proceedings before the ITSC. Co-operation implies an act of volition on the part of the assessee; the present assessee "co-operated" in the proceedings before the ITSC only when faced with the reports submitted by the CIT. The ITSC, in our opinion, was therefore not justified in taking a somewhat charitable view

towards the assessee when it observed that it was at its *"advice"*, made in a *"spirit of settlement"* that the assessee offered the entire bogus purchases of Rs.117.98 crores as its income. Right from the beginning, as the seized material would show, the assessee was aware that the purchase of steel and cement from the five parties of Delhi and Gurgaon was bogus; it had no evidence that the goods were transported to it – it had, in fact submitted evidence which established that the vehicles which allegedly carried the goods were not even registered with the transport authorities at the relevant time, that some of them were two-wheelers which were incapable of transporting cement and steel; the proprietors of those five firms had gone on record, on oath, that they issued bogus bills for a commission; there was immediate withdrawal of funds from the bank accounts of those firms after the cheques issued by the assessee were cleared, but there was no information forthcoming as to the destination of those funds leading to the inference that they came back to the till of the assessee; the addresses given by those firms were found to be non-existent. All this was known to the assessee, but still it did not make a full and true disclosure in the settlement application; it waited till the ITSC called for reports from the CIT which reiterated the aforesaid facts established by the seized material. It had no answer to the evidence,

but in a desperate attempt tried to prove its innocence by filing valuation reports before the ITSC to show that the inflation of the expenses on purchase of cement and steel was only in the order of 15% of the actual consumption, which difference would be taken care by the offer of additional income of Rs.43.78 crores.

14. The aforesaid factual position shows that the assessee took a chance – sat on the fence, so to say – by not coming clean in the settlement application and not disclosing income which it did not disclose before the assessing officer – and when the CIT's reports exposed its conduct in the proceedings before the ITSC, it was *"advised"* by the ITSC, *"in a spirit of settlement"* to offer the entire amount of bogus purchase of Rs.117.98 crores, which it accepted. We fail to see any spirit of settlement; that spirit ought to have been exhibited by the assessee in the application filed before the ITSC, as the law requires, and it is not enough if it is shown in proceedings before the ITSC *after* being confronted with adverse reports, to which it had no answer. In *Ajmera Housing Co-operation and another v. CIT*, (2010) 326 ITR 642, the Supreme Court held that the fact that the assessee kept revising its application for settlement by disclosing higher income in the revised applications established that it did not make a full and true

disclosure of income which it did not disclose to the assessing authority. In the circumstances, the assessee cannot be said to have "co-operated" in the proceedings before the ITSC. It did not voluntarily offer the additional income, being the difference between 117.98 crores and 39.53 crores. It first offered additional income of Rs.39.53 crores in the settlement application filed under Section 245-C(1); when the ITSC found, pursuant to the report filed by the CIT on 17.10.2012, that by the assessee's own admission, purchase invoices were bogus to the extent of Rs.43.78 crores instead of Rs.39.53 crores, the assessee made a further disclosure of Rs.4.25 crores. After all the reports were examined by the ITSC and after considering the evidence adduced by both the sides, it found that the assessee ought to have offered the entire amount of Rs.117.98 crores, being the bogus purchases of cement and steel from 5 parties as against Rs.39.53 crores offered by it. It was only at that stage, when cornered and when it was unable to rebut the evidence and the facts established by the evidence, that the assessee came forward with the additional income of Rs.78.45 crores, which when added to Rs.39.53 crores disclosed in the settlement application, aggregated to Rs.117.98 crores. In other words the assessee waited till the last moment to make the additional offer. This conduct of the assessee, far from showing co-

operation in the proceedings before the ITSC, shows defiance and an attitude of a fence-sitter. The Member who expressed the minority view rejecting the claim for immunity from penalty and prosecution has pertinently brought out this aspect of the assessee's conduct in the observations quoted hereinabove. We agree with his view that the assessee was all along quite aware that the entire amount of Rs.117.98 crores, being bogus purchase of cement and steel from 5 parties of Gurgaon and Delhi, was concealed income. There is ample evidence brought on record by the revenue in this behalf. Yet the assessee consciously chose not to offer the aforesaid amount as additional income – i.e. income which was not disclosed before the assessing officer – in the application filed before the ITSC under Section 245(1). The assessee has thus failed to satisfy the twin conditions of Section 245H (1) and was, therefore, not entitled to the immunity. The majority view expressed by the ITSC, with respect, goes contrary to the evidence on record and fails to take note of the contumacious conduct of the assessee despite an opportunity afforded by Chapter XIX-A of the Income Tax Act to errant assessees to come clean and turn a new leaf. The spirit of settlement was absolutely lacking; it may not be without justification to say that the assessee was indulging in abuse of a well-intentioned

statutory provision. It is certainly open to the ITSC to grant immunity to an applicant from penalty and prosecution. This power, however, has to be exercised only in accordance with law i.e. on satisfaction of the conditions of Section 245H(1). We are constrained to observe that the majority view taken by the ITSC in the present case reflects a somewhat cavalier approach, perhaps driven by the misconception that granting of immunity from penalty and prosecution was ritualistic, once the assessee discloses the entire concealed income, ignoring the vital requirement that it is the stage at which such income is offered that is crucial and that the applicant cannot be permitted to turn honest in instalments. When there is unimpeachable evidence of a much larger amount of concealed income, about which there is no ambiguity, then what was disclosed by the assessee in the application filed under Section 245-C1 cannot be regarded as full and true disclosure of income merely because the assessee, when cornered in the course of the proceedings before the ITSC, offered to disclose the entire concealed income. In as much as the ITSC has ignored this crucial aspect, the majority view expressed by it cannot at all be countenanced.

15. So far as the power of judicial review of the orders of ITSC is concerned, we need only refer to the following judgments of the

Supreme Court: *R.B. Shreeram Durga Prasad v. Settlement Commission*, (1989) 176 ITR 169; *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. In *Jyotendrasinghji* (supra), the position was summed up as follows: -

> "*Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the Commission to make a particular order, unless the Commission itself chooses to give reasons for its order. Even if it gives reasons in a given case, the scope of inquiry in the appeal remains the same as indicated above, viz., whether it is contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (audi alterant partem) has been incorporated in section 245D itself. The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under article 226 or by this court under article 136 is also the same – whether the order of the Commission is contrary to any of the provisions of the Act and if so, apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category has it prejudiced the petitioner/ appellant.*"

The impugned order of the ITSC (majority view) is contrary to the provisions of Section 245H(1).

16. In view of the foregoing discussion, we uphold the contentions of the revenue and quash the majority view of the ITSC granting immunity to the assessee from penalty and prosecution vide order dated 08.02.2013.

The writ petition is allowed with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

FEBRUARY 10, 2014
vld/hs