

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.01.2016

+ **W.P.(C) 2927/2013**

AGSON GLOBAL PVT LTD & ORS

... Petitioners

versus

**INCOME TAX SETTLEMENT
COMMISSION AND ORS**

... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr M. S. Syali, Sr Advocate with Ms Gayatri Verma,
Ms Husnal Syali, Mr Mayank Nagi and Mr Harkunal Singh

For the Respondents : Ms Suruchi Aggarwal, Adv. with Ms Lakshmi Gurung,
Ms Radhika Gupta and Mr Abhishek Sharma

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V. KAMESWAR RAO

JUDGMENT

BADAR DURREZ AHMED, J

1. The only issue which arises for consideration in this writ petition is whether the income tax settlement commission has the power to direct a special audit under section 142 (2A) in exercise of its power vested in section 245F of the Income Tax Act, 1961 (hereinafter referred to as "the said act")?

2. Petitioner Nos. 1 to 7 filed a settlement application before the income tax settlement commission, New Delhi under the provisions of chapter XIX-A of the said act on 12.12.2011. Thereafter, on 22.12.2011 petitioner nos. 8 to 10 filed their settlement application before the said income tax settlement commission. On 22.12.2011, the principal bench of the said settlement commission passed an order under section 245D (1) of the said act admitting the application made by petitioner nos. 1 to 7 for settlement before it. Similarly, on 28.12.2011, the principal bench of the income tax settlement commission passed an order under section 245D (1) of the said act admitting the applications made by petitioner nos. 8 to 10 for settlement before it. On 21.06.2012, the Commissioner of income tax, Delhi furnished his consolidated report as required by the income tax settlement commission. The petitioners submitted their reply to the said consolidated report on 10.09.2012. As required by the settlement commission, the petitioners submitted their consolidated profit and loss account and balance sheets for the assessment year's 2004-05 to 2011-12 before the assessing officer (Asst Commissioner of income tax, central circle 23, Jhandewalans, New Delhi).

3. The Commissioner of income tax submitted a supplementary report dated 05.12.2012 in which he noted that after examining the accounts submitted by the petitioners, the assessing officer was of the opinion that the accounts were very complex in nature and that the same ought to be audited under section 142 (2A) of the said act *for determining the correct income* of the petitioner group. The Commissioner indicated that he was also of the opinion that owing to the complexity in the maintenance of accounts, to arrive at the correct income of the assessee group for all the assessment years for which settlement applications have been filed and admitted by the settlement commission, the accounts of the assessee group are required to be audited under section 142 (2A) of the said act. The settlement commission was therefore requested to direct a special audit of the accounts of the assessee group.

4. After considering the material on record, including the supplementary report dated 05.12.2012 requesting for a special audit under section 142 (2A), the settlement commission sent a letter dated 17.04.2012 to the petitioners providing them an opportunity of being heard as to why their accounts should not be subjected to the said special audit. Arguments were heard on this aspect by the settlement commission on 25.04.2013. It

was *inter alia* argued on behalf of the petitioners that a special audit under section 142 (2A) of the said act could only be directed at the stage of assessment and cannot be conducted in the course of settlement proceedings. This argument was rejected by the settlement commission in the following manner: –

“(V) The powers of the settlement commission u/s 245F (2) entail exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority. This, in our view, includes the powers to direct audit u/s 142 (2A). The contention of the applicants that Sec 142(2A) can be conducted only in assessment proceedings and not settlement proceedings under chapter XIX – A, is misplaced. Accepting such a contention will render the provisions of section 245F (2) otiose. We therefore reject this contention.”

5. The settlement commission was of the view that the accounts were complex and that it was in the interest of the revenue that the special audit be ordered. Consequently, by virtue of the impugned order dated 26.04.2013, the settlement commission directed that the special audit be carried out. Being aggrieved by this, the petitioners have filed the present petition seeking the quashing of the impugned order dated 26.04.2013.

6. On behalf of the petitioners it was argued that there is a clear distinction between a settlement and an assessment. The procedure for

assessment is provided in chapter XIV of the said act. On the other hand the procedure for settlement of cases is set out in chapter XIX-A of the said act. The requirement of a special audit is spelt out in section 142 (2A) of the said act which falls within the ambit of inquiry before assessment. It was contended that the proceedings under chapter XIX-A are entirely different from assessment proceedings and, therefore, the settlement commission which is concerned with settlement of cases would not have the jurisdiction to direct a special audit. It was also contended that merely because section 245F confers powers on the settlement commission which are vested in an income tax authority, does not mean that all the powers of an income tax authority under the said act vest in the income tax settlement commission. It was submitted that the powers conferred under section 245F ought to be construed keeping in mind the distinction between an assessment and a settlement. Reliance was placed on the following decisions:

- (1) **CIT v. Om Prakash Mittal: (2005) 2 SCC 751;**
- (2) **Brij Lal & Ors v. CIT, Jalandhar: (2011) 1 SCC 1;**
- (3) **Picasso Overseas & Ors v. DGRI: WPC 1495/2007: decided on 03.08.2009;**

- (4) *Ashwani Tobacco Pvt. Ltd v. Union of India: WPC 9104/2009 decided on 29.01.2010;*
- (5) *Union of India v. Dharampal & Ors.: WPC 4376/2012 decided on 27.09.2013; and*
- (6) *Director General of Central Excise Intelligence v. Murarilal Harishchandra Jaiswal Pvt. Ltd: (2010) 172 DLT 593 (DB).*

7. The learned counsel for the revenue supported the view taken by the income tax settlement commission. It was contended that the settlement commission by virtue of the provisions of section 245F of the said act acquires exclusive jurisdiction in respect of a case when an application under section 245C is made before it and such jurisdiction comes to an end if an order under section 245D(1) is made whereby the settlement application is not proceeded with or, where the application is proceeded with, till the order is passed under section 245D (4). It was submitted that in respect of matters covered by the settlement application and all proceedings incidental thereto, the settlement commission has exclusive jurisdiction with regard to adjudication, orders and directions. It was also submitted, on the strength of *Brij Lal (supra)*, that the filing of an application before the settlement commission is akin to the filing of a return before the assessing authority under section 139 of the said act. It was submitted that the

settlement commission has to determine the income as is done by the assessing officer under section 143(3) of the said act. Thus, according to the learned counsel for the revenue, just as the assessing officer has a right to make any enquiry for proper assessment and can direct a special audit having regard to the nature and complexity of the accounts and keeping in mind the interest of the revenue, the settlement commission, which also has to determine the total income and thereby make an assessment, can, when it has exclusive jurisdiction over the case, certainly direct that a special audit be carried out. Reliance was also placed on the following decisions: –

- (1) *CIT v. Express Newspapers Limited: (1994) 206 ITR 443 (SC);*
- (2) *Parag Nivesh Private Limited v. DCIT: (1999) 240 ITR 419 (Cal).*

8. The relevant provisions of the said act are set out hereunder:

A. Section 142 {in Chapter XIV: Procedure for Assessment} as it stood on the date of the impugned order:

“142. Enquiry before assessment.—(1) For the purpose of making an assessment under this Act, the Assessing Officer may serve on any person who has made a return under Section 115-WD or Section 139 or in whose case the time allowed under sub-section (1) of Section 139 for furnishing the return has expired a notice requiring him, on a date to be therein specified,—

- (i) where such person has not made a return within the time allowed under sub-section (1) of Section 139 or

before the end of the relevant assessment year, to furnish a return of his income or the income of any other person in respect of which he is assessable under this Act, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, or:

Provided that where any notice has been served under this sub-section for the purposes of this clause after the end of the relevant assessment year commencing on or after the 1st day of April, 1990 to a person who has not made a return within the time allowed under sub-section (1) of Section 139 or before the end of the relevant assessment year, any such notice issued to him shall be deemed to have been served in accordance with the provisions of this sub-section.

(ii) to produce, or cause to be produced, such accounts or documents as the Assessing Officer may require, or

(iii) to furnish in writing and verified in the prescribed manner information in such form and on such points or matters (including a statement of all assets and liabilities of the assessee, whether included in the accounts or not) as the Assessing Officer may require:

Provided that—

(a) the previous approval of the Joint Commissioner shall be obtained before requiring the assessee to furnish a statement of all assets and liabilities not included in the accounts;

(b) the Assessing Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

(2) For the purpose of obtaining full information in respect of the income or loss of any person, the Assessing Officer may make such enquiry as he considers necessary.

(2-A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of Section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Assessing Officer may require:

Provided that the Assessing Officer shall not direct the assessee to get the accounts so audited unless the assessee has been given a reasonable opportunity of being heard.

XXXX XXXX XXXX XXXX XXXX”

(underlining added)

B. Provisions of Chapter XIX-A {Settlement of Cases}:

“245-A. Definitions.—In this Chapter, unless the context otherwise requires,—

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(b) “case” means any proceeding for assessment under this Act, of any person in respect of any assessment year or assessment years which may be pending before an Assessing Officer on the date on which an application under sub-section (1) of Section 245-C is made:

Provided that—

(i) a proceeding for assessment or reassessment or recomputation under Section 147;

(ii) [* * *]

(iii) [* * *]

(iv) a proceeding for making fresh assessment in pursuance of an order under Section 254 or Section 263 or Section 264, setting aside or cancelling an assessment,

shall not be a proceeding for assessment for the purposes of this clause.

Explanation.—For the purposes of this clause—

(i) a proceeding for assessment or reassessment or recomputation referred to in clause (i) of the proviso shall be deemed to have commenced from the date on which a notice under Section 148 is issued;

(ii) [* * *];

(iii) a proceeding for making fresh assessment referred to in clause (iv) of the proviso shall be deemed to have commenced from the date on which the order under Section 254 or Section 263 or Section 264, setting aside or cancelling an assessment was passed;

(iii-a) a proceeding for assessment or reassessment for any of the assessment years, referred to in clause (b) of sub-section (1) of Section 153-A in case of a person referred to in Section 153-A or Section 153-C, shall be deemed to have commenced on the date of issue of notice initiating such proceedings and concluded on the date on which the assessment is made;

(iv) a proceeding for assessment for any assessment year, other than the proceedings of assessment or reassessment referred to in clause (i) or clause (iv) of the proviso or clause (iii-a) of the Explanation], shall be deemed to have commenced from the 1st day of the assessment year and concluded on the date on which the assessment is made;

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“245-C. 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 153-A or clause (b) of sub-section (1) of Section 153-B in case of a person referred to in Section 153-A or Section 153-C have been initiated, the additional amount of Income Tax payable on the income disclosed in the application exceeds fifty lakh rupees,

(i-a) 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 153-A or clause (b) of sub-section (1) of Section 153-B in case of the applicant, being a person referred to in Section 153-A or Section 153-C, 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 (i-a),—

(a) the applicant, in relation to the specified person referred to in clause (i-a), 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, on the date of search, 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, on the date of search, beneficially entitled to not less than twenty per cent of the profits of such business or profession.

(1-A) For the purposes of sub-section (1) of this section, the additional amount of income tax payable in respect of the income disclosed in an application made under sub-section (1) of this section shall be the amount calculated in accordance with the provisions of sub-sections (1-B) to (1-D).

(1-B) Where the income disclosed in the application relates to only one previous year,—

(i) if the applicant has not furnished a return in respect of the total income of that year, then, tax shall be calculated on the income disclosed in the application as if such income were the total income;

(ii) if the applicant has furnished a return in respect of the total income of that year, tax shall be calculated on the aggregate of the total income returned and the income disclosed in the application as if such aggregate were the total income.

(1-C) The additional amount of income tax payable in respect of the income disclosed in the application relating to the previous year referred to in sub-section (1-B) shall be,—

(a) in a case referred to in clause (i) of that sub-section, the amount of tax calculated under that clause;

(b) in a case referred to in clause (ii) of that sub-section, the amount of tax calculated under that clause as reduced by the amount of tax calculated on the total income returned for that year;

(c) [* * *]

(1-D) Where the income disclosed in the application relates to more than one previous year, the additional amount of income tax payable in respect of the income disclosed for each of the years shall first be calculated in accordance with the provisions of sub-sections (1-B) and (1-C) and the aggregate of the amount so arrived at in respect of each of the years for which the application has been made under sub-section (1) shall be the additional amount of income tax payable in respect of the income disclosed in the application.

(2) Every application made under sub-section (1) shall be accompanied by such fees as may be prescribed.

(3) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

(4) An assessee shall, on the date on which he makes an application under sub-section (1) to the Settlement Commission, also intimate the Assessing Officer in the prescribed manner of having made such application to the said Commission.”

“245-D. Procedure on receipt of an application under Section 245-C.— (1) On receipt of an application under Section 245-C, 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 Commissioner.

(2-A) Where an application was made under Section 245-C 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 application 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).

(2-B) 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 (2-A) 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 Commissioner, and the 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 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 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 Commissioner has not furnished the report within the aforesaid period, the Settlement Commission shall proceed further in the matter without the report of the 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 Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and

any other matter relating to the case, and the Commissioner shall furnish the report within a period of ninety days of the receipt of communication from the Settlement Commission:

Provided that where the 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 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 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.

(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 ⁵[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.

(6-B) The Settlement Commission may, at any time within a period of six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (4):

Provided that an amendment which has the effect of modifying the liability of the applicant shall not be made under this sub-section unless the Settlement Commission has given notice to the applicant and the Commissioner of its intention to do so and has allowed the applicant and the Commissioner an opportunity of being heard.

(7) Where a settlement becomes void as provided under sub-section (6), the proceedings with respect to the matters covered

by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission and the income tax authority concerned, may, notwithstanding anything contained in any other provision of this Act, complete such proceedings at any time before the expiry of two years from the end of the financial year in which the settlement became void.

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

“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.

(3) Notwithstanding anything contained in sub-section (2) and in the absence of any express direction to the contrary by the Settlement Commission, nothing contained in this section shall affect the operation of any other provision of this Act requiring the applicant to pay tax on the basis of self-assessment in relation to the matters before the Settlement Commission.

(4) For the removal of doubts, it is hereby declared that, in the absence of any express direction by the Settlement Commission to the contrary, nothing in this Chapter shall affect the operation of the provisions of this Act in so far as they relate to any matters other than those before the Settlement Commission.

(5) [Omitted]

(6) [Omitted]

(7) The Settlement Commission shall, subject to the provisions of this Chapter, have power to regulate its own procedure and the procedure of Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its functions, including the places at which the Benches shall hold their sittings.”

9. On examining the provisions of section 142, it is evident that it is part of Chapter XIV which specifically details the procedure for

assessment. The said provision relates to the enquiry before assessment. It is specifically for the purpose of making an assessment under the said act. Sub-section (2A) stipulates that if at any stage of the proceedings before him, the assessing officer, having regard to the nature and complexity of the accounts of the assessee and the interest of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner of Commissioner, direct the assessee to get the accounts audited by an accountant as prescribed under the said act and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the assessing officer may require. It is obvious that the expression “at any stage of the proceedings before him” has clear reference to the assessment proceedings. Thus, the assessing officer, subject to the pre-conditions set out in the said provision, could require a special audit to be conducted but this is with the sole and ultimate object of making an assessment under the said act. The language employed in section 142 clearly indicates that the steps, including that of special audit, taken thereunder are part and parcel of the assessment proceedings with the object and purpose of enabling the assessment to be made under the said act by the assessing officer.

10. We shall now examine the provisions pertaining to settlement of cases. These provisions have been examined in detail in *Commissioner of Income Tax v. Income Tax Settlement Commission & Ors.* *MANU/DE/1816/2013* [= [2014]360ITR407(Delhi)] and it would be apposite to reproduce the same: –

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

7. Section 245D of the said Act sets out the procedure which is to be adopted by the Settlement Commission on receipt of an application under Section 245C. Section 245D(1) stipulates that on receipt of an application under Section 245C, the Settlement Commission is required to, within seven days from the date of receipt of the application, issue a notice to the applicant requiring him to explain as to why the application made by him be allowed to be proceeded with. Thereafter on hearing the applicant, the Settlement Commission is required to, within a period of 14 days from the date of the application, by an order in writing, reject the application or allow the application to be

proceeded with. The proviso to Section 245D(1) stipulates that where no order is passed within the above mentioned period by the Settlement Commission, either allowing the application or rejecting the application, the application shall be deemed to have been allowed to be proceeded with.

8. Sub-section (2B) of Section 245D of the said Act stipulates that the Settlement Commission shall call for a report from the Commissioner and the Commissioner shall furnish the said report within 30 days of receipt of the communication from the Settlement Commission. Section 245D(2C) of the said Act prescribes that where a report of the Commissioner, which has been called for under sub-section (2B), has been furnished within the specified period, the Settlement Commission may, on the basis of the report and within a period of 15 days of receipt of the report, by an order in writing, declare the application in question as invalid and in such eventuality, the Settlement Commission is enjoined to send a copy of such order to the applicant and the Commissioner. The first proviso to Section 245D (2C) ensures that an application shall not be declared invalid by the Settlement Commission unless an opportunity has been given to the applicant of being heard. The second proviso thereto stipulates that where the Commissioner has not furnished the report within the specified period, the Settlement Commission is enjoined to proceed further in the matter without the report of the Commissioner.

9. Under Section 245D(3), the Settlement Commission, inter alia, in respect of an application which has not been declared invalid under Section 245D(2C) of the said Act may call for the records from the Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made such further enquiry or investigation and to furnish a report on the matters covered by the application and any other matter relating to the case. The Commissioner is required to furnish the report within a period of 90 days of receipt of the communication from the Settlement Commission. It is further provided that where the

Commissioner does not furnish a report within the said period of 90 days, the Settlement Commission may proceed to pass an order under sub-section (4) without such report.

10. Under Section 245D(4) of the said Act, the Settlement Commission, after examination of the records and the report of the Commissioner, if any, received under, inter alia, sub-section (2B) or subsection (3) and after giving an opportunity to the applicant as also to the Commissioner to be heard, may pass such order as it thinks, in accordance with the provisions of the said Act, on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the Commissioner.

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

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

245D(2C) and finally by the order passed under Section 245D(4).....

13., it would also be appropriate if we refer to the provisions of Section 245F of the said Act. The said section deals with the powers and procedures of the Settlement Commission. Sub-section (1) stipulates that in addition to the powers conferred on the Settlement Commission under the said Act, it would also have all the powers which are vested in an income tax authority under the said Act. Sub-section (2) of Section 245F further stipulates that where an application under Section 245C has been allowed to be proceeded with under Section 245D, the Settlement Commission shall, until an order is passed under sub-section (4) of Section 245D, have, subject to the provisions of sub-section (3) of that section, exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the said Act in relation to the case. We must also notice the proviso to Section 245F(2) which makes it clear that where an application has been made under Section 245C on or after the first day of June, 2007, the Settlement Commission shall have exclusive jurisdiction from the date on which the application was made.....

14. For the sake of completeness, it would also be appropriate for us to refer to the second proviso to Section 245F(2) of the said Act which, inter alia, makes it clear that where an application which has been made on or after the first day of June, 2007 is rejected under Section 245D(1) or is declared invalid under Section 245D(2C), the Settlement Commission, inspite of such an application, would have exclusive jurisdiction upto the date on which the application is rejected or declared invalid as the case may be.

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27. It is clear that disclosure of "full and true" particulars of undisclosed income and "the manner" in which such income had been derived are the prerequisites for a valid application under Section 245-C(1) of the Act. Additionally, the amount of income tax payable on such undisclosed income is to be computed and

mentioned in the application. It needs little emphasis that Section 245C-(1) of the Act mandates "full and true" disclosure of the particulars of undisclosed income and "the manner" in which such income was derived and, therefore, unless the Settlement Commission records its satisfaction on this aspect, it will not have the jurisdiction to pass any order on the matter covered by the application."

11. Section 245F of the said act calls for closer scrutiny as that is the provision which has been invoked by the settlement commission as also the learned counsel for the revenue for supporting the order with regard to the conducting of a special audit. Sub-section (1) of section 245F stipulates that in addition to the powers conferred on the settlement commission under chapter XIX – A, it shall have all the powers which are vested in an income tax authority under the said act. But, in our view, this has to be read in the context of and the scope of settlement proceedings. It does not entail that the powers of regular assessment which are vested in an income tax authority can be exercised by the settlement commission. What we mean to say is that the settlement commission does not engage itself in the process of assessment and cannot make an assessment order. The order that the settlement commission makes under section 245D(4) is not in the nature of an assessment but by way of a settlement and contains the terms of settlement. Thus, we reiterate that the powers which are vested in an

income tax authority and could be exercised by the settlement commission are such which have a nexus with the settlement proceedings which does not include, in our view, the making of an assessment under the said act.

12. Coming now to sub-section (2) of section 245F of the said act read with the first proviso thereto, it is thus clear that where an application has been made under section 245C on or after the first day of June, 2007 (which is the case at hand), the settlement commission shall until an order is passed under sub-section (4) of section 245D, have, subject to the provisions of sub-section (3) of section 245D, exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the said act in relation to the case from the date on which the application was made. In our view, the exclusivity of jurisdiction which is contemplated by the said provision is that once an application for settlement is made before the settlement commission, no income tax authority would have jurisdiction to deal with the case. It does not mean that the settlement commission from that date steps into the shoes of the income tax authority who was hitherto dealing with the case. To be clear, let us take an example. Let us assume that assessment proceedings are underway before an assessing officer. At that point of time, the assessee files a settlement application before the

settlement commission. In view of the provisions of Section 245F, from that date onwards the settlement commission would have exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority under the said act in relation to the case. Does it mean that the settlement commission could continue with the assessment proceedings which were before the assessing officer and pass an assessment order under section 143(3) by way of regular assessment as an assessing officer would have done? We do not think so. The settlement commission does not carry out the function of assessment and does not make an assessment order. It settles the case in terms of the provisions contained in chapter XIX-A of the said act. Therefore, the exclusivity of jurisdiction stipulated in section 245F entails two things: (1) that from the point of time of filing of the settlement application, no income tax authority can exercise jurisdiction over the case and it is only the settlement commission which could exercise such jurisdiction; (2) the powers and functions of the income tax authority which can exclusively be exercised by the settlement commission must have a nexus with the settlement proceedings before it.

13. We also note that the exclusive jurisdiction of the settlement commission in terms of sub-section (2) of section 245F of the said act is

subject to the provisions of section 245D(3) of the said act. That provision entails that the settlement commission, in respect of, inter alia, an application which has not been declared invalid under section 245D(2C), may call for the records from the Commissioner and after examination of such records, if the settlement commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case. Thus, the only income tax authority who is permitted some jurisdiction in the matter is the Commissioner, who, when called upon by the Settlement Commission, is enjoined 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.

14. It is, therefore, clear that the powers and functions of an income tax authority which are to be exclusively exercised by the settlement commission (subject to the provisions of section 245D (3)) must be in the context of and have a nexus with the settlement proceedings. That being the case, since the requirement of a special audit falls under the procedure for

assessment which is distinct and different from settlement proceedings, the settlement commission would not, in our view, have jurisdiction to direct a special audit as it does not have any nexus with the settlement proceedings. All that the settlement commission is required to do in the course of the settlement proceedings is to ensure that the assessee who has made the application for settlement of his case has inter-alia made a full and true declaration of his hitherto undisclosed income and the manner in which it was derived. The method of computation of the tax liability of the applicant is set out in section 245C and in particular in sub-sections (1A) to (1D) thereof. If the settlement commission is of the view that an assessee has not made a full and true declaration of the undisclosed income then the application is liable to be rejected. In other words, if the accounts put forth by the assessee before the settlement commission are found by the settlement commission on the basis of the available records and/or the reports of the Commissioner to be neither full nor true then the only option available with the settlement commission is to reject the application for settlement and relegate the assessee to the normal provisions of assessment under the said act. The settlement commission cannot, by itself, enter upon an assessment and step into the shoes of an assessing officer for the purposes of making an assessment.

15. Let us now examine the decisions cited at the bar. In *CIT v. Om*

Prakash Mittal: (2005) 2 SCC 751 the Supreme Court observed as under:

“13. Section 245-F dealing with powers and procedure of the Settlement Commission provides that in addition to the powers conferred on the Settlement Commission under Chapter XIX-A, it has all the powers which are vested in the Income Tax Authority under the Act. Sub-section (2) is of vital importance and provides that where an application made under Section 245-C has been allowed to be proceeded with under Section 245-D, the Commission shall until an order is passed under sub-section (4) of Section 245-D, subject to the provisions of sub-section (3) of that section, have exclusive jurisdiction to exercise the powers and perform the functions of the Income Tax Authority under the Act in relation to the case. In essence, the Commission assumes jurisdiction to deal with the matter after it decides to proceed with the application¹ and continues to have the jurisdiction till it makes an order under Section 245-D. Section 245-D(4) is the charging section and sub-section (6) prescribes the modalities to be adopted to give effect to the order. **It has to be noted that the language used in Section 245-D is “order” and not “assessment”. The order is not described as the original assessment or regular assessment or reassessment. In that sense, the Commission exercises a plenary jurisdiction.**”

(emphasis supplied)

16. In *Brij Lal v. CIT: (2011) 1 SCC 1*, the Supreme Court held:

“23. **Descriptively, it can be stated that assessment in law is different from assessment by way of settlement.** If one reads Section 245-D(6) with Section 245-I, it becomes clear that every order of settlement passed under Section 245-D(4) shall be final and conclusive as to the matters contained therein and that the same shall not be reopened except in the case of fraud and misrepresentation. Under Section 245-F(1), in addition to the

¹ Now, the exclusive jurisdiction is from the date on which the application is made.

powers conferred on the Settlement Commission under Chapter XIX-A, it shall also have all the powers which are vested in the Income Tax Authority under the Act. **In this connection, however, we need to keep in mind the difference between “procedure for assessment” under Chapter XIV and “procedure for settlement” under Chapter XIX-A (see Section 245-D).** Under Section 245-F(4), it is clarified that nothing in Chapter XIX-A shall affect the operation of any other provision of the Act requiring the applicant to pay tax on the basis of self-assessment in relation to matters before the Settlement Commission.

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39. 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 245-D(4) is not an order of regular assessment. It is neither an order under Section 143(1) or Section 143(3) or Section 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 AO under Sections 142 and 143 and making of the order of assessment by the AO 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 245-D(4).

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44. As stated, proceedings before the Settlement Commission are similar to arbitration proceedings. It contemplates assessment by settlement and not by way of

regular assessment or assessment under Section 143(1) or under Section 143(3) or under Section 144 of the Act. In that sense, it is a code by itself. It does not begin with the filing of the return but by filing the application for settlement. As stated above, under the Act, the procedure for assessment falls in Chapter XIV (in which Section 154 falls) which is different from the procedure for settlement in Chapter XIX-A in which Sections 245-C and 245-D fall. Provision for levy of interest for default in payment of advance tax under Section 234-B falls in Chapter XVII (Section F) which deals with collection and recovery of tax which as stated above is incidental to the liability to pay advance tax under Section 207 (which is also in Chapter XVII) and to the computation of total income in the manner indicated under Chapter XIX-A vide Sections 245-C(1-B) and 245-C(1-C) read with the provisos to Section 245-C(1) on the additional income tax payable on the undisclosed income.”
(emphasis supplied)

17. The Supreme Court, in *Brij Lal (supra)*, made a clear distinction between assessment in law (regular assessment under Chapter XIV) and “assessment” by way of settlement. It clearly held that there is a difference between “procedure for assessment” under Chapter XIV and “procedure for settlement” under Chapter XIX-A. In fact, it reiterated that under the said Act, there is a clear difference between ‘assessment in law’ [regular assessment or assessment under Section 143(1)] and ‘assessment by settlement’ under Chapter XIX-A. It also held categorically that an order of settlement under Section 245D(4) is not an order of regular assessment nor is it an order under Section 143(1) or Section 143(3) or Section 144. What

is of importance is that the Supreme Court held that the making of an order of assessment is an integral part of the process of assessment. Meaning thereby that if the proceedings do not culminate in an assessment order the same cannot be regarded as assessment proceedings. In the case of proceedings under Chapter XIX-A there is no provision for an assessment order and the said chapter only contemplates the taxability determined with respect to undisclosed income by the process of settlement/arbitration. Elaborating on this aspect, the Supreme Court held that the Chapter XIX-A provisions contemplate assessment by settlement and not by way of regular assessment or assessment under Section 143(1) or under Section 143(3) or under Section 144 of the Act and that the said Chapter XIX-A is a code by itself.

18. Since the learned counsel for the revenue placed reliance on paragraphs 25 to 27 of the decision in *Brij Lal (supra)* it would be appropriate to consider the same. The said paragraphs are as under:

“25. Our detailed analysis shows that though Chapter XIX-A is a self-contained code, the procedure to be followed by the Settlement Commission under Sections 245-C and 245-D in the matter of computation of undisclosed income; in the matter of computation of additional income tax payable on such income with interest thereon; **the filing of settlement application indicating the amount of income returned in the return of income and the additional income tax payable on the**

undisclosed income to be aggregated as total income shows that Chapter XIX-A indicates aggregation of incomes so as to constitute total income which indicates that the special procedure under Chapter XIX-A has an in-built mechanism of computing total income which is nothing but assessment (computation of total income).

26. To elaborate, under Section 245-C(1-B), if the applicant has furnished a return in respect of his total income, tax shall be calculated on the aggregate of total income returned and the income disclosed in the settlement application as if such aggregate were total income. Under the Act, tax is payable on the total income as computed in accordance with the provisions of the Act. Thus, Section 143(3) provision is sought to be incorporated in Section 245-C. **When Parliament uses the words “as if such aggregate would constitute total income”, it presupposes that under the special procedure the aggregation of the returned income plus income disclosed would result in computation of total income which is the basis for the levy of tax on the undisclosed income which is nothing but “assessment”.** Similarly, Section 245-C(1-C) provides for deductions from the total income computed in terms of Section 245-C(1-B).

27. **Thus, the special procedure under Sections 245-C and 245-D in Chapter XIX-A shows that a special type of computation of total income is engrafted in the said provisions which is nothing but assessment which takes place at Section 245-D(1) stage.** However, in that computation, one finds that provisions dealing with a regular assessment, self-assessment and levy and computation of interest for default in payment of advance tax, etc. are engrafted. [See Sections 245-C(1-B), 245-C(1-C), 245-D(6), 245-F(3) in addition to Sections 215(3), 234-A(4) and 234-B(4).]”

(emphasis supplied)

19. On the strength of the observations quoted above it was contended by the learned counsel for the revenue that the proceedings under Chapter

XIX-A also entail assessment. The corollary to this being that the direction for the conducting of a special audit was legitimate. We cannot agree with this contention of the learned counsel for the revenue. Wherever the Supreme Court spoke of assessment in the context of settlement proceedings under Chapter XIX-A, it qualified it by using the expression “computation of income” (which has necessarily to be done by aggregating the disclosed and undisclosed income) and more particularly the expression – “*a special type of computation of total income*”. In any event, as pointed out above, the Supreme Court held that the Chapter XIX-A provisions contemplate assessment by settlement and not by way of regular assessment under section 143(3) or ‘assessment’ under Section 143(1) or under Section 144 of the Act and that the said Chapter XIX-A is a code by itself.

20. In view of the above analysis, we need not examine the decisions in *Picasso Overseas (supra)*, *Ashwani Tobacco (supra)*, *Dharampal (supra)* and *Murarilal Harishchandra Jaiswal (supra)*, which, though they support the contentions on behalf of the petitioners, have been rendered either under the Central Excise Act, 1944 or the Customs Act, 1962. We may, however, notice the decision of a division bench of the Madras High Court in *Canara*

Jewellers v. Settlement Commission: [2009] 315 ITR 328 (Madras), in

which it was held that:-

“11. So far as section 245F is concerned, though the Settlement Commission is empowered to have all powers which are vested in an income-tax authority under the Act, in addition to the power conferred under Chapter XIX-A, but such power can be exercised for the purpose of procedure of settlement of application under section 245C and not for reassessment of tax of a particular year which is vested with the assessing authority.”

21. We have already expressed a similar view above. The exclusive jurisdiction of the settlement commission to exercise the powers and perform the functions of an income tax authority, in terms of section 245F(2) of the said Act, is to be exercised and performed for the purpose of settlement of the case under Chapter XIX-A and not for assessment under Chapter XIV. That being the case, the powers and functions which are in the exclusive jurisdiction of the settlement commission are circumscribed by the object and role which has been ascribed to the settlement commission, which is to settle the case in terms of the procedure stipulated in Chapter XIX-A. Since assessment of the type contemplated under section 143(3) is outside the purview of settlement proceedings, a special audit under section 142(2A), which is in aid of assessment, would also be beyond the scope of settlement proceedings. The other decisions referred

to by the learned counsel for the revenue do not militate against the view we have taken.

22. In sum, we hold that the income tax settlement commission does not have the power to direct a special audit under section 142(2A) in the course of settlement proceedings under Chapter XIX-A of the said Act. Consequently, the impugned order dated 26.04.2013, to the extent it directs the conduct of a special audit, is quashed. The matter be placed before the settlement commission for further consideration of the petitioners' settlement applications in accordance with the prescribed procedure under Chapter XIX-A. The writ petition is allowed to the aforesaid extent. We are making it clear that we have not commented upon the merits of the settlement applications. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

JANUARY 06, 2016
HJ

V. KAMESWAR RAO, J