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

\+ **W.P.(C) 4398/2017**

Reserved on: 20th August, 2018

% **Date of Decision**:13th September, 2018

R.T. INDUSTRIES & ORS ..... Petitioner

Through Mr. N.P. Sahni and Mr. Ruchesh Sinha, Advocates.

versus

INCOME TAX SETTLEMENT COMMISSION & ANR.

..... Respondent

Through Mr. Ruchir Bhatia, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

Petitioner No.1, M/s. R.T. Industries is a partnership firm based in the Tonk district in the State of Rajasthan and primarily engaged in production and trading of mustard oil, mustard seeds, oil cake etc. Petitioner Nos.2 and 3, Trilok Chand Jain and Gyan Chand Jain are the partners of R.T. Industries and claim that they were engaged in business of lending money on interest. Petitioner Nos.4 and 5, are Rajesh Kumar Jain (HUF) and Ashok Kumar Jain (HUF) and claim that they had earned income from commission/brokerage on sale/purchase of properties.

2. On 10.12.2015 search and seizure operations under Section 132 of the Income Tax Act, 1961 (the Act, for short) were conducted in the case of the petitioners and others associated with them. Simultaneously, survey operations under Section 133A at some locations were undertaken.

3. During the aforesaid operations, cash of Rs. 34,89,000/- and jewellery worth Rs. 1,49,73,682/- were found out of which Rs.34,00,000/- in cash and jewellery valued at Rs.23,53,853/- was seized. Incriminating documents in the form of loose papers, registers, dairy etc. were also found and seized. Trilok Chand Jain in his statement recorded on 10th December, 2015 had admitted and surrendered undisclosed income of more than Rs. 18 Crores for the entire group in the hands of different assessees. Subsequently, Trilok Chand Jain vide his letter dated 18th November,2016 had retracted the surrender.

4. Consequent to the search, the petitioners were served with notices under Section 153A for the assessment years 2010-11 to 2015-16. As returns were not filed, notices for prosecution under Section 276CC of the Act were also issued and served on the petitioners. The petitioners on the other hand claim that they had filed their returns after seeking extension of time on two occasions.

5. On 28th April, 2017, five separate applications under Section 245C (1) of the Act were filed by the five petitioners before the Income Tax Settlement Commission (the Settlement Commission, for short), the first respondent before us. The applications were for the assessment years 2010-11 to 2016-17. On the same date itself intimation regarding filing of the applications before the Settlement Commission was served on the Assistant

Commissioner of Income Tax, Central-I, Jaipur, the Assessing Officer and Respondent No. 2 before us.

6. The Settlement Commission by notice dated 28th April, 2017 had informed the petitioners that the applications would be taken up for hearing on 9th May, 2017. However, by notice dated 2nd May, 2017, hearing on the applications before the Settlement Commission was preponed to 8th May, 2017.

7. On 8th May, 2017, the Settlement Commission had heard ex-parte arguments addressed by the petitioners for allowing the applications to be proceeded with under Section 245D(1) of the Act.

8. The Settlement Commission by the impugned order under Section 245D(1) of the Act also dated 8th May, 2017 has rejected the settlement applications, holding that the petitioners had failed to establish sources of undisclosed income, extent of such income and manner in which such income was derived. The statement of affairs filed by the petitioners, it was observed, were uniformly lacking from "foundation of credible evidence and were unreliable". The Settlement Commission held that "prima facie" the conditions prescribed in Section 245C (1) of the Act were not fulfilled. We shall subsequently refer to and quote from the impugned order.

9. As the primary issue raised in the present writ petition relates to the scope and ambit of the enquiry at the stage of passing of the order under Section 254D(1) of the Act, we deem it proper to begin by reproducing and examining Sections 245 C(1), sub-sections (1), (2), (2B), (2C), (2D), (3), (4), (4A), (5), (6) and (6A) of Section 245 D and sub-sections (1) and (2) of Section 245F and Sections 245-J of the Act, which are as under:-

"245C. Application for settlement of cases.- (1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless,—

(i) in a case where proceedings for assessment or reassessment for any of the assessment years referred to in clause (b) of sub-section (1) of section 153A or clause (b) of sub-section (1) of section 153B in case of a person referred to in section 153A or section 153C have been initiated, the additional amount of income-tax payable on the income disclosed in the application exceeds fifty lakh rupees,

(ia) in a case where—

(A) the applicant is related to the person referred to in clause (i) who has filed an application (hereafter in this sub-section referred to as "specified person"); and

(B) the proceedings for assessment or re-assessment for any of the assessment years referred to in clause (b) of sub-section (1) of section 153A or clause (b) of sub-section (1) of section 153B in case of the applicant, being a person referred to in section 153A or section 153C, have been initiated, the additional amount of income-tax payable on the income disclosed in the application exceeds ten lakh rupees,

(ii) in any other case, the additional amount of income-tax payable on the income disclosed in the application exceeds ten lakh rupees, and such tax and the interest thereon, which would have been paid under the provisions of this Act had the income

disclosed in the application been declared in the return of income before the Assessing Officer on the date of application, has been paid on or before the date of making the application and the proof of such payment is attached with the application.

Explanation.—For the purposes of clause (ia),—

(a) the applicant, in relation to the specified person referred to in clause (ia), means,—

(i) where the specified person is an individual, any relative of the specified person;

(ii) where the specified person is a company, firm, association of persons or Hindu undivided family, any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member;

(iii) any individual who has a substantial interest in the business or profession of the specified person, or any relative of such individual;

(iv) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the specified person or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member;

(v) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the specified person; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member;

(vi) any person who carries on a business or profession,—
(A) where the specified person being an individual, or any relative of such specified person, has a substantial interest in the business or profession of that person; or

(B) where the specified person being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person;

(b) a person shall be deemed to have a substantial interest in a business or profession, if—

(A) in a case where the business or profession is carried on by a company, such person is, at any time during the previous year, the beneficial owner of shares (not being shares entitled to a fixed rate of dividend, whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power; and

(B) in any other case, such person is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the profits of such business or profession.

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245-D. Procedure on receipt of an application under Section 245-C.— (1) On receipt of an application under section 245C, the Settlement Commission shall, 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, and on hearing the applicant, the Settlement Commission shall, within a period of fourteen days from the date of the application, by an order in writing, reject the application or allow the application to be proceeded with:

Provided that where no order has been passed within the aforesaid period by the Settlement Commission, the application shall be deemed to have been allowed to be proceeded with.

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

(2A) Where an application was made under section 245C before the 1st day of June, 2007, but an order under the provisions of sub-section (1) of this section, as they stood immediately before their amendment by the Finance Act, 2007, has not been made before the 1st day of June, 2007, such application shall be deemed to have been allowed to be proceeded with if the additional tax on the income disclosed in such application and the interest thereon is paid on or before the 31st day of July, 2007.

Explanation.—In respect of the applications referred to in this sub-section, the 31st day of July, 2007 shall be deemed to be the date of the order of rejection or allowing the application to be proceeded with under sub-section (1).

(2B) The Settlement Commission shall,—

(i) in respect of an application which is allowed to be proceeded with under sub-section (1), within thirty days from the date on which the application was made; or

(ii) in respect of an application referred to in sub-section (2A) which is deemed to have been allowed to be proceeded with under that sub-section, on or before the 7th day of August, 2007,

call for a report from the Principal Commissioner or Commissioner, and the Principal Commissioner or Commissioner shall furnish the report within a period of thirty days of the receipt of communication from the Settlement Commission.

(2-C) Where a report of the Principal Commissioner or Commissioner called for under sub-section (2-B) has been furnished within the period specified therein, the Settlement

Commission may, on the basis of the report and within a period of fifteen days of the receipt of the report, by an order in writing, declare the application in question as invalid, and shall send the copy of such order to the applicant and the Principal Commissioner or Commissioner:

Provided that an application shall not be declared invalid unless an opportunity has been given to the applicant of being heard:

Provided further that where the Principal Commissioner or Commissioner has not furnished the report within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report of the Principal Commissioner or Commissioner.

(2-D) Where an application was made under sub-section (1) of Section 245-C before the 1st day of June, 2007 and an order under the provisions of sub-section (1) of this section, as they stood immediately before their amendment by the Finance Act, 2007, allowing the application to have been proceeded with, has been passed before the 1st day of June, 2007, but an order under the provisions of sub-section (4), as they stood immediately before their amendment by the Finance Act, 2007, was not passed before the 1st day of June, 2007, such application shall not be allowed to be further proceeded with unless the additional tax on the income disclosed in such application and the interest thereon, is, notwithstanding any extension of time already granted by the Settlement Commission, paid on or before the 31st day of July, 2007.

(3) The Settlement Commission, in respect of—

(i) an application which has not been declared invalid under sub-section (2-C); or

(ii) an application referred to in sub-section (2-D) which has been allowed to be further proceeded with under that sub-section,

may call for the records from the Principal Commissioner or 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 Principal Commissioner or 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, and the Principal Commissioner or Commissioner shall furnish the report within a period of ninety days of the receipt of communication from the Settlement Commission:

Provided that where the Principal Commissioner or Commissioner does not furnish the report within the aforesaid period, the Settlement Commission may proceed to pass an order under sub-section (4) without such report.

(4) After examination of the records and the report of the Principal Commissioner or Commissioner, if any, received under—

(i) sub-section (2-B) or sub-section (3), or

(ii) the provisions of sub-section (1) as they stood immediately before their amendment by the Finance Act, 2007,

and after giving an opportunity to the applicant and to the Principal Commissioner or 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 Principal Commissioner or Commissioner.

(4-A) The Settlement Commission shall pass an order under sub-section (4)—

(i) in respect of an application referred to in sub-section (2-A) or sub-section (2-D), on or before the 31st day of March, 2008;

(ii) in respect of an application made on or after the 1st day of June, 2007 but before the 1st day of June, 2010, within twelve months from the end of the month in which the application was made.]

(iii) in respect of an application made on or after the 1st day of June, 2010, within eighteen months from the end of the month in which the application was made.

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

(6) Every order passed under sub-section (4) shall 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 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.

(6-A) 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 instalments, the assessee shall be liable to pay simple interest at one and one-fourth per cent for every month or part of a month on the amount remaining unpaid from the date of expiry of the period of thirty-five days aforesaid.

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245-F. Power and procedure of Settlement Commission.— (1) In addition to the powers conferred on the Settlement Commission under this Chapter, it shall have all the powers which are vested in an income tax authority under this Act.

(2) Where an application made under Section 245-C has been allowed to be proceeded with under Section 245-D, the Settlement Commission shall, until an order is passed under sub-section (4) of Section 245-D, 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 this Act in relation to the case:

Provided that where an application has been made under Section 245-C on or after the 1st day of June, 2007, the Settlement Commission shall have such exclusive jurisdiction from the date on which the application was made:

Provided further that where—

(i) an application made on or after the 1st day of June, 2007, is rejected under sub-section (1) of Section 245-D; or

(ii) an application is not allowed to be proceeded with under sub-section (2-A) of Section 245-D, or, as the case may be, is declared invalid under sub-section (2-C) of that section; or

(iii) an application is not allowed to be further proceeded with under sub-section (2-D) of Section 245-D,

the Settlement Commission, in respect of such application shall have such exclusive jurisdiction up to the date on which the application is rejected, or, not allowed to be proceeded with, or, declared invalid, or, not allowed to be further proceeded with, as the case may be.

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> 245-J. Recovery of sums due under order of settlement.— Any sum specified in an order of settlement passed under sub-section (4) of Section 245-D may, subject to such conditions, if any, as may be specified therein, be recovered, and any penalty for default in making payment of such sum may be imposed and recovered in accordance with the provisions of Chapter XVII, by the Assessing Officer having jurisdiction over the person who made the application for settlement under Section 245-C.

10. Settlement Commission has been constituted under Section 245B of the Act. Section 245BA delineates and outlines jurisdiction and powers of Settlement Commission. Sub-section (1) to Section 245C states that an assessee at any stage of a case relating to him can make an application to the Settlement Commission in the prescribed form containing full and true disclosure of his income not disclosed before the Assessing Officer; the manner such income was derived; the additional amount of tax payable on undisclosed income and other particulars as prescribed. Proviso prescribes other conditions including the minimum amount of tax that should be payable on the undisclosed income and that the tax and the interest on the undisclosed income has to be paid on or before the date of making of the application. Proof of payment is to be attached with the application.

11. Section 245D vide as many as 15 sub-sections sets forth in detail the procedure to be followed by the Settlement Commission. We are primarily concerned with sub-section (1) to Section 245D, which states that the Settlement Commission shall within 7 days of the receipt of the application issue notice to the applicant to explain as to why the application should be allowed to be proceeded with and within a period of 14 days from the date of application pass an order in writing allowing or rejecting the application

to be proceeded. The proviso states that if no order is passed within the stated period, the application is deemed to have been allowed to be proceeded with. Sub-section (2) states that the order passed under sub-section (1) would be communicated to the Principal Commissioner or Commissioner. Thus, at this stage only the applicant is heard and the statute does not mandate oral hearing or written representation by the Principal Commissioner or Commissioner. As the Principal Commissioner/ Commissioner do not get opportunity to respond and ague at this stage, their stand and stance remains unknown.

12. Sub-section (2B) to Section 245D states that the Settlement Commission shall within thirty days of the application being allowed to be proceeded with, call for report from the Principal Commissioner or Commissioner and that the Principal Commissioner/Commissioner shall within thirty days of the receipt of the communication submit their report to the Settlement Commission. The Settlement Commission in terms of Sub-Section (2C) to Section 245D of the Act can within a period of 15 days of the submission of the report, pass an order and declare the settlement application as invalid. However, before an order of rejection is passed, opportunity of hearing is required and mandated. In case of failure of the Principal Commissioner/Commissioner to furnish their report within the specified period, the settlement application proceeds without their report.

13. Where the application is not declared invalid or has been allowed to be proceeded with on account failure of the Principal Commissioner/Commissioner to file report under Sub-Section (2C) to Section 245D of the Act, the Settlement Commission may call for records from the Principal Commissioner/Commissioner. If on examination of

records the Settlement Commission feels that further inquiry or investigation is necessary, they can direct the Principal Commissioner/Commissioner to make or cause to make further inquiry or investigation and furnish a report on the matters covered by the application and also other matters relating to the case. The report is to be furnished within 90 days from the date of receipt of the communication from the Settlement Commission. Sub-section (4) to Section 245D states that Settlement Commission may after examining the records and the report of the Principal Commissioner/Commissioner, if any, received under sub-section (2B) or sub-section (3) and after giving an opportunity of hearing to the applicant and the Principal Commissioner/Commissioner and examining further evidence as may be placed or obtained by it, pass an order in accordance with the provision of the Act as it thinks fit on the matters covered by the application and other matters relating to the case not covered by the application. These can be matters referred to in the report of the Principal Commissioner/Commissioner. Sub-section (4A) prescribes time limits for passing of orders under sub-section (4) to Section 245D. Sub-section (5) states that the material brought on record shall be considered by Settlement Commission before passing an order under Section 245D (4) of the Act. Sub-section (6) mandates that every order under sub-section (4) to Section 245D of the Act shall include demand by way of tax, penalty or interest, the manner in which sum due would be paid and all other matters to make the settlement effective and also stipulate that the settlement would be void if it is subsequently found by the Settlement Commission that the settlement has been obtained by fraud or misrepresentation of facts. Sub-section (6A) states that in case tax is not paid within thirty-five days from

receipt of the order under Section 245D(4) of the Act or the extended period, tax as determined, interest etc. would be payable. Sub-Section 6A authorises the jurisdictional Assessing Officer to recover demands of the additional tax and interest (and also penalty imposed for default) not paid in terms of order under Section 245D(4) of the Act.

14. Provisions with regard to payment of additional tax, and interest (and penalty in default) in terms of the decision by the Settlement Commission under Section 245D(4) of the Act and payment/recovery post the decision does indicate and affirms that there could well be cases where the tax payable as computed as per the settlement application could be enhanced requiring deposit of additional tax and interest, notwithstanding the statutory requirement to make “full and true” disclosure of undisclosed income and pre-deposit of tax and interest before the settlement application is filed. In the context of the present writ petition we need not elaborate, except record that the requirement of "full and true" disclosure of undisclosed income and the manner in which such income was derived are the two essential and core mandatory conditions, which every settlement application must satisfy. Failure to make "full and true" disclosure of undisclosed income and the manner by which such income was derived is fatal. However, the statute does not rule out possibility that an order under section 245D (4) of the Act could require payment of additional tax and interest. This pliancy envisaged by the provisions is limited and the order under section 245D (4) of the Act should not undermine the legislative dictum in the form of the strict pre-conditions. The legislature was conscious that inspite of full and true disclosure of undisclosed income and the manner in which it was earned, situations could arise when on interpretation of statutory provisions

additional tax and interest is required to be paid. A strait-jacket command and stipulation that no additional tax and interest can be demanded in an order under Section 245D(4) of the Act is therefore not the mandate, albeit this leverage should not be exercised to dilute and undermine the condition of "full and true" disclosure of income not earlier disclosed and the manner in which such income was derived. The provision does not permit and postulate piecemeal disclosures, which can be enhanced and increased during the proceedings before the Settlement Commission for the statute requires "full and true" disclosure in the settlement application and not incomplete or partial disclosure. Modification and amendment of the settlement application to comply with the statutory preconditions is not permissible.

15. On many occasions, an application for settlement could on the question of computation of undisclosed income have an element of estimation. Settlement provisions would well apply to the said cases and are not barred as long as the undisclosed income declared is “full and true” and the manner in which it is derived is stated. The Settlement Commission under Chapter XIX –A has all powers as vested in the Income-tax authorities under the Act till a final order is passed. The Settlement Commission has exclusive jurisdiction to exercise power and performs functions of the Income-tax Authorities under the Act in relation to the case. However, unlike the Income-tax authorities, the Settlement Commission does not proceed to make an assessment but passes an order of settlement. The Supreme Court in ***The Commission of Income-tax Vs. Om Prakash Mittal,*** [2005] 143 Taxman 373 (SC), has held that Section 245D(4) of the Act uses the word ‘order’ and not ‘assessment’ and observed that the order

passed is not like an original assessment, regular assessment or re-assessment. In that sense, the Commission exercises plenary jurisdiction.

16. We would now refer to other case law dealing the power and nature of jurisdiction exercised by the Settlement Commission under Chapter XIX-A of the Act, which was introduced by Taxation Laws (Amendment) Act, 1975, pursuant to Wanchoo Committee Recommendations. Interpreting the provisions, the Supreme Court in ***CIT versus B.N. Bhattacharjee***, (1979) 4 SCC 121 had expressed a degree of reservation and had cautioned that the provisions could become a panacea for tax evaders to avoid penalty and prosecution, nevertheless it was observed that functionally the Chapter provides settlement of a tax dispute as a compromise measure where the tax evader could make a true disclosure to buy quittance for himself. The State avoids protracted litigation, gains from accelerated recovery of taxes and need not take recourse to cumbersome recovery proceedings. The judgment highlights that the statutory provisions as enacted would work properly if the settlement arrived is fair, prompt and independent. This is possible if the Settlement Commission is to be composed of officers with integrity, wide knowledge and experience thereby preventing misuse. The Settlement Commission, it was observed, in terms of the statute stands vested with full powers to investigate cases, and on its jurisdiction being invoked quantify the amount of tax, penalty or interest. This judgment thereafter refers to the quasi-judicial nature of the proceedings as the Settlement Commission has the right to object to and reject the application from being proceeded with. However, a rejection requires hearing to be given to the assessee before an order under Section 245D(1) of the Act is passed.

17. ***Commissioner of Income Tax, Jalpaiguri versus Om Prakash Mittal***, (2005) 2 SCC 751, opines that Section 245C(1) makes it clear that the assessee can approach Settlement Commission by way of an application at any stage of the proceedings against him by disclosing fully and truly his income, which has not been disclosed before the Assessing Officer. This disclosure must be voluntary and that the application must contain true and full disclosure of the hitherto concealed income and the manner in which it was derived. These were the fundamental and essential pre-conditions.

18. Aspect of "full and true" disclosure was highlighted and brought to forefront in ***Ajmera Housing Corporation and Another versus Commissioner of Income Tax***, (2010) 8 SCC 739. The self-confessed tax evader must come clean with his past illegitimate affairs, discharge his tax liability as determined by the Settlement Commission to buy quittance for himself and in the process, accelerate recovery of taxes by the State, though less than what may have been recovered after protracted litigation and by recovery proceedings. Disclosure of "full and true" of particulars undisclosed income, and the manner in which said income has been derived are essential and mandatory pre-requisites of a valid application. Therefore, unless the Settlement Commission records their satisfaction on the said aspect, it would not have jurisdiction to pass an order on a matter covered by the application. Reference was made to form No. 34B, which in different columns, requires the assessee to make "full and true" disclosure and also give full details of issues for which application for settlement is made, nature and circumstances of the case, as well as complexities of investigation involved. This decision makes it clear that the question of "full and true" disclosure as well as manner in which the undisclosed income is

derived can be examined at different stages and is finally decided while passing the order under Section 245D(4) of the Act. The Settlement Commission is not denuded of its power to examine the aforesaid two quintessential aspects, when the application is allowed to be proceeded with under Section 245D(1) of the Act or thereafter not declared invalid under Section 245D(2C) of the Act. These are steps in the proceedings. At each stage, the Settlement Commission is required to consider the two pre-conditions and an earlier observation on "full and true" disclosure would not affect the power of the Settlement Commission to reject an application on non satisfaction of the said requirements under sub-section (4) to Section 245D of the Act.

19. In view of the aforesaid statutory position, it is clear that the Settlement Commission can examine the questions and issues of maintainability of the settlement application at three different stages. The first is a very initial stage, when it in terms of Section 245D(1) of the Act, the Settlement Commission examines whether or not to allow an application to be proceeded with. The second stage is after the Principal Commissioner/Commissioner has filed its report before the Settlement Commission and the Settlement Commission passes an order under Section 245D(2C) of the Act. The third stage is when the final order under Section 245D(4) of the Act is passed. In the present writ petition, we are concerned with the first stage, i.e. under Section 245D(1) of the Act.

20. The Gujarat High Court has elaborately examined and dealt with the scope and ambit of inquiry at the stage of Section 245D(1) of the Act in ***Vishnubhai Mafatlal Patel Vs. Assistant Commissioner of Income Tax***, Special Civil Application Nos. 12060,12061 and 12063 of 2012 decided on

4th December, 2012. Relevant paragraphs of the said judgment read as under:-

> "8. Under sub-section(1) of section 245D thus, the first stage of scrutinising the application of settlement made by an assessee is envisaged. The statute does not provide for grounds on which Settlement Commission may reject such an application or allow the application to be proceeded with. There are however, sufficient indications in the statute itself what would be the purpose and nature of scrutiny of Commission at that stage. As already noted, sub-section(1) of section 245C an assessee may make an application for settlement in the prescribed manner containing true and full disclosure of income not previously disclosed before the Assessing Officer and the manner in which such income had been derived as also the additional amount of income-tax payable on such income and such other particulars as may be prescribed. At the stage of sub-section(1) of section 245D of the Act, therefore, prime scrutiny of the Commission would be whether application of the assessee is in order and in conformity with the requirements of sub-section(1) of section 245C which would include filing of an application in the prescribed manner and also making necessary disclosures as required therein. There are also additional requirements of sub-section(1) of section 245C such as payment of requisite tax and interest thereon which would have been payable under the provisions of the Act, had the income disclosed in the application been declared by the assessee in the return of income before the Assessing Officer. It would thus be well within the jurisdiction of the Settlement Commission to examine whether the application for settlement fulfills such requirements or not. Such scrutiny of-course would be summary in nature. We may recall that the Settlement Commission upon receipt of such an application within seven days thereof, has to issue notice to the assessee and pass a final order either rejecting the application or allowing the application to be proceeded within fourteen days of the date of application. Proviso to sub-section(1) of section 245D makes it further clear that when no such order is passed rejecting the application

within the period prescribed, the application shall be deemed to have been allowed to be proceeded with.

9. Two things therefore, emerge. Firstly, that at the stage of section 245D(1) of the Act, the Commission would have ample powers to examine whether an application of an assessee made under section 245C(1) of the Act fulfills the legal requirements particularly, those provided in section 245C(1) of the Act. Secondly, that such inquiry however, shall have to be summary in nature. The later provisions of sections 245D would also demonstrate that any decision of the Commission to allow the application to be proceeded with would only be prima facie in nature. We would elaborate this aspect a little later. At this stage, therefore, we find that under section 245D(1) of the Act, if the Commission on a summary inquiry comes to the conclusion that an application filed by the assessee under section 245C(1) of the Act does not fulfill the legal requirements, it would be within the jurisdiction of the Commission to reject the same. However, if it is allowed to be proceeded with, such decision would be tentative in nature.

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"12. The twin requirements for an assessee making an application for settlement under section 245C(1) of the Act, of containing full and true disclosure of income which has not been disclosed before the Assessing Officer and the manner in which such income has been derived, are thus of considerable importance and would be open for the Settlement Commission to examine the fulfillment thereof at several stages of the settlement proceedings. If therefore, while at the threshold, considering the question whether such application should be allowed to be proceeded with or be rejected, the Commission examined such questions on the basis of disclosure made by the applicants and the supporting material produced along with the applications, we do not see that the Commission committed any legal error. As already noted, it was well within the jurisdiction of the Commission at the stage of sub-section(1) of section 245D of the Act to examine whether application for settlement

> fulfills the statutory requirements contained in sub-section(1) of section 245C of the Act. At this stage we may refer to the decision of the Supreme Court in case of *Ajmera Housing Corporation and another(supra)*. It was a case in which the assessee had made certain disclosures in the initial application under section 245C(1) of the Act. Such disclosures were however, revised and additional income was disclosed in the revised annexures. The Apex Court held that the assessee had no right to revise an application under section 245C(1) of the Act and further that such revised annexure making further disclosure of undisclosed income alone was sufficient to establish that the initial application made by the assessee could not be entertained as it did not contain true and full disclosure of the undisclosed income and the manner in which such income had been derived.

21. Referring to the aforesaid provisions, a Division Bench of this Court in ***Commission of Income-tax Vs. Income-tax Settlement Commission***, [2014] 360 ITR 407 (Delhi), had observed and referred to the different stages the Settlement Commission examines the application and can reject the same. The first stage is when an order under Section 245 D(1) of the Act is passed, followed by the order under Section 245D (2C) of the Act and finally the order under Section 245 D (4) of the Act. The first two orders under Section 245 D (1) and (2C) are not final orders and they are subject to final orders to be passed under Section 245 D (4) of the Act. The issue of "full and true" disclosure on the part of the applicant and the manner in which the undisclosed income was derived from is open for discussion and debate at each stage, notwithstanding, the fact that it may have been examined earlier under Sub-section (1) or (2C) of Section 245D of the Act. The entire issue remains open till an order under Section 245 D (4) is passed. At each stage, the Settlement Commission can examine the issue of

"full and true" disclosure and the manner in which the undisclosed income has been derived.

22. In ***Commissioner of Income-tax Vs. M/s. Godwin Steels Pvt. Ltd.***,[2013] 353 ITR 353 (Delhi), reference was made to Section 245(D) (5) which requires that before passing an order under Sub-section (4) members of the Settlement Commission shall consider the material brought on record and referring to the nature of consideration required and determination by the Settlement Commission, it was observed:

> "27. Applying the ratio laid down in the aforesaid judgments to the case before us, we find that the ITSC has not disposed of the application before them in the manner required by law. The report of the CIT filed before the ITSC under Rule 9 of the Settlement Commission (Procedure) Rules is very elaborate and we have also made a reference to the same. It would appear that the ITSC has not accorded due weightage, credibility or consideration to the serious objections taken by the CIT in his report. Section 245D(5) reads as under:-
>
> > "(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."
> > [Emphasis supplied]
>
> The aforesaid sub-section requires that the materials brought on record before ITSC shall be "considered" by the members before passing any final order under sub-section (4). The word "consideration" means an independent examination of the evidence and materials brought on record before the ITSC by the members and application of mind thereto with a view to independently assess the materials and evidence, whether

adduced by the assessee-applicant or by the CIT and come to a conclusion by themselves. In *Bikhubhai Vithlabhai Patel. v. State of Gujarat* [2008] (4) SCC 144 the Supreme Court considered the expression "as considered necessary" and opined that the term "consider" means to think over and it connotes that there should be "active application of the mind". Earlier in *CIT vs. Rai Bahadur Hardutroy Motilal Chamaria* [1967] 66 ITR 443, a three Judges Bench of the Supreme Court, while dealing with the power of the first appellate authority under the Income Tax Act to enhance the assessment, observed that the word "consideration" (in its verb form) means that there must be something in the assessment order to show that the income tax officer "applied his mind" to the particular subject matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection. It is necessary to remember that the ITSC is not deciding a case inter-parties; they are assessing or estimating the amount on which, in the interests of the country at large, the tax payer ought to be taxed. The observations made by the Court of Appeal in England in *King Vs. Income Tax Special Commissioners* [1936] 1K.B. 487 are relevant. Lord Wright observed that the Special Commissioners were not in the position of judges deciding an issue between two particular parties, that their obligation is wider than that, that they were exercising statutory authority and statutory duty which they are bound to carry out and it is their obligation "to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make." These observations made in relation to the proceedings before the Special Commissioners of income tax, who proceeded to hear the appeal filed by the assessee despite notice given by him to withdraw the appeal, apply with equal force to the ITSC which has been given a special position and authority under the Income Tax Act. However, in the present case, the ITSC seems to have entrusted the job of verification and application of mind to the officers assisting it. It may be true that in all cases it may

not be expected of the members constituting the Bench to themselves verify every material or evidence brought before them in the matter of settling the case. However, in cases where there are copious material and evidence collected by the income tax authorities in respect of which an in-depth examination of the explanation of the assessee-applicant is called for, it is necessary that the members constituting the Bench themselves examine the materials and evidence and come to their own conclusion. In such cases they are not expected to merely endorse the report of the officers assisting them.

28. Section 245B(3) provides for appointment of members of the ITSC from amongst "persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts". This requirement is obviously designed not only to take advantage of such knowledge, ability and experience but also to ensure that cases involving complexity of business accounts are properly unravelled and the significance of the accounts is properly appreciated and incorporated in the settlement. Section 245-I provides for finality of the order of the ITSC in respect of matters covered by the order of settlement. This section casts a duty upon the ITSC to thoroughly examine the evidence and material placed before them in order to ensure that unscrupulous assessees do not take undue advantage of the finality of the order of settlement. It is no doubt open to the ITSC to take the assistance of its officers in the matter of doing the ground work and carrying out the verification of the record, seized materials, documents, account books etc., but in the present case, having regard to the grave charges levelled against the assessee-applicant in the report of the CIT, the ITSC ought to have itself examined independently the claim of the assessee-applicant and the officers of the Income Tax Department that everything stood reconciled or explained by the assessee. This important step in the decision making process does not appear to have been carried out by the ITSC."

The aforesaid paragraphs highlight the importance of the need to have detailed and in-depth examination of the contentions of both the Assessee and the Revenue, for the Settlement Commission is invested with the power to determine the tax payable, which power is exercised in the interest of the society at large. Therefore, it is necessary that the Settlement Commission should consist of members of integrity and outstanding ability having special knowledge and experience in problems relating to direct taxes and business accounts, who can dwell into intricate issues and questions in a pragmatic and practical way, without being strictly bound by strict rules of procedure. Further, the assessee must fully cooperate, and make "full and true" disclosure and state the manner in which he had derived undisclosed income. The object and purpose is that the undisclosed income, which is brought to tax must be the fair and true income of the assessee, which was hitherto not declared and taxed. If an order is obtained by fraud or misrepresentation of fact, it cannot be said that there was true and fair disclosure. Neither will there be a true and fair disclosure in case the undisclosed income is revised upwards. The provisions do not postulate revision of the undisclosed income. Declaration contemplated under Section 245C(1) of the Act is in the nature of warranty that a disclosure made must be true and fair disclosure. This is the necessary pre-condition for invoking jurisdiction of the Settlement Commission.

23. ***Commissioner of Central Excise Vs. True Woods Pvt. Ltd and Anr.,*** (2005) 125 DLT 203 (DB), was a case relating to matter arising out of the proceedings under Section 32F of the Central Excise Act, 1944 wherein an application was allowed to be proceeded without majority Bench recording

their view on "full and true" disclosure, though the minority view had opined in negative. The Division Bench had held:-

> "8. We regret our inability to accept that line of reasoning. It is true that the foundation for settlement is an application from the assessee 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 record 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."

The aforesaid passage was quoted in ***Income-tax Settlement Commission (Supra)***, to observe as under:

"22. From the above, it is clear that in *True Woods (P.) 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. Led. (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, it 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 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."

24. An order under Section 245D(1) of the Act has to be passed within a rigid time frame of 15 days. Principal Commissioner/Commissioner is unrepresented at this stage. The scrutiny or the inquiry at this stage, is summary in nature. This however, does not take away or dilute the power of the Settlement Commission to reject the application for settlement which in its opinion does not satisfy the legal requirements and more particularly the two pre-conditions mentioned in Sub-Section(1) of section 245C of the Act. We must affirmatively acknowledge and accept that the Settlement Commission at the stage of 245D (1) can examine and go into the question whether the applicant fulfils the legal requirements and conditions for invoking jurisdiction of the Settlement Commission; like pendency of proceedings, payment of tax and interest on the undisclosed income etc. The Settlement Commission would also without doubt examine the two core conditions, "full and true" disclosure of undisclosed income and the manner in which the said income was derived. Onus to show that the pre-conditions for allowing the application to be proceeded with is on the applicant. Application can be rejected or not allowed to be proceeded with where the Settlement Commission forms an "opinion" that "full and true" disclosure of undisclosed income and manner in which it was derived has not been made or for other grounds and stipulations set out in the proviso or on failure to furnish the particulars prescribed. The Gujarat High Court in ***Vishnu Bha Mafatlal Patel Vs. Assistant Commissioner of Income-tax,*** (supra) has

observed that the Statute does not provide for grounds on which the Settlement Commission may reject an application or allow the application to be proceeded with, but there are sufficient indications in the Statute itself as to the purpose and nature of scrutiny at the preliminary or final stage. Scrutiny could be whether the application was in order and in conformity with the requirements of sub-section (1) to section 245C, which would include filing of the application in the prescribed manner, making necessary disclosure as required, and requirements as to payment of requisite tax on undisclosed income and interest thereon. Thus, there has to be application of mind as Section 245D(1) of the Act requires an order to be passed in writing by the Settlement Commission allowing or rejecting the application to be proceeded with or by default the application is to be proceeded with. At the same time, necessarily, the inquiry on the said aspects at that the initial stage cannot be elaborate and exhaustive given the limited and rigid time frame prescribed, with a default stipulation when no order is passed.

25. An order under 245D(1) when allowing an application for settlement to be proceeded with, is interim or interlocutory in nature for there is no finality attached to the preliminary findings recorded as the proceeding do not come to a closure and end, but an order of rejection concludes the proceedings and has different consequences. In this sense the opinion formed by the Settlement Commission in case of rejection under Section 245D(1) is conclusive and final. Notwithstanding that the onus to show and establish that the application should be allowed to be proceeded with, the negative finding cannot be merely a "tentative" or "prima facie" as in case if the proceedings are allowed to be proceeded with. Necessarily and as a sequitur it follows that if the Settlement Commission is unable to form a

decisive opinion to give a definitive finding for rejection after the initial and preliminary hearing, proceeding to the second stage is the only option. The deemed approval provision when the Settlement Commission is unable to decide and form an opinion supports the above interpretation.

26. Sub-section 3 to Section 245 C states that an application once made under sub-section 1 shall not be allowed to be withdrawn. We would also record consequences when an application is rejected or declared invalid. As per sub-section (2) to Section 245F, subject to Sub-Sections (3) and (4), the Settlement Commission has exclusive jurisdiction to exercise the powers and functions of the income tax authority from the date application for settlement is made till an order of rejection under 245D(1) or invalidity order under Section 245D(2C) or an order under Section 245D(4) of the Act is passed. Section 245HA deals with abatement of proceeding before the Settlement Commission and that on abatement, proceeding before the Income Tax Authority recommence or revive as if no application under Section 245C(1) had been made. Abatement of proceedings has been defined for the purpose of the Section 245F as to include an order of rejection under 245D(1) or invalidity order under 245D(2C) of the Act. On abatement in terms of Sub-Section (3), the Assessing Officer/Income Tax Authority is entitled to use all the material and other information produced by the assessee before the Settlement Commission, result of the inquiry held or the evidence recorded before the Settlement Commission as if this material was produced, inquiry was held or evidence was recorded before the said authority. Rejection or invalidity denies the assessee benefit of Section 245H of Act. Thus, rejection and invalidity of an application which has the effect of abatement has serious and adverse consequences for the

applicant, whose application is rejected. These are mandated and required to prevent potential of abuse of the provisions eloquently highlighted in **B.N. Bhattacharjee (supra)**. Accordingly, ***B.N. Bhattacharjee (Supra)***, also observes that an order rejecting an application under 245D(1) is to refuse relief outright, which order would affect the applicant adversely, and, therefore, first proviso to Section 245 D(1) obligates the Settlement Commission to hear the applicant. Apart from the specific provision, hearing was justified and required for fairplay. In this context, it was held that consideration of the application, at this stage *in limine* was a *prima facie* exercise.

27. We would now refer to the reasoning given in the impugned order dated 8th May, 2017 by the Settlement Commission to reject the settlement application in the case of the first, second and third petitioner which read:-

> "6. The applicant firm claims to be dealing in production and trading of mustard oil, trading of mustard seeds and trading of mustard cakes etc. The activities of the group are spread in Tonk District in Rajasthan. In the SoF of the firm, it is said that the main basis of earning undisclosed income was through suppression of the gross profit rate. A comparison was made of the GP rate with one M/s Rajesh Products which is a related concern, as also with two other assessees. By comparing the GP rate of these three entities, it was stated that since there was a manipulation of GP rate, the higher rate shown by M/s Rajesh Traders was adopted to work out the undisclosed income in different years from AY 2010-11 to 2016-17. The relevant contentions of the applicant firm are reproduced below:-
>
> > "on a careful analysis of the two tabulations given above, it shall be clear that the gross profit percentage of RT Industries is less than that of other similar entities and also the Rajesh Products. The reason for the same is that, in RT Industries, the Applicant was indulging in inflation of

purchases of mustard seeds from the farmers, due to which a lower rate of GP has been· shown by it in its case. The applicant has not maintained complete record of the inflation of purchases. The applicant has admittedly been suppressing its income by inflating the amount of purchases of mustard from the illiterate farmers on one . pretext or the other and manipulating its gross profit rate. It is evident from its GP rate which is lower than to the GP rate being shown by other comparable as also M/s Rajesh Traders referred to above in similar line of business."

7. The applicant has stated that while working out the higher GP rate, the unaccounted investments / personal expenses were also seen so as to explain that unaccounted investments resulting from the undisclosed income. It was also mentioned during the course of hearings that the present surrender on account of GP rate amounting to Rs.3.20 crores is closer to the figure of Rs.3.35 crores made during the course of search by Sh. Trilok Chand Jain in answer to question No.26 of his statement. It was mentioned during pleading that since these two figures are closer to each other, it only shows the present surrender of Rs.3.20 crores is correct and should be acceptable.

8. As far as the two partners are concerned, it was stated in the SoF that this unaccounted income of the firm flowed to the two partners who invested these amounts in making advances to farmers and such income being undisclosed, and interest ranging upto 12% p.a. having being charged, led to income which was not disclosed and that formed the basis of surrender in the case of two partners.

9. On being asked to establish the basis of surrender, the AR could not show us any evidence to suggest that there was suppression of income to the extent claimed by the applicants. Further, the claim made in the SoF that "the applicant has admittedly been suppressing its income by inflating the amount of purchases of mustard from the illiterate farmers on one pretext or the other and manipulating its gross profit rate", remained a hollow claim not backed by any kind of evidence,

found during the course of search or otherwise. Rather, the applicant firm has maintained that entries in the seized material find place in the regular books of account. The SoF mentions categorically that "the entries in the papers found and seized are basically soudha entries made in the "soudha register" and have been entered in the regular books of account of the applicant. Thus, all entries relating to exhibits AS7, AS8, AS9, AS10, ASll, AS12, AS23, AS26 etc. which are seized documents are claimed to be appearing in the regular books of account. Similarly, entries relating to AS14, AS15, AS16 and AS22 relating to banking transactions between RT Industries and Rajesh Products which are claimed to be duly recorded in the books of account. Similarly, entries appearing in AS24 and AS25 are said to contain details of oil seeds and various ledger accounts which are all claimed to be part of the regular books of account."

10. As regards, the two partners, when questioned about evidence to suggest that the unaccounted income was advanced to farmers at a interest rate of 12 %, remained a hollow claim. No evidence has been led either from the seized material or from any subsequent documentation or from books of account, disclosed or undisclosed to suggest that the unaccounted income was earned in this manner and to this extent. There is not an iota of evidence to suggest which farmers were advanced these monies, when were the amounts advanced and at what rate. Thus, both in the case the firm and the partners, the mode of earning income and manner of earning income remained unsubstantiated. The authenticity of earning the income and the manner as claimed by the firm and invested by the partners is highly suspect. The comparison made by the firm with the trading results of Rajesh products is also questionable. If profit results of other entities are compared, it is possible that we come across instances of still better gross profit. In that situation, why should the comparison be restricted to Rajesh Products or to other entities brought before us by the applicant. Rajesh products is also not a trustworthy comparison on account of two factors. One, it is a related concern, and therefore, any comparison will be self serving. And two,

because Sh. Trilok Chand Jain had himself referred to this entity during the questioning at the time of the search, and made this as a basis of surrender (which was later retracted). In fact, the applicant firm, in the SoF at para 6, while summarizing the surrender of Rs.18.00 crores, has stated at item 9 that a surrender of Rs.3.20 crores is on account of unaccounted transactions of Rajesh Products. Thus, that entity has admittedly also entered into unaccounted transactions which make its books of account also unreliable. So the very comparison of a suspect entity would be undesirable. As regards the partners, there was not an iota of evidence to suggest that first the income flowed to the partners in the manner claimed and then that it was advanced to the farmers at a rate of 12%. Rather, there was evidence to suggest that if at all an advancement of monies was made, it was at the rate of $1^{1/2}$ percent to two parties, which were not even farmers. Thus, the very foundation of surrender of the applicants and the partners appears to be a concocted story which has no basis, and no evidence and therefore no credibility."

28. In the case of the fourth and fifth petitioners, the Settlement Commission has held:-

"11. Coming to the cases of the other two applicants i.e. Sh. Rajesh Kumar Jain, HUF and Sh. Ashok Kumar Jain, HUF, who are not partners in the applicant firm, it is observed that they have claimed to have earned income from earning commission/brokerage on the sale/purchase of properties for last several years. It was claimed that the applicants have acted as mediators/facilitators for sale/purchase of properties and the commission earned there from at the rate of 1.5 to 2%, was not offered for taxation before the Department. Asked about evidence in this regard, it was stated there were seized documents and some rough papers/notings on which the amounts pertaining towards selling/purchase properties have been mentioned. It was claimed that these were only rough figures on which the interest calculation was at the rate of 2% which has now being offered as undisclosed income. The Ld.

AR offered to exhibit copies of these seized documents, some of which were examined by the Commission during the course of hearing. Admittedly, some rough sheets have been seized which indicate property dealing and in some of these documents commission income/ percentage of such commission has been indicated. It is also true that these documents were found from the premises of the two applicants. However, there is no indication or hardly any indication that the present applicants were the facilitators/ mediators in the transaction which resulted in commission income. Even if, Sh. Ashok Kumar Jain and Sh. Rajesh Kumar Jain were facilitators, then the question to be answered is how were the HUFs concerned with these transactions. These were matters brought to the hilt by virtue of professional expertise/ knowledge of the individuals. The role of the HUFs in the transactions, if any, is doubtful,. to say the least. If, it was only professional expertise, then the applicants should have been the individuals rather than their HUFs. Needless to say, once again that the claim of the applicants have no evidentiary backing. The other claim that the applicants also earned from a business of money lending and this became a source of income, is also only a claim made without any evidence being led on the issue. If there was any such income, the pertinent question would be as to whom was the money was lent, for what period and at what rate. During the course of hearing, no evidence on these transactions could be brought to our knowledge."

29. Thereupon, the Settlement Commission in the concluding paragraphs had summarised their final findings on the five applications in the following words:-

"12. Considering the entire material on record and the evidence brought to our notice, it can not be said with any reasonable certainty that a full and true disclosure has been made in these cases. As noted by the Apex Court in the case of Ajmera Housing Corporation Vs. CIT 193 Taxman 193, the disclosure of full and true particulars of undisclosed income and the

> manner in which such income has been derived, are the prerequisites of a valid application u/s 245C(l). The Apex Court noted that unless the Settlement Commission records its satisfaction on this aspects, it will not have jurisdiction to pass any order on matters covered by the applications.
>
> 13. We therefore hold, that the applicants have failed to establish the sources of undisclosed income, the extent of such income and the manner of such income before us. The claims made in the SoFs are uniformly lacking the foundation of credible evidence and hence are unreliable. As such, prima facie, the conditions prescribed u/s 245C(l) are not fulfilled. Accordingly, we cannot allow these applications to be proceeded with."

30. The first petitioner had declared undisclosed income of Rs.3,20,40,338/-. Impugned order records admission of the first petitioner that they had inflated their expenses, i.e. payments made to the farmers/traders to procure oilseeds, and in this manner they had reduced or deflated their gross profits. There was substantial difference in 'moisture content' acceptable and found, 'oil content' acceptable and found, extent of dust in oil seeds, type of *bardana* used etc. and manipulations of price to inflate the purchases. The petitioner No.1 had however expressed inability to precisely work out and give an exact figure of the undisclosed income earned in absence of 'duplicate accounts'. Therefore, they had deduced or computed the undisclosed income on basis of the gross profit rate in the comparable or same line of business. The second admission made by the first petitioner was that the gross profit rate earlier declared by them was lower when compared with other cases in the same line.

31. Application of gross profit rate in comparable cases to compute and furnish particulars of undisclosed income is not objected to and adversely commented upon by the Settlement Commission.

32. Selection of comparables was objected to, for the reasons recorded by the Settlement Commission. While reliance placed on the gross profit rate declared by Rajesh Products, a sister concern, who were subjected to search was clearly a suspect and unreliable, there was no evidence or material to reject the trading results of the other two entities, namely, Goyal Udyog and Goyal Products for the assessment years 2011-12 to 2013-14 averaging 4.05% and 5.71%, respectively. Their trading results were rejected by observing that the Settlement Commission may come across cases or instance of still better gross profit. However, there was no evidence and material to establish better results. The observation is therefore hypothetical. The reasoning would only show the uncertainty in the mind of the Settlement Commission and that they were unable to opine on whether the profit results of the two entities could be used as a comparison. Use of the word “possible” with reference to "other" two entities would indicate that the Settlement Commission was unable to conclude and had predicated their case on the assumption or possibility of still better results. Inspite of the uncertainty and doubt, the settlement application by the first petitioner was rejected observing that the gross profit rate of the two entities was untrustworthy on this surmise.

33. Revenue had argued that the average gross profit rate declared by M/s. Rajesh Products was higher than gross profit rate declared by M/s. Goyal Udyog and M/s. Goyal Products. A valid argument. However, this was not the ground or reason given by the Settlement Commission to reject

the gross profit rates of M/s Goyal Udyog and M/s Goyal Products. We would not add and include a reason in the impugned order though not so recorded and then take on record and examine the explanation by the petitioner and answer the same in this Writ Petition. Impugned order must be tested and subjected to judicial review on its merits without adding or subtracting the reasons given therein. Paragraph 10 of the impugned order notices the contention that undisclosed income of Rs.3.20 crores as surrendered was close to the figure of Rs.3.35 crores mentioned by Trilok Chand Jain in his statement recorded during the course of search. This, as per the petitioner No.1, would reflect that the surrender of Rs.3.20 crores was the correct, true and full disclosure of the undisclosed income. In support, the first petitioner had referred to the *sauda* entries in the *sauda* register and the entries appearing in the regular books of accounts. Thus, as per the first petitioner they had made true, full and correct disclosure of the undisclosed income of Rs.3.20 crores and the manner and *modus operandi* adopted by them to earn the undisclosed income. These arguments though noted have not been considered and pondered upon while recording the tentative reasons to reject the settlement application of the first petitioner.

34. Paragraphs 12 and 13 of the impugned order state that the conclusions drawn were tentative and "prima facie" and not conclusive and firm findings on merits. The expression “prima facie” specifically used in the last paragraph of the impugned order, would manifest that the negative finding was subject to confirmation and to some extent therefore conjectural. This is also clear from the penultimate paragraph of the impugned order wherein the Settlement Commission observed that upon consideration of the entire material on record and evidence brought to their notice, they cannot with

"reasonable certainty" hold that full and true disclosure had been made. These observations in the conclusions are not only with reference to the first petitioner, but would equally apply to rejection of applications filed petitioner Nos.2 to 5.

35. We would, therefore, observe that the finding of the Settlement Commission that the petitioner No.1 had not declared and made full and true disclosure is not an affirmative but an inconclusive and plausible view, which required a deeper and detailed scrutiny at the second stage. The Settlement Commission should have as per the statutory mandate called the Principal Commissioner/Commissioner to submit their report as second stage examination under Section 245D(2C) was required. It is at that second stage after the Revenue has submitted their report that more in-depth scrutiny and verification takes place, notwithstanding the earlier preliminary scrutiny under Section 245D(1) of the Act. At each passing stage, the scrutiny and examination becomes more extensive and decisive. The relevance of rejection at the initial stage under sub-section (1) to Section 245D is to throw out frivolous applications and applications palpably not maintainable for want of full and true disclosure and manner in which the undisclosed income was earned.

36. Petitioner Nos.2 and 3 had 50% share in the partnership firm R.T. Industries and 33.3% share in another partnership firm Ridhi Siddhi Food Products. Petitioner Nos. 2 and 3 had surrendered undisclosed income of Rs.46,02,472/- and Rs.46,24,341/-, respectively being the suppressed interest income earned on loans advanced out of unaccounted share of profits from R.T. Industries, earned year after year. They had admitted to undisclosed withdrawals and other expenditures, which included investment

made for purchase of properties. The Settlement Commission has opined that the two petitioners had failed and not referred to any evidence in the form of seized material, subsequent documentation or books of accounts in support of their contention that unaccounted for money was advanced to farmers at an interest of 12% per annum and, therefore, the claim was a hollow one. Thus, the mode and manner of earning undisclosed income had remained unsubstantiated. There was no evidence to show that the unaccounted for money or income of R.T. Industries was transferred to the two partners in the manner claimed. At the same time, the impugned order refers to documents produced by the petitioners that money had been advanced on interest @ 1.5% to two parties. The Settlement Commission observed that the parties were not farmers. Hence, the entire story of two partners lending money to the farmers was concocted having no basis and credibility.

37. Questioning the said finding as incoherent and on Wednesbury principles, Counsel has submitted that the two petitioners being the partners would have benefitted and utilized the unaccounted income of R.T. Industries. Undeclared income earned as partners of the first petitioner was invested by the two petitioners in purchase of properties or given as loan to various persons, mainly farmers, against standing crops to earn interest, which varied from 9% to 12% per annum. Their plea of investment in properties was based upon documents found and seized. It was also stated that the partners had not maintained day-to-day record of transactions and interest rate charged. In one or two cases of short term advance, even higher interest was charged. Reference was made to loose sheets, namely, AS-3 and AS-5 in which rate of interest was mentioned as 1.4% and 1.5%. These

were short-term advances given to third parties other than farmers. The two petitioners had prepared a tabulation of year-wise income earned after considering the entire seized records. Petitioner Nos.2 and 3 had accordingly declared additional income of Rs.46,02,472/- and Rs.46,24,341/-, respectively.

38. Our attention was drawn to the income tax returns filed by the Petitioner Nos.2 and 3 under Section 139 of the Act in which they had shown interest from parties under the head "income from other sources" or "income from other sources", which it is stated included interest income. They have also relied upon details of mode and manner of earning interest income mentioned in the settlement application. Submission is that interest income was disclosed and accounted for by the second and third petitioners in their returns of income, prior to search and seizure operations and, therefore, the settlement application should not have been dismissed on mere "tentative" or presumptive prima facie opinion, without a firm and authoritative finding.

39. What is important and relevant at this stage is the observation of the Settlement Commission in the last sentence of paragraph 10 that "the very foundation of the surrender made by the two petitioners appears to be concocted story" etc. The word "appears" would reflect that the Settlement Commission had not reached or made any firm and final decision. The findings as per the observations were tentative and prima facie. In view of the legal position explained above, the settlement application at the initial stage cannot be dismissed when firm opinion as to frivolousness or concoction is lacking and merits of the settlement application cannot be ascertained and determined.

40. Petitioner Nos.4 and 5, namely, Rajesh Kumar Jain HUF and Ashok Kumar Jain HUF, had declared unaccounted income of Rs.45,68,410/- and Rs.40,46,545/-, respectively, earned from lending money on interest and commission/brokerage received in property transactions. The petitioners had acted as mediators and facilitators in sale and purchase of properties and earned commission/brokerage @ 1.5% to 2%. The Settlement Commission in paragraph 11 has stated that the petitioner Nos.4 and 5 had referred to seized documents and rough papers/noting relating to sale and purchase of properties. As reliance was placed on these rough papers some of them were examined by the Settlement Commission. Calculations were made to show and establish payment of commission @2%. The impugned order records and accepts that the rough sheets seized refer to and indicate property transactions and in some documents, even percentage of such commission it was shown was computed. However, the settlement applications have been rejected as there was no indication or hardly any indication that the two HUFs were acting as facilitators or mediators in the property transactions. Even if the Ashok Kumar Jain and Rajesh Kumar Jain were acting as mediators or facilitators, question would arise whether the income should be taxed in the hands of the two HUFs, or the two individuals, as this was a matter of personal, and professional expertise or knowledge. Indeed, it would be true and correct that undisclosed income earned by Ashok Kumar Jain and Rajesh Kumar Jain cannot be treated as undisclosed income of Ashok Kumar Jain HUF and Rajesh Kumar Jain HUF. At the same time, this would be matter of detailed verification. Firm and conclusive finding would require examination of the past position; whether the two HUFs were engaged and had earned income by way of commission or brokerage.

However, the Settlement Commission was itself uncertain and has not given any firm or conclusive opinion as it has observed that "the role of the HUFs in the transactions, if any, was doubtful to say the least". The Settlement Commission had also observed that the claim was lacking evidentiary backing, notwithstanding the fact that the Settlement Commission itself had recorded that rough sheets seized indicated property dealings and payment of commission. Statement that the two petitioners had not made any reference or given particulars of the deals as well as full details of the commission/brokerage earned, is contested. The petitioners had accepted that they had not kept complete records of the brokerage/commission earned as the papers were destroyed or torn off after the deal had materialized. However, they had filed details and calculations. Uncertainty in the mind of the Settlement Commission is clearly reflected when they had used the word "doubtful" with reference to the role of the HUFs in the transactions. Therefore, it was urged that the claim did have evidentiary backing. Thus, the Settlement Commission was doubtful and uncertain as to whether the HUFs had earned the income by way of commission. We would observe that question could well arise whether the property transactions were sales and purchases made by the two petitioners, and not mere earnings as commissions earned. However, this is not an aspect examined and the reason given for rejection.

41. On the same ground, the income from money lending was rejected as a claim made without evidence being led. However, the Settlement Commission observed that if there was income, the question would arise as to whom the money was lent, for what period and at what rate, again indicative of the fact that the Settlement Commission was not sure and

unable to form any opinion one way or the other. The petitioners submit that it is the case of the Revenue that the two HUFs' were lending money and were earning interest.

42. Petitioner Nos. 4 and 5, have drawn our attention to returns filed by the two HUFs under Section 139 of the Act. It is submitted that "other income" mentioned in the returns included income earned by way of commission etc. from sale and purchase of property. In the settlement applications, fourth and fifth petitioner had given tabulations and details of the commission earned by them, which was duly corroborated and supported by evidence in the form of income tax returns filed by the petitioners prior to the date of search. Thus, the "prima facie" finding of the Settlement Commission that the fourth and the fifth petitioner had made a wrong declaration as to the manner of earning undisclosed income, is nothing but a surmise, which is incorrect and baseless. This contention is without prejudice to the contention of the fourth and fifth petitioners that the Settlement Commission had erroneously and contrary to law dismissed the application filed by the fourth and fifth petitioners on tentative opinion and "prima facie" assumption, without forming a conclusive and final opinion.

43. We are conscious and aware that scope of judicial review and exercise of writ jurisdiction while examining an order of the Settlement Commission is limited and primarily confined to considering whether the Settlement Commission has committed grave or patent error of jurisdiction and failed to abide by and act in accordance with the provisions of the Act. The Settlement Commission is a fact finding body, whose orders have been given finality. A writ court would hesitate and not go into the merit of the decision taken by the Settlement Commission to reappraise disputed

questions of fact, specially, in view of the nature of the jurisdiction and questions, which come up before the Settlement Commission. What is amiable and can be scrutinized while exercising power of judicial review is the decision making process and not merits of the decision. While examining and scrutinizing the decision making process, there is a limited scope for the writ Court to appreciate the facts under the grounds of illegality, irrationality and pre-procedural impropriety [see ***State of U.P. & Anr. Vs. Johri Mal*** (2004) 4 SCC 714 and ***R. B. Shreeram Durga Prasad and Fatehchand Nursing Das v. Settlement Commission (IT and WT) and Anr.***, (1989) 176 ITR 169 (SC)].

44. In ***Jyotendrasinhji Vs. S.I. Tripathi and Ors.,*** (1993) 201 ITR 611 (SC), the Supreme Court observed that given the nature of power that Settlement Commission enjoys, it may be difficult to predicate the reasons and considerations, which had induced the Settlement Commission to make a particular order, unless the Settlement Commission chooses to give reasons. Where reasons are given, the scope of enquiry would be limited and confined to decision making process and not with the decision on merits i.e. whether the order is contrary to any provision of the Act, has caused prejudice to any party apart from bias, fraud, malice etc., which constitute a separate and independent category. The aforesaid principles were reiterated in ***M/s Godwin Steels Pvt. Ltd.***(supra) quoted above. This judgment observes that procedural defects would be such as violation of mandatory procedural requirement or violation of principles of natural justice or where there was no nexus between the reasons given and the decision taken by the Settlement Commission. The Court may not interfere either when allegations of the error of fact or error of law are raised as was held by Karnataka High

Court in ***N. Krishan vs. Settlement Commission(IT & WT)***, (1989) 180 ITR 585 (Karnt.).

45. Lastly, we would like to deal with the objection with regard to territorial jurisdiction. A five-Judges Bench of this Court in ***Sterling Agro Industries Ltd. & Ors. Vs. Union of India & Ors.***, W.P. (C) No.6570/2010 decided on 1st August, 2011 has drawn a distinction between cause of action jurisdiction and doctrine of forum conveniens. It has been observed that if a miniscule part of the cause of action has accrued within the jurisdiction of the Court, a writ petition would be maintainable before the said High Court. However, the expression "cause of action" must be understood in the light of the decision of the Supreme Court in ***Alchemist Ltd. and Anr. v. State Bank of Sikkim and Ors.***, (2007) 11 SCC 335, which means material essential or integral part of the cause of action. Therefore, even if a small part of cause of action had arisen within the jurisdiction of a court, the writ petition before the said court would be maintainable. In the context of the present case, we need not dilate further on the said issue for what is impugned and challenged before us is the order of the Settlement Commission under Section 245D (1), which is an order passed without having the views of the Revenue. Principal Bench of the Settlement Commission located and functions from Delhi. The order was passed in Delhi. In the context of the present writ petition, we would record that notice in this writ petition was issued by a Division Bench of this Court on 19th May, 2017. In these circumstances, it would not be appropriate to invoke doctrine of forum conveniens.

46. In view of the aforesaid discussion, we allow the present writ petition and set aside and quash the impugned order of the Settlement Commission

dated 8th May, 2017 rejecting the settlement applications of the petitioners under Section 245D(1) of the Act, with an order of remand to the Settlement Commission to pass a fresh order under the said section within a period of fourteen (14) days from the date a copy of this order is received by them or served on them by the petitioners or the Revenue, whichever is earlier. In order to cut delay, we direct the parties to appear before the Settlement Commission on 20th of September, 2018, when a date of hearing would be fixed. Observations made in the judgment are for disposal of the present writ petition and would not be construed as observations on merits on different issues raised in the settlement application including question of pre-conditions, which are required to be satisfied. In the facts and circumstances of the case, there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

SEPTEMBER 13th, 2018
NA/ssn