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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 65 OF 2015

The Commissioner of Income Tax,
Central – II
having his office at R. No. 415,
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020.

....Petitioner

V/s.

1. Income Tax Settlement Commission
Additional Bench, S.K. Rathod Marg,
Mahalaxmi Chambers, Mumbai – 400 034.

2. M/s. Kanakia Spaces Pvt. Ltd.
10th Floor, 215, Atrium, CTS No. 215,
Andheri Kurla Road, Andheri (E),
Mumbai – 400 059.

...Respondents

Mr. Suresh Kumar for Petitioner.

Mr. J.D. Mistri, Senior Advocate a/w Mr. Nitesh Joshi i/b Mr. Atul K. Jasani
for Respondent No.2.

CORAM : K.R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 4th APRIL 2024

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. Petitioner, who is the Commissioner of Income Tax, Central – II, Mumbai, is impugning an order dated 31st July 2013 passed by Respondent No.1 - the Income Tax Settlement Commission (ITSC) under Section 245D(4) of the Income Tax Act, 1961 (the Act). Petitioner has jurisdiction over Respondent No.2 who is the assessee.

Rule was granted on 27th February 2015.

2. Assessee is engaged in the business of development and sale of residential and commercial properties in the Western Suburbs of Mumbai. Assessee was subjected to search and seizure action on 29th March 2011 under Section 132 of the Act. During the course of search and seizure action, cash of Rs.45 Lakhs was seized. Besides, cash, various papers, books of accounts and other documents were also found and seized. Scrutiny of the documents allegedly revealed that assessee along with other group entities has shown purchase in its books of account from certain entities without receipt of any material from any such party and these entities had only issued accommodation bills without supplying any materials. This was the allegation of Revenue. The documents revealed total of such purchases to be Rs.11,95,41,448/- for the Financial Years 2006-07 to 2010-11. The search also revealed that cash amounting to Rs.21,31,812/- on sale of scrap was also not recorded in the books of account. As a result, a Director of assessee, in the statement recorded under Section 132(4) of the Act during the search proceedings, offered to tax additional income of Rs.12,16,83,252/- (Rs.1,19,55,140/- + Rs.21,31,812/-).

3. To put an end to all issues, assessee had filed an application under Section 245C of the Act before the ITSC for settlement of its case for Assessment Years (A.Y.) 2005-06 to 2011-12.

4. By an order dated 12th October 2012 passed under Section

245D(1) of the Act, the ITSC allowed the settlement application of assessee to be proceeded with. Revenue submitted a report dated 23rd November 2012 under Section 245D(2B) of the Act. Various grounds were taken by the Revenue to oppose the settlement application. The ITSC by an order dated 26th November 2012 passed under Section 245D(2C) of the Act, admittedly after considering the submissions of both sides, held that the application is not invalid and allowed it to be proceeded with further. The ITSC thereafter gave directions to the Revenue to furnish report under Rule 9 of the Income Tax Settlement Commission (Procedures) Rules 1997 (the Rule). Revenue accordingly submitted a report dated 20th December 2012. Further report was called for by the ITSC and in response thereto Revenue submitted another report dated 1st July 2013. After hearing parties on 24th July 2013, the ITSC passed an order dated 31st July 2013 under Section 245D(4) of the Act which is impugned in this petition. The ITSC allowed assessee's settlement application and also granted immunity from penalty and prosecution.

5. Admittedly, in the statement recorded of assessee's Director under Section 132(4) of the Act, assessee offered additional income of Rs.12,16,83,252/- which included Rs.11,95,51,448/- on account of alleged bogus purchases. The ITSC, in the impugned order, allowed capitalization to the extent of Rs.8,33,53,000/- and consequently held depreciation may be allowed. The relevant portion of the impugned order with which

Revenue has a problem, which is Paragraph No. 34, reads as under :

34. Capitalization :

On account of total bogus purchases of Rs.11,95,51,440/- net cash received by the applicant was Rs.11,04,32,745/- after commission @ 3.25%. The said amount has been applied for the following purposes :

<i>Capital cash incurred for office premises</i>	
<i>Renovation (A. Yr. 2010-11)</i>	<i>2,96,27,000</i>
<i>- do - (A. Yr. 2011-12)</i>	<i>12,47,000</i>
<i>Air Conditioner (A. Yr. 2011-12)</i>	<i>1,40,24,000</i>
<i>Furniture (A. Yr. 2011-12)</i>	<i>3,84,55,000</i>
	<i>-----</i>
	<i>8,33,53,000</i>
<i>Expenditure incurred (Revenue in nature</i>	<i>2,70,79,745</i>
	<i>-----</i>
	<i>11,04,32,745</i>

*Capitalisation to the extent of Rs.8,33,53,000/- is being allowed.
Depreciation may be allowed.*

6. It is Revenue's case in this petition that in the report dated 20th December 2012 furnished under Rule 9 of the Rule, Revenue had sought direction from the ITSC to direct Revenue to make or cause to make further enquiry or investigation under Section 245D(3) of the Act. It was Revenue's case that seized material does not indicate what figures written there pertain to though, on perusal, the figures appeared to be flow of money. Revenue also submitted, in the alternative, that investigation be permitted to also ascertain within which assessment year the materials mentioned in the seized documents were purchased.

7. On the claim of deduction made by assessee under Section 80IB(10) of the Act it was Revenue's case that a sum of Rs.2,07,51,048/- should be treated as income from other sources.

8. Though these submissions were made before the ITSC, the only grounds on which the impugned order of the ITSC is challenged are as under :

(a) Adjustment under Section 80IB(10) of the Act :

According to Revenue the ITSC should have directed the Commissioner under Section 245D(3) of the Act to examine the claim by making further enquiry. By not so directing, prima facie, errors have crept into the order. According to Revenue, the error is, for A.Y. 2009-10 the deduction claimed by assessee and accepted by the ITSC is Rs.87,60,556/- whereas the amount disclosed on account of bogus purchases for A.Y. 2009-10 as per the settlement application is Rs.66,92,869/-. Thus the claim of deduction was more than the amount surrendered on this account and the impugned order does not explain the difference.

(b) Capitalization :

The ITSC has erred in allowing capitalization of Rs.8,33,53,000/-. Assessee had submitted before the ITSC that these amounts generated out of the bogus cash purchases has been invested in renovation of its office and purchase of air conditioners and furniture. The claim of capitalization and consequent depreciation has been allowed on the basis of few entries of a seized document. The case of Revenue is that the ITSC has simply accepted the claim of assessee without directing enquiry or investigation and there was virtually no evidence for allowing depreciation in the case at hand. The acceptance of petitioner's case that the amount of Rs.8,33,53,000/- was

used for renovation, air conditioners and furniture was without any evidence and hence perverse.

9. Mr. Suresh Kumar submitted as under :

(a) As regards the deduction under Section 80IB(10) of the Act, in page no. 4 of the impugned order the deduction claimed by assessee as accepted by the ITSC for A.Y. 2009-10 is shown as Rs.87,60,556/- whereas the break up of the amount of additional income disclosed in the application before the ITSC for A.Y 2009-10 is shown as Rs.66,92,869/-. Therefore, there was error in the impugned order.

(b) The ITSC accepted the case of assessee that an amount of Rs.8,33,53,000/- generated by bogus cash purchases has been invested in renovation of the office and purchase of air conditioners and furniture without directing an enquiry/investigation as to whether the amount was in fact spent or invested in renovation of the office and purchase of air conditioners and furniture.

(c) The procedure followed by the ITSC is in the nature of a presumption and therefore the ITSC should have directed the Commissioner to investigate/enquire as to whether the expenditure as claimed by assessee was correct.

(d) The impugned order has given no reasons as to why it accepted the claim of assessee that an amount of Rs.8,33,53,000/- has been spent on renovation and purchase of air conditioners and furniture.

(e) The order was without reasons and hence, bad in law.

(f) Therefore, the impugned order should be quashed and set aside and the matter be remanded to the Interim Board as now constituted.

10. Mr. Mistri submitted as under :

(a) The deduction under Section 80IB(10) of the Act has been correctly allowed as the difference of Rs.20,67,687/- (Rs.87,60,556/- less Rs.66,92,869/-) represents adhoc disallowances made by the A.O. in the Assessment Orders for A.Y. 2005-06 to A.Y. 2008-09. The said disallowance resulted in decrease of work in progress in respect of Vasundhara and Samarpan project for the respective years and correspondingly increase in income for A.Y. 2009-10 as the income from the said projects stands reflected during the said year. The computation of income filed before the ITSC for A.Y. 2009-10 reflects those figures.

(b) In the impugned order dated 31st July 2013 the issue relating to adjustment to work in progress in view of disallowances has been made, discussed and correspondingly deduction under Section 80IB(10) of the Act has been allowed.

(c) On the claim of Revenue for capital expenditure incurred out of cash generated from alleged bogus purchases and consequential grant of depreciation thereon, the said claim has been thoroughly scrutinized by the ITSC on the issues raised by the Revenue before them and the report dated 23rd November 2012 makes no reference to this claim.

(d) Even in the report dated 20th December 2012 filed under Rule 9 of the Rule, nexus between cash generated on account of bogus purchases and use of such cash for incurring capital expenditure is not established. The submissions made by Mr. Suresh Kumar and raised in the petition go beyond the case as made out before the ITSC.

(e) The Hon'ble Apex Court in *Jyotendrasinhji vs. S.I.Tripathi*¹ has discussed the scope of challenge to orders passed by the ITSC. According to the Hon'ble Apex Court, after examining such further evidence as may be placed before it or obtained by it, the ITSC may, "*in accordance with the provisions of this Act, pass such order as it thinks fit*" or the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under Sub Section (1) or Sub Section (3) of Section 245C of the Act.

(f) Section 245-I declares that every order of ITSC passed under Sub Section (4) of Section 245D of the Act shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in Chapter XIX-A, be reopened in any proceeding under the Act or under any other law for the time being in force. Though the finality clause contained in Section 245-I of the Act does not and cannot bar the jurisdiction of the High Court under Article 226 of the Constitution that does not mean that in every case the court should interfere. The scope of enquiry as held in *Jyotendrasinhji* (supra) is restricted to whether the

1 (1993) 68 Taxman 59 (SC)

order passed by the ITSC 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 assessee.

(g) The ITSC, as held in *Jyotendrasinhji* (supra), need not even give reasons. The Hon'ble Apex Court held that even if the interpretation placed by the ITSC on documents is not correct, it would not be a ground for interference since a wrong interpretation of documents cannot be said to be a violation of the provisions of the Act. In other words, the scope of interference is very very narrow.

(h) Section 292C(1)(ii) provides for presumption as to assets, books of accounts etc. Under Section 292C(1)(ii) it is provided that where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search under Section 132 of the Act it may, in any proceeding under this Act, be presumed that the contents of such books of account and other documents are true. There is similar provision under Section 132(4A) of the Act. A presumption is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorized to draw a particular inference from a particular fact. The Section says "may presume" which leaves it to the discretion of the Court to make the presumption according to the circumstances of the case. In this case, the ITSC has presumed the contents of the documents seized to be

true/correct. That cannot be held against the ITSC. The ITSC accepted undisclosed income of assessee to the tune of Rs.11,95,51,448/- and the same was brought to tax. The ITSC also accepted the expenditure revealed in the same books of accounts which have been incurred for the purpose mentioned therein. That was for the ITSC to exercise its discretion to presume that the contents of those documents were correct. The judgment of the Hon'ble Apex Court in *P. R. Metrani vs. Commissioner of Income Tax*² which was followed in *Commissioner of Income Tax vs. Indeo Airways (P) Ltd.*³ supports the case of assessee.

(i) The ITSC, as held in *N. Krishnan vs. Settlement Commission And Others*⁴, is the forum for self surrender and seeking relief and not a forum for challenging the legality of assessment order or orders passed in any other proceedings. This is evident from the provisions of the Act because it even prevents the application made from being withdrawn. The power conferred on the settlement commission is so wide that it can take any view on any questions of law, which it considers appropriate having regard to the facts and circumstances of a case including giving immunity against prosecution or imposition of penalty. Therefore, the scope of interference against a decision of the Settlement Commission is very narrow and it is in the nature of statutory arbitration to which a person may submit himself voluntarily. The scope of interference is much more restricted than the power of the court to interfere with an arbitration award.

2 (2006) 157 Taxman 325

3 (2012) 26 taxmann.com 244 (Delhi)

4 (1989) 180 ITR 585

(j) The Hon'ble Apex Court in *Brij Lal And Others vs. Commissioner of Income Tax*⁵ has held that there is a difference between assessment in law (regular assessment or assessment under Section 143(1) of the Act) and assessment by settlement under Chapter XIX-A. The order under Section 245D(4) is not an order of regular assessment. It is neither an order under Section 143(1) or 143(3) or 144 of the Act. No steps of filing of return or enquiry by the A.O. under Section 142 and 143 of the Act or issuing a notice of demand under Section 156 of the Act on the basis the Assessment Order etc. are required to be followed in the case of proceedings under Chapter XIX-A. The nature of the orders under Sections 143(1), 143(3) and 144 is different from the orders of the ITSC because Chapter XIX-A only contemplates the taxability determined with respect to undisclosed income only by the process of settlement/arbitration.

11. **Findings :**

At the outset let us examine the scope of intervention by a court, in its jurisdiction under Article 226 of the Constitution of India, with an order passed by the ITSC. It came up for consideration in *Jyotendrasinhji* (supra). The Hon'ble Apex Court held that the High Court under Article 226 can interfere with an order of the ITSC only when the order is contrary to provisions of the Act and that such contravention has prejudiced assessee. Paragraph Nos. 14 and 15 of *Jyotendrasinhji* (supra) read as under :

5 (2010) 328 ITR 477 (SC)

14. *The first question we have to answer is the scope of these appeals preferred under Article 136 against the orders of the Settlement Commission. The question is whether all the questions of fact and law as may have been decided by the Commission are open to review in this appeal. For answering this question one has to have regard to the scheme of Chapter XIX-A. The said chapter was inserted by the Taxation Laws (Amendment) Act, 1975 with effect from 1-4-1976. A somewhat similar provision was contained sub-sections (1A) to (1D) of Section 34 of the Income Tax Act, 1922 introduced in the year 1954. The provisions of Chapter XIX-A are, however, qualitatively different and more elaborate than the said provisions in the 1922 Act. The proceedings under this chapter commence by an application made by the assessee as contemplated by Section 245C. Section 245D prescribes the procedure to be followed by the commission on receipt of an application under Section 245C. Sub-section (4) says: 'after examination of the records and the report of the commissioner received under sub-section (1), and the report, if any, of the commissioner received under sub-section (3), and after giving an opportunity to the applicant and to the commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the settlement commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the commissioner under sub-section (1) or sub-section (3).' Section 245E empowers the Commission to reopen the completed proceedings in appropriate cases, while Section 245F confers all the powers of an Income Tax authority upon the Commission. Section 245H empowers the Commission to grant immunity from penalty and prosecution, with or without conditions, in cases where it is satisfied that the assessee has made a full disclosure of his income and its sources. Under Section 245HA the Commission can send back, the matter to assessing officer; where it finds that the applicant is not cooperating with it. Section 245-I declares that every order of settlement passed under Sub Section (4) of Section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in, Chapter XIX-A, be re-opened in any proceeding under the Act or under any other law for the time being in force. Section 245L declares that any proceedings under chapter XIX-A before the settlement commission shall be deemed to be a judicial proceeding within the meaning of Section 193 and 228 and for the purposes of Section 196 of the Indian Penal Code.*

15. *It is true that the finality clause contained in Section 245I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this court under Article 32 or under Article 136, as the case may be. But that does not mean that the jurisdiction of this Court in the appeal preferred directly in this court is any different than what it would be if the assessee had first approached the High Court under Article 226 and then come up in appeal to this court under Article 136. A party does not and*

cannot gain any advantage by approaching this Court directly under Article 136, instead of approaching the High Court under Article 226. This is not a limitation inherent in Article 136; it is a limitation which this court imposes on itself having regard to the nature of the function performed by the Commission and keeping in view the principles of judicial review. May be, there is also some force in what Dr. Gauri Shankar says viz., that the order of commission is in the nature of a package deal and that it may not be possible, ordinarily speaking, to dissect its order and that the assessee should not be permitted to accept what is favourable to him and reject what is not. According to learned counsel, the Commission is not even required or obligated to pass a reasoned order. 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 of course the commission itself chooses to, give reasons for its order. Even if it gives reasons in a given case, the scope of enquiry 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 (and alteram 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, has it prejudiced the petitioner/appellant apart from ground of bias, fraud & malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in Sri Ram Durga Prasad v. Settlement Commission 176 I.T.R. 169, which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji J., speaking for the Bench comprising himself and S.R. Pandian, J. observed that in such a case this Court is "concerned with the legality of procedure followed and not with the validity of the order." The learned Judge added 'judicial review is concerned not with the decision but with the decision-making process.' Reliance was placed upon the decision of the House of Lords in Chief Constable of the N.W. Police v. Evans, [1982] 1 W.L.R.1155. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders' of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. The main controversy in these appeals relates to the interpretation of the settlement deeds though it is true, some contentions of law are also raised. The commission has interpreted the trust deeds in a particular manner. Even if the interpretation

placed by the commission the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be said to be a violation of the provisions of the Income Tax Act. It is equally clear that the interpretation placed upon the said deeds by the Commission does not bind the authorities under the Act in proceedings relating to other assessment years. In view of the above, though it is not necessary, strictly speaking, to go into the correctness of the interpretation placed upon the said deeds by the commission, and it is enough if we confine ourselves to the question whether the order of the Commission is contrary to the provisions of the Act, we propose to, for the sake of completeness, examine also whether the order of Commission is vitiated by any such wrong interpretation?
(emphasis supplied)

Therefore, the ITSC is empowered to pass, after hearing the applicant and the Commissioner, and after examining such further evidence as may be placed before it or obtained by it, such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner under Sub Section (1) or (3) of Section 245C of the Act. The ITSC also has power to grant immunity from penalty and prosecution, with or without conditions. The ITSC need not give any reasons and even if it gives any reason the scope of enquiry cannot go beyond - whether, it is contrary to any of the provisions of the Act and whether such contravention has prejudiced the appellant. Further the court should be concerned with the legality of procedure followed and not with the validity of the order. The judicial review is concerned not with the decision but with the decision making process. Further, even if the interpretation placed by the ITSC on documents is not correct, it would not be a ground for interference since a wrong interpretation of documents cannot be said to be a violation of the

provisions of the Act. There are no allegation of bias or fraud or malice alleged in the petition against the Commission.

12. The Hon'ble Apex Court in *Kotak Mahindra Bank Ltd. vs. Commissioner of Income Tax & Anr.*⁶ held that the High Court cannot sit in appeal as to the sufficiency of the material and particulars placed before the Commission, based on which the Commission proceeded to pass its orders. The court also held, relying on *Jyotendrasinhji* (supra), that while exercising powers under Article 226 of the Constitution of India the High Court may not interfere with an order of the Commission passed in exercise of its discretionary powers and the scope for judicial review is very narrow. The court held that sufficiency of the material and particulars placed before the Commission, based on which the Commission proceeded to pass its orders are particularly beyond the scope of judicial review, except under the circumstances set out in *Jyotendrasinhji* (supra).

While discussing the legislative intent on the provisions of Chapter XIX-A, the Hon'ble Apex Court in *Kotak Mahindra Bank Ltd.* (supra) held that frequent interference with the orders or proceedings of the ITSC should be avoided and the High Court should not scrutinize an order or proceeding of the ITSC as an appellate court. The court further held that unsettling reasoned orders of the Settlement Commission may erode the confidence of the bonafide assesseees, thereby leading to multiplicity of

6 (2023) 7 NYPCTR 1353 (SC)

litigation where settlement is possible and this larger picture has to be borne in mind. Paragraph Nos.9, 10, 12 and 13 of the judgment read as under :

9. In the present case, as noted above, we find that the appellant placed material and particulars before the Commission as to the manner in which income pertaining to certain activities was derived and has sought to offer such additional income to tax. Based on such disclosures and on noting that the appellant co-operated with the Commission in the process of settlement, the Commission proceeded to grant immunity from prosecution and penalty as contemplated under Section 245H of the Act. The High Court ought not to have sat in appeal as to the sufficiency of the material and particulars placed before the Commission, based on which the Commission proceeded to grant immunity from prosecution and penalty as contemplated under Section 245H of the Act.

10. We are fortified in our view by the judgment of this Court in Jyotendrasinhji vs. S.I. Tripathi, 1993 Supp (3) SCC 389, wherein it was observed that a Court, while exercising powers under Articles 32, 226 or 136 of the Constitution of India, as the case may be, may not interfere with an order of the Commission, passed in exercise of its discretionary powers, except on the ground that the order contravenes provisions of the Act or has caused prejudice to the opposite party. Interference may also be open on the grounds of fraud, bias or malice. Therefore, this Court has carved out a very narrow scope for judicial review of the Commission's orders, passed in the exercise of its discretionary powers. Hence, we hold that sufficiency of the material and particulars placed before the Commission, based on which the Commission proceeded to grant immunity from prosecution and penalty as contemplated under Section 245H of the Act, are beyond the scope of judicial review, except under the circumstances set out in Jyotendrasinhji vs. S.I. Tripathi (supra).

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12. While we are mindful of the fact that the provisions of Chapter XIX-A of the Act are not to be employed so as to provide a shelter for tax dodgers to obtain immunity from facing the consequences of tax evasion by simply approaching the Settlement Commission, vide B.N. Bhattacharjee (supra), we are however of the view that in the present case, the Commission rightly exercised its discretion under Section 245H having regard to the bona fide conduct of the assessee of offering additional income for tax, apart from the income disclosed in the return of income.

13. Before parting with the record, we may add that having regard to the legislative intent, frequent interference with the orders or proceedings of the Settlement Commission should be avoided. We have already indicated the limited grounds on which an order or proceeding of the Settlement Commission can be judicially reviewed. The High Court should not scrutinize an order or proceeding of a Settlement Commission as an appellate court.

Unsettling reasoned orders of the Settlement Commission may erode the confidence of the bonafide assesseees, thereby leading to multiplicity of litigation where settlement is possible. This larger picture has to be borne in mind.

(emphasis supplied)

13. In *N. Krishnan* (supra) the Karnataka High Court held that the Settlement Commission is a forum for self surrender and seeking relief and not a forum for challenging the legality of assessment order or orders passed in any other proceedings. The court further held that the power conferred on the Settlement Commission is so wide that it can take any view on any questions of law, which it considers appropriate, having regard to the facts and circumstances of the case, which would be applicable only to that case and the Settlement Commission has power to give immunity against prosecution or imposition of penalty. The court further held that the provisions of settlement would show that it is in the nature of statutory arbitration to which a person may submit himself voluntarily and therefore the scope is much more restricted than the power of the court to interfere with an arbitration award. The relevant portion reads as under :

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With reference to the second question arising for our consideration, as we have pointed out earlier, the provision for constitution of the Settlement Commission was not in existence earlier. This legislative step was taken on the recommendation of the Wanchoo Committee. As observed by us earlier, the Settlement Commission was to be constituted for settling the complicated claims of chronic tax evaders as an extraordinary measure, for giving an opportunity to such persons to make true confession and to have the matters settled once for all, and earn peace of mind. It is a Forum for self surrender and seeking relief and not a Forum for challenging the legality of assessment order or orders passed in any other proceedings. This is not only evident from the provision of the Act which prevents the application made, from being withdrawn as also the provision which makes the decision of the

*Settlement Commission final and conclusive both on question of law and fact. The power conferred on the Settlement Commission is so wide that it can take any view on any questions of law, which it considers appropriate, having regard to the facts and circumstances of a case, which would be applicable only to that case and it has also the power to give immunity against prosecution or imposition of penalty. It is in this background we should find out the answer to the second question, namely, the scope for interference against a decision of Settlement Commission in a petition under Article 226 of the Constitution of India. The provision for settlement would show that it is in the nature or statutory arbitration, to which a person may submit himself voluntarily. Therefore, it appears to us that the scope is much more restricted than the power of the Court to interfere with an arbitration award. Regarding the jurisdiction of the Civil Court to deal with an arbitration award, the Supreme Court in the case of **Coimbatore District Podu Thozillar Samgam v. Bala Subramania Foundry, AIR 1987 SC 2045** has stated thus:*

“The Court was also entrusted with the power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which were severable from those referred. The Court had also power to remit, the award when it had left some matters referred undetermined or when the award was indefinite, where the objection to the legality of the award was apparent on the face of the award. The Court might also set aside the award on the ground of corruption or misconduct of the arbitrator, or that a party had been guilty of fraudulent concealment or willful deception. But the Court could not interfere with the award if otherwise proper on the ground that the decision appeared to it to be erroneous. The award of the arbitrator was ordinarily final and conclusive, unless a contrary intention was disclosed by the agreement. The award was the decision of a domestic Tribunal chosen by the parties, and the Civil Courts which were entrusted with the power to facilitate arbitration and to effectuate the awards, could not exercise appellate powers over the decision. Wrong or right the decision was binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. This Court reiterated in the said decision that it was now firmly established that an award was bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there was found some legal proposition which was the basis of the award and which was erroneous.”

In our opinion, many of the grounds on which arbitration award could be set aside, would not be available in view of the nature and jurisdiction of the Settlement Commission. We are of the view that a decision of Settlement Commission could be interfered with only :

(i) if grave procedural defect such as violation of the mandatory procedural requirements of the provisions in the Chapter XIX-A and/or violation of Rules of natural justice is made out;

(ii) if it is found that there is no nexus between the reasons given and the decision taken by the Settlement Commission.

(iii) this Court cannot interfere either with an error of fact or error of law, alleged to have been committed by the Settlement Commission.

We answer the second question accordingly.

As far as the present case is concerned, there is neither violation of any mandatory procedure prescribed under any of the Sections of Chapter XIXA of the Act nor any violation of any of the Rules of natural justice. Further, it cannot be said that the reasons assigned by the Settlement Commission for rejecting the relief sought for, by the petitioner, have no nexus to the decision taken.

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(emphasis supplied)

14. In *Brij Lal And Others* (supra) the Hon'ble Apex Court held that Chapter XIX-A contemplates taxability determined with respect to undisclosed income only by the process of settlement/arbitration and the nature of orders under Sections 143(1), 143(3) and 144 of the Act relating to process of assessment is different from the orders of the Settlement Commission under Section 245D(4) of the Act. Paragraph No.13 of the said judgment reads as under :

13. XXXXXXXXXXXX

Moreover, as stated above, under the Act, there is a difference between assessment in law (regular assessment or assessment under Section 143(1)) and assessment by settlement under Chapter XIX-A. The order under Section 245D(4) is not an order of regular assessment. It is neither an order under Section 143(1) or 143(3) or 144. Under Sections 139 to 158, the process of assessment involves the filing of the return under Section 139 or under Section 142; inquiry by the Assessing Officer under Sections 142 and 143 and making of the order of assessment by the Assessing Officer under Section 143(3) or under Section 144 and issuing of notice of demand under Section 156 on the basis of the assessment order. The making of the order of assessment is an integral part of the process of assessment. No such steps are required to be followed in the case of proceedings under Chapter XIX-A. The said Chapter contemplates the taxability determined

with respect to undisclosed income only by the process of settlement/arbitration. Thus, the nature of the orders under Sections 143(1), 143(3) and 144 is different from the orders of the Settlement Commission under Section 245D(4).

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(emphasis supplied)

Therefore, Mr. Suresh Kumar's submission that order of the ITSC is like an assessment order is not correct.

15. In *Jyotendrasinhji* (supra) reliance was placed in ***R.B Shreeram Durga Prasad & Fatechand Nursing Das vs. Settlement Commission***⁷ in which the Hon'ble Apex Court held that any challenge to the orders of the Settlement Commission, the court should be concerned with the legality of the procedure followed and not with the validity of the order. The judicial review is concerned not with the decision but with the decision making process.

16. The conspectus of the law therefore would be that the court could not interfere with the order if otherwise proper on the ground that the decision appeared erroneous. Wrong or right decision was binding, if it be reached fairly after giving adequate opportunity to the parties to place their case in the manner provided by the Act. The court should be concerned not with the decision but the decision making process. If grave procedural defect such as violation of the mandatory procedural requirements of the provisions of Chapter XIX-A and/or violation of rules of natural justice is

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made out or if it is found that there is no nexus between the reasons given and the decision taken only then the court may interfere. The court may also interfere if the order of the Commission is contrary to any of the provisions of the Act and that has prejudiced petitioner/appellant. Of course ground of bias, fraud and malice constitute a separate and independent category. The power conferred on the ITSC is so wide that it can take any view on any questions of law, which it considers appropriate, having regard to the facts and circumstances of the case. High Court also ought not to sit in appeal as to the sufficiency of the material and particular placed before the Commission.

17. In view of the law as noted above, let us examine whether the order of the ITSC is contrary to the provisions of the Act on the grounds raised by Revenue on two issues.

18. Claim of deduction under Section 80IB(10) :-

It is Revenue's case that the claim of deduction under Section 80IB(10) of the Act was not examined as per Section 245D(3) of the Act. According to Revenue additional deduction for A.Y. 2009-10 on account of bogus purchases ought to have been Rs.66,92,869/- while such additional deduction is allowed at Rs.87,60,556/-. In our view, the said deduction has been correctly allowed as the difference of Rs.20,67,687/-, (Rs.87,60,556/- (-) Rs.66,92,869/-) represents adhoc disallowances made by the A.O. in the

Assessment Orders for A.Y. 2005-06 to 2008-09. The said disallowance resulted in decrease of work in progress in respect of Vasundhara and Samarpan project for the respective years and corresponding increase in income for A.Y. 2009-10 as the income from the said projects stands reflected during the said year. Revenue has only challenged computation of profit for such deduction which has increased on account of disallowance of expenses by way of bogus purchases and other expenses on Adhoc basis. From the representations filed by Revenue on 23rd November 2002 or under Rule 9 of the Rule on 20th December 2012 or in the submissions dated 1st July 2013 Revenue does not seem to have even asked for examination on issue relating to quantum of deduction to be allowed under Section 80IB(10) which has been raised for the first time in the grounds of the writ petition. Further calling for a report from the Commissioner under Section 245D(3) of the Act is at the discretion of the ITSC.

Section 245D(3) of the Act says the ITSC “may” call for the records from the Principal Commissioner or Commissioner and after examination of such records, if the ITSC is of the opinion that any further enquiry or investigation in the matters 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. It further says the report has to be furnished within 90 days and provided it is not furnished the ITSC may proceed to pass an order without such report. Therefore, calling for the report is solely at the discretion of the ITSC, and as held in

Kotak Mahindra Bank Ltd. (supra), the court should not interfere with an exercise of discretion by the ITSC.

Before alleging non exercise of such powers by the ITSC, in our view Revenue ought to show that it had requested for such an examination to be carried out which we find missing in the case. Not that our view herein would change if it had. The undisputed position is that the projects carried out by assessee at Vasundhara, Samarpan and Country Park III qualified for deduction under Section 80IB(10) of the Act and that disallowance of expenditure by way of bogus purchases and towards business promotion and travelling expenses on Adhoc basis would go to increase the profits of the eligible projects. Further the additional deduction as also noted in the impugned order of Rs.87,60,556/- for A.Y. 2009-10 comprises of additional income of Rs.66,92,869/- arising on account by disallowance of bogus purchases and additional income of Rs.20,67,687/- arising on account of Adhoc disallowance of expenses made by the Revenue for A.Y. 2005-06, 2006-07, 2007-08, 2008-09 in the Assessment Order passed under section 143(3) read with Section 153A of the Act for those years. Detailed working and explanation in respect of the same was already available as a part of the settlement application and submissions made before the ITSC. The issue raised being question of fact as to the quantum of deduction to be allowed under Section 80IB(10) of the Act can never qualify as ground for interference by this court under jurisdiction of Article 226 of the Constitution of India.

19. Capitalization :

According to Revenue, the ITSC, before allowing capitalization of the expenditure incurred by assessee on acquisition of fixed assets by way of civil work, furniture and air conditioning system at its office premises on the 10th floor at Atrium benefits the assessee ought to have conducted an enquiry or investigation on the issue as these factual issues required verification to ascertain whether the amount was spent on the assets as stated, its actual cost, year of purchase, etc.

20. Having considered the reports and submissions made, it does not appear that any such request for verification of these aspects were made by the Revenue in the reports or statements that were filed before the Commission. Moreover, the discretionary power under Section 245D(3) discussed above will apply here also. Further, the Revenue had accepted that the seized diary discloses the correct facts in respect of the cash generated by assessee on account of bogus purchases. In view thereof, Revenue should also accept utilization of such cash as narrated in the said diary/document seized at the time of search. It is assessee's case that assessee has its office on 10th Floor at Atrium and the expenses have been incurred on civil work, furniture and air conditioning system at the said office and the said office premises has been used in the previous year relevant to A.Y. 2011-12. Assessee has been allowed deduction by way of depreciation on the other capital expenditure incurred with respect to the

said office premises. The ITSC has accepted the issue of capitalization of expenditure incurred and granted the relief.

21. As noted earlier assessee was subjected to search and seizure action under Section 132 of the Act on 29th March 2011. In the course of search, the investigation team of the Revenue came across a diary which was seized by them and it showed that assessee had entered into certain transactions of purchases which were alleged to be bogus. The Director of assessee in his statement recorded under Section 132(4) of the Act accepted the total of such bogus purchases at Rs.11,95,41,448/-. The seized diary showed that part of the cash generated by the company from bogus purchases was utilized for the purposes of incurring capital expenditure at its office premises on the 10th Floor in Atrium. Such expenses incurred on civil work, furniture and air conditioning system aggregated to Rs.8,33,53,000/-. Further enquiry or investigation on the utilization of the amount need not be entertained because Revenue has, relying upon the same documents, accepted the fact of generation of cash by way of bogus purchases. Therefore, the manner of utilization of the cash as noted in the seized diary also has to be accepted as correct. This is the position prevailing as per Section 132 (4A) and 292C of the Act which mandates that the contents of seized documents are true.

22. Section 292C (1)(ii) of the Act provides that where any books of account, other documents, money, bullion, jewellery or other valuable

article or thing are or is found in the possession or control of any person in the course of a search it may be presumed that the contents of such books of account and other documents are true. A presumption, as held by the Hon'ble Apex Court in *P. R. Metrani* (supra) followed by Delhi High Court in *Indeo Airways (P) Ltd.* (supra), is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorized to draw a particular inference from a particular fact. "May presume" leaves it to the discretion of the court to make the presumption according to the circumstances of the case. The ITSC had discretion to presume explanation of certain facts based on the seized documents and it exercised its discretion.

23. Since the bogus purchases were offered for tax by making deduction from the work in progress, the corresponding utilization of the cash towards incurring of capital expenditure was treated as an addition to fixed assets eligible for claim of depreciation. Once the contents of the seized diary are accepted to be correct and it is not disputed that assessee is the owner of the office premises on the 10th Floor at Atrium which have been used by it for the purposes of business, then, no further enquiry as suggested in the grounds was required to be carried out. The enquiry under Section 245D(3) of the Act was subjected to discretion of the ITSC as it relates to question of fact and is not amenable to the jurisdiction of this court.

24. As held in *Jyotendrasinhji* (supra), even if the interpretation placed by the ITSC on the documents seized is not correct, it would not be a ground for interference since a wrong interpretation of documents cannot be said to be a violation of the provisions of the Act. Further, as held in *Kotak Mahindra Bank Ltd.* (supra) sufficiency of the material and particulars placed before the Commission based on which the Commission proceeded to pass its orders are beyond the scope of judicial review. The High Court should not also scrutinize order of the ITSC as an appellate court because as held in *Brij Lal And Others* (supra), the orders of the Settlement Commission under Section 245D(4) of the Act is different from the nature of orders under Section 143(1), 143(3) and 144 of the Act.

25. Mr. Suresh Kumar relied on the judgment of the Bombay High Court in *Harish Textile Engrs. Ltd. vs. Deputy Commissioner of Income Tax, Special Range-1*⁸ to buttress his submission that the ITSC should have ordered enquiry on the expenditure incurred by assessee. Said judgment is not applicable to the facts of the case at hand. In *Harish Textile Engrs. Ltd.* (supra) the court came to a finding that the documents found during the course of the search were inchoate and it does not indicate the person to whom payment was made or the address of the recipient or the person by whom the payment was made. The court also observed on facts that even if the presumption is to be applied and the documents are accepted as true, it would not lead to the conclusion that payments have been made in cash so

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as to claim the expenditure. As against that in the case at hand the documents are accepted as true. The Revenue cannot say that it will accept one part of the document but will not accept the other part.

26. In our view, the ITSC was entitled to exercise discretion and has rightly exercised its discretion. We find nothing wrong in the judicial decision making process of the Commission. When the department relies on the seized records for estimating the undisclosed income, we see no reason why the expenditure stated therein should be disbelieved. We find support in *Commissioner of Income Tax vs. P. D. Abraham Alias Appachan And Another*⁹. Moreover there was no justification for doubting the entries found in seized records pertaining to expenditure while accepting the income found recorded therein.

27. In our view, there is neither violation of any mandatory procedure prescribed under any of the sections of Chapter XIX-A of the Act nor any violation of any of the Rules of natural justice. Further, it cannot be said that the reasons assigned by the ITSC for granting relief sought for by assessee have no nexus to the decision taken.

28. As held in *N. Krishnan* (supra), the ITSC is the forum for self surrender and seeking relief and not a forum for challenging the legality of assessment order or orders passed in any other proceedings. This is evident

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from the provisions of the Act because it even prevents the application made from being withdrawn. The power conferred on the settlement commission is so wide that it can take any view on any questions of law, which it considers appropriate having regard to the facts and circumstances of a case including giving immunity against prosecution or imposition of penalty. Therefore, the scope of interference against a decision of the Settlement Commission is very narrow. As observed in *N. Krishnan* (supra), it is in the nature of statutory arbitration to which a person may submit himself voluntarily and the scope of interference is much more restricted than the power of the court to interfere with an arbitration award.

29. Unsettling reasoned orders of the Settlement Commission, as noted by the Hon'ble Apex Court in *Kotak Mahindra Bank Ltd.* (supra), may erode the confidence of bona fide assessee, thereby leading to multiplicity of litigation where settlement is possible and this larger picture has to be borne in mind.

30. Moreover, we also should note that Section 245B(3) of the Act provides that Chairman, Vice Chairman and other members of the Settlement Commission shall be appointed by the Central Government from amongst persons of integrity and outstanding ability, having special knowledge of, and, experience in, problems relating to direct taxes and business accounts. Therefore, the members of the ITSC have been

appointed because of their integrity and outstanding ability and for the special knowledge and experience in problems relating to direct taxes and business accounts. It is rather unfortunate that the Central Government questions the findings of the ITSC without explicitly and in detail explaining how the order of the Commission is contrary to the provision of the Act or there was miscarriage of justice or order has been passed without jurisdiction. More so when bias or fraud or malice is not alleged in the petition against the members of the ITSC. In the case at hand we are not satisfied that the order of the ITSC is contrary to the provisions of the Act. It is rather unfortunate that the Commissioner who has filed the Writ Petition is sitting in appeal over findings of the members of the ITSC.

Chapter XIX-A was inserted to enable an assessee, at any stage of a case relating to him, to make an application containing a full and true disclosure of his income which has not been disclosed before the A.O., the manner in which such income has been derived, the additional tax payable on such income and such other particulars as may be prescribed, to the ITSC to have the case settled. When such an application is made and the ITSC is satisfied that there has been a full and true disclosure, the department cannot raise any grievance. Unless a case of bias or fraud or malice is alleged, not being a bald allegation, but with details, no petition by Revenue impugning an order by the ITSC should be entertained. We say this because the Central Government has appointed the persons who are members of the Commission as they are persons of integrity and outstanding ability, having

special knowledge of, and, experience in, problems relating to direct taxes and business accounts. Or the order impugned must be so perverse that no person would pass such an order, like for e.g., it is said the sun rises in the west. An assessee may have a little more leeway as per the scope prescribed in *Jyotendrasinhji* (supra).

31. As observed by the Hon'ble Apex Court in *Kotak Mahindra Bank Ltd.* (supra), interference with the orders of the ITSC should be avoided, keeping in mind the legislative intent. The scope of interference is very narrow and certainly the High Court should not scrutinize an order of the ITSC as an appellate court. Unsettling reasoned orders of the ITSC may erode the confidence of assessees. This larger picture has to be kept in mind.

32. In the circumstances, Rule discharged. Petition dismissed with no order as to costs.

(DR. NEELA GOKHALE, J.)

(K.R. SHRIRAM, J.)