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IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 20th DAY OF MAY, 2010

BEFORE

THE HON'BLE MR. JUSTICE H.N. NAGAMOHAN DAS

W.P.No.12239/2008(T-IT)

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
BANGALORE-I, BANGALORE
I FLOOR, C.R.BUILDINGS,
BANGALORE-560 001.

2. THE UNION OF INDIA
MINISTRY OF FINANCE
REP. BY REVENUE SECRETARY
DEPARTMENT OF REVENUE
NEW DELHI.

..PETITIONERS

(By Sri.DR.R.B.KRISHNA, ADV. FOR P1
SRI M.V.SESHACHALA, ADV. FOR P2)

AND:

1. THE VYSYA BANK LTD.,
(NOW ING-VYSYA)
A SCHEDULED BANKING COMPANY
AT NO.72, ST.MARKS ROAD,
BANGALORE-560 001
REPRESENTED BY ITS CHAIRMAN.

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2. THE INCOME-TAX SETTLEMENT COMMISSION
(ADDITIONAL BENCH)
EXERCISING JURISDICTION WITHIN THE STATE
OF KARNATAKA AND LOCATED AT
640, ANNA SALAI, CHENNAI-600035
REPRESENTED BY ITS VICE-CHAIRMAN.

.RESPONDENTS

(By SRI ASHOK A.KULKARNI FOR
M/S.K.R.PRASAD FOR R1
R2 SERVED)

THIS WRIT PETITION FILED U/A 226 & 227 OF
CONSTITUTION OF INDIA PRAYING TO QUASH THE
ORDER DATED 4.3.2008 PASSED BY THE SECOND
RESPONDENT IN SETTLEMENT APPLICATION NO.563/KNK-
III/15/2000-IT (ANNEX-G).

This petition having been heard and reserved for orders,
H.N.NAGAMOHAN DAS. J, pronounced the following;

ORDER

In this writ petition the petitioners have prayed for a writ in
the nature of certiorari to quash the order dated 04.03.2008 passed
by the second respondent – Settlement Commission as per
Annexure G.

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2. First respondent is a schedule Bank and has been an Income Tax assessee for a number of years. The returns filed by the first petitioner came to be processed and the Assessing Officer completed the assessment wide order dated 30.03.2000 for the assessment year 1997-98 as per Annexure A. In the order of assessment at Annexure A the Assessing Officer brought to tax the concealed income, disallowed depreciation claimed on non-existing assets and corrected certain anomalies in the accounting procedure of first respondent. Further the Assessing Officer being satisfied that first respondent had concealed its income levied penalty under Section 271(1)(c) of the Income Tax Act (for short 'the I.T. Act.') vide order dated 14.06.2000 as per Annexure B. Consequently the first respondent issued show-cause notice to the first respondent as to why they should not be prosecuted under Section 276(c)(1), 277 read with Section 276(b) of the I.T. Act as per Annexure C. Further notice under Section 148 of the I.T. Act was issued to reopen the completed assessments of previous years. At that stage the first respondent filed an application under Section 245(c)(1) of the I.T. Act before the second respondent – Settlement Commission for the



assessment years 1995 to 2000 in the prescribed Form 34-B dated 10.07.2000 as per Annexure Y. Before the Settlement Commission the first petitioner entered appearance and objected for admitting the application filed by the first respondent on the ground that it has no jurisdiction to entertain the application filed by the first respondent. The second respondent, after hearing both the parties, passed an order on 11.12.2000 admitting the application of the first respondent as per Annexure E. The petitioners questioned the order of Settlement Commission at Annexure E before this Court in W.P.No.13111/2001. This Court vide order dated 18.08.2005 disposed W.P.No.13111/2001 directed the Settlement Commission to examine all contentions notwithstanding its earlier order dated 11.12.2000. Thereafter, the Settlement Commission passed the impugned order as per Annexure-G dated 04.03.2008. Hence, this writ petition.

3. During the pendency of this writ petition the Settlement Commission passed an order on 14.07.2009 rectifying its earlier order at Annexure G allowing interest tax, granting immunity from

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the imposition of penalty and prosecution under the IT Act. In view of this development the first petitioner filed an application seeking amendment of writ petition by way of incorporating additional facts, additional grounds and additional prayer. This Court vide order dated 11.09.2009 allowed the application for amendment of writ petition and accordingly the writ petition came to be amended.

4. Further during the pendency of this writ petition the Union of India filed an application under Order 1 Rule 10 CPC to come on record as second petitioner. This Court vide order dated 02.12.2009 allowed the impleading application permitting the Union of India to come on record as second petitioner. Accordingly the writ petition is amended.

5. Dr. R.B. Krishna, learned counsel for the first petitioner contends that the Settlement Commission has no jurisdiction to entertain an application under Section 245(c)(1) of the Act after detection/discovery of concealed income of the assessee by the department. It is contended that the Settlement Commission



committed an illegality in passing the impugned order when the first respondent had disclosed a negative income for certain assessment years which is invalid in the eye of law. It is contended that the Settlement Commission committed an illegality in not following the law laid down by this Court and the Apex Court in the decisions placed before it. The Settlement Commission committed an error in deleting the penalty and granting immunity from prosecution. Reliance is placed on the following decisions.

- a. Commissioner of Income Tax Vs. Express Newspapers Ltd., Vol. 206 ITR 443
- b. Commissioner of Income Tax (Central) Calcutta Vs. B N Bhattachargee and another, Vol. 118 ITR 461
- c. Chief Conservator of Forests, Govt. of A.P. Vs. Collector and others, (2003) 3 SCC 472
- d. Commissioner of Income-Tax Vs. Income Tax Settlement Commission and another, (2009) 310 ITR 10 (Mad)
- e. Raja Ram Industries Vs. Settlement Commission Vol. 81 ITR 505

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6. Per contra Sri. Ashok A Kulkarni, learned counsel for the first respondent contends that the Government of India constituted a committee (for short 'COD') to resolve the disputes of every nature that is, between one wing of the Government and another wing of the Government including intra-departmental disputes. Only after an application has been made to COD and its approval is obtained, wherever necessary, legal proceedings can be initiated by one authority against another authority of the Central Government and not otherwise. In the instant case the petitioners on one hand and second respondent on the other hand are the wings of the Central Government and in the absence of clearance obtained from the COD the present writ petition is not maintainable. If the writ petition is not maintainable against the second respondent then the same is not maintainable against the first respondent which is a private Bank. It is contended that the first petitioner is empowered to file appeals and to initiate legal proceedings under Section 260-A and 261 of the I.T. Act. There is no provision under the Act authorising the first petitioner to file a writ petition under Article 227 of the Constitution of India. Therefore the writ petition filed by the first petitioner is not

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maintainable. It is contended that after 1991 the first petitioner has no authority to object the jurisdiction of the Settlement Commission to entertain an application under section 245-C of the I.T. Act. In the proceeding before the Settlement Commission the first petitioner can only submit a report and he has no power to question the jurisdiction of the Settlement Commission. After deletion of Section 245-C(1E) of the Act the assessee can go before the Settlement Commission even after seizure, discovery and detection by Assessing Officer. He supports the impugned order.

7. Sri. Sarangan, learned Senior counsel for first respondent has taken me through Section 245-C and 245-D of the I.T. Act and various amendments at different points of time and the growth of law, the object, scope and ambit of Settlement Commission. Learned Senior Counsel also distinguished the decisions relied on by the petitioners and contend that they are not applicable to the facts of this case. He supports the impugned order. Reliance is placed on the following decisions.

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- a. commissioner of Income Tax Vs. Anjum M H Ghaswala and others, Vol. 252 ITR 2
- b. Commissioner of Income-Tax Vs. Nainital Bank Ltd., (2009) 309 ITR 335 (Uttaranchal)

8. Heard arguments on both the side and perused the entire writ papers. On the basis of pleadings and arguments the following points will arise for my consideration.

- 1) Whether the writ petition is not maintainable for want of clearance from the committee on disputes(COD)?
- 2) Whether the first respondent has no authority to file the writ petition ?
- 3) Whether the Settlement Commission has no jurisdiction to admit and entertain the application of first respondent under Section 245(c) of the I.T. Act after detection and discovery of the concealed income ?
- 4) Whether the impugned order passed by the Settlement Commission is in accordance with law ?

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On point No. I

9. The first petitioner and first respondent are the parties before the second respondent - Settlement Commission. The impugned order at Annexure-G is passed by the second respondent. The prayer of the petitioners in this writ petition is to quash the impugned order at Annexure-G. The final outcome in this writ petition will not have any bearing on the second respondent. There is no prayer against the second respondent. The second respondent is only a formal party. The lis is not between petitioners and second respondent. On the other hand the lis is between petitioners and first respondent. The clearance from COD is necessary only if there is a lis between two wings of the Central Government. Though petitioners and second respondent are the wings of Central Government there is no lis between them. As such clearance from C.O.D. is not necessary to maintain the present writ petition. The decisions relied on by the first respondent are not applicable to the facts of this case. Accordingly point No. 1 is answered in negative holding that the writ petition is maintainable.



On point No. II

10. First petitioner is the Commissioner of Income Tax and Second petitioner is the Union of India. First respondent initiated proceedings before the second respondent by filing an application under Section 245-(c)(1) of the I.T. Act. The first petitioner and first respondent are parties to the proceedings before the second respondent – Settlement Commission. On contest and on merits, the second respondent has passed the impugned order at Annexure G. There is no appeal or revision under the Act against the impugned order at Annexure G. The order at Annexure G is final and the same is binding on the parties. Any aggrieved party is entitled to question the impugned order at Annexure G before this Court under Article 227 of the Constitution of India. This Court in its supervisory jurisdiction under Article 227 of the Constitution is entitled to review the impugned order at Annexure G. Therefore the first petitioner is entitled to maintain the present writ petition questioning the impugned order at Annexure G.

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11. The first petitioner is an Income Tax authority under Section 117 of the Act. The first petitioner in his pivotal position as authority under the Income Tax Act carries with him certain implied powers. This implied power is essential to the first petitioner to protect the interest of the Government revenue, to prevent the escape from the tax liability and to take appropriate action against the tax evaders. Even in the absence of specific provision enabling the Commissioner to file the writ petition before this Court there is implied power authorising him to file the writ petition. In addition to the first petitioner, the Union of India is impleaded as second petitioner calling in question the impugned order at Annexure G. Therefore the writ petition filed by the first petitioner is within his powers. Accordingly point No. 2 is answered in negative holding that the Commissioner of Income Tax is having the implied powers to file this writ petition questioning the impugned order at Annexure G.

On point No. III

12. Under Chapter XIX-A of the IT Act the provisions relating to Settlement Commission was introduced with effect from



01.04.1976 on the basis of the recommendations made by the Wanchoo Committee for establishing a Settlement Commission. The relevant portion of the recommendations reveals the legislative background and also the salient aspects of the provisions providing for establishment of Settlement Commission and they read as under:

“This, however, does not mean that the door for compromise with an errant taxpayer should, for ever, remain closed. In the administration of fiscal laws whose primary objective is to raise revenue, there has to be room for compromise and settlement. A rigid attitude would not only inhibit a one-time tax-evader or an unintending defaulter from making a clean breast of his affairs, but would also unnecessarily strain the investigational resources of the Department in cases of doubtful benefit to revenue, while needlessly proliferating litigation and holding up collections. We would, therefore, suggest that there should be a provision in the law for a settlement with the taxpayer at any stage of the proceedings.”

13. The provisions under Chapter XIX-A of the IT Act came to be amended in the years 1979, 1991 and 2007. It is relevant to

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notice the changes that had occurred in the amendments to the provisions under Chapter XIX-A of the IT Act. Initially in the year 1976 the provisions specified that if the CIT contends that concealment was likely to be established and objected to the admission of the case, then the Settlement Commission was debarred from taking up the case and the objections of the Commission was to be respected. The 1979 amendment specifies that the Settlement Commission could overrule the objections raised by the CIT stating that there is likelihood of establishing concealment. The 1991 amendment specifies that the CIT would give its views on the complexity of the investigation and nature and circumstances of the case, however they have no power to object on the ground that the concealment was established or likely to be established since they would not be aware of the income disclosed. The 1991 amendment further specifies that the CIT can only submit its report and the same shall be considered by the Settlement Commission. It further specifies that even in the absence of a report from the CIT, the Settlement Commission can proceed and decide the application filed by the assessee. Keeping in view the object of



establishing a machinery called Settlement Commission and the subsequent amendments to Chapter XIX-A of the I.T. Act, the decisions relied on by the learned counsel on both the side is to be examined.

14. The Supreme Court in the case of Commissioner of Income Tax Vs. Express Newspapers Limited, ITR (206) 1994 SC 443 held that "if the Assessing Officer has already discovered a concealment and has gathered the material to establish the particulars of such income or fraud fully or is at a stage of investigation/enquiries, where the material gathered by him is likely to establish the particulars of such income or fraud, the assessee cannot be allowed to defeat or forestall as the case may be, the entire exercise of the income-tax authorities just by approaching the Settlement Commission. In such a case, it cannot be said that he is acting voluntarily or in good faith. The assessee should not be allowed to take advantage of the comparatively easy course of settlement. The assessee must face the normal channels of assessment/appeal etc. Section 245-C is meant for those assesses

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who seek to disclose income not disclosed before the Officer including the manner in which such income has been derived. If the department already knows and has gathered particulars of such income and the manner in which it has been derived, then there is no disclosure by the assessee.”

15. The Supreme Court in Express Newspapers Limited’s case specifically observed that it is not considering the effect of the legislative change brought in 1991 to Sec.245C and 245D of the IT Act. In the said decision the Supreme Court construed the provisions of Section 245-C of the I.T. Act in conjunction with Section 245-D-1 of the I.T. Act as those sections stood prior to its amendment by the Finance (No. 2) Act, of 1991. Admittedly, in the instant case, the first respondent filed application before the Settlement Commission under Section 245-C-1 of the I.T. Act on 10.07.2000 for the assessment years 1994-95 to 1999-2000. On the face of it the claim of first respondent before the Settlement Commission was subsequent to the amendment in the year 1991. The amendment of 1991 to Section 245-C-1 and Section 245-D of I.T. Act specifies that

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the Settlement Commission will send copy of the application of the assessee excluding the confidential portion containing additional income disclosed to the CIT for his report on the complexity of investigation and nature and circumstances of the case. It further specifies that in the event of the CIT not furnishing the report within the specified time then the Settlement Commission can proceed with the application in accordance with law. In view of this change in the legal position, the law laid down by the Supreme Court in Express Newspapers Limited's case has no application to the facts of the present case.

16. From 01.06.2007 Section 245-D-1 of the I.T. Act has undergone a further change and the same reads as under:

“On receipt of an application under Section 245, 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.”

17. From a reading of the above section it is clear that the word 'report of the Commissioner' and the word 'complexity' have been left out. The only person who has to be heard by the Settlement Commission is the assessee. A combined reading of Section 245-C-1 and Section 245-D-1 of the I.T. Act manifestly makes it clear that the CIT's power to object to the application made by the assessee is narrowed down. The word 'at any stage' in Section 245-C-1 of the I.T. Act specifies that even at the stage of the appeal pending before the first Appellate Authority the assessee can go before the Settlement Commission and disclose the true and correct income. Therefore the assessee can go before the Settlement Commission at any stage even after detection/investigation by the Assessing Authority.

18. In the event of the Assessing Authority detecting the concealed income, then he is entitled to pass assessment orders bringing the concealed income to tax liability, impose penalty and



initiate prosecution proceedings. This power is also available with the Settlement Commission. If the Settlement Commission holds that there is deliberate concealment of income by the assessee then it has got the power to bring the conceded income, to impose interest, penalty and to order for prosecution. Therefore it cannot be contended that in the event of detection by the Assessing Officer an application under Section 245-C-1 of the I.T. Act is not maintainable. If such an interpretation is given then the very object of establishing a machinery called Settlement Commission will be defeated. Accordingly, I answer point No. 3 in negative.

On Point No.IV

19. The contention of the petitioner that the first respondent had only disclosed negative income for certain assessment years is unacceptable to me. The settlement commission in the impugned order directed the first respondent to pay tax on undisclosed income with interest. Except this contention no other contention is urged with regard to the merits of the impugned order.

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20. On the question of granting immunity from penalty and prosecution, the reasoning of the settlement commission is contrary to the admitted facts. The reasoning of the settlement commission under these heads is vague, unsound and contrary to the established principles of law. It is not in dispute that subsequent to the order of Assessing Officer bringing the concealed income to tax, disallowing depreciation claimed, correcting certain anomalies in the accounting procedure, after levying penalty, issuing show cause notice to prosecute and a notice to reopen the completed assessments, the first respondent filed an application before the Settlement Commission under Section 245(c) (1) of the IT Act. The burden is on the first respondent to prove that concealment did not arise from any fraud or any gross or wilful neglect on their part. There is no such evidence placed by the first respondent before the Settlement Commission. In the absence of convincing explanation and evidence, the Settlement Commission committed an illegality in granting immunity from penalty and prosecution. It is necessary that the Settlement Commission shall record a finding whether there is deliberate concealment or not. There is no such finding in the

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impugned order. On this ground the impugned order in so far as it relates to granting immunity from penalty and prosecution is liable to be quashed.

For the reasons stated above, the following order:

- i) The writ petition is partly allowed.
- ii) The impugned order passed by the second respondent dated 4.2.2008 Annexure-G in so far as it relates to granting immunity from penalty and prosecution and annulling the order of assessing officer in so far as levying penalty is hereby quashed. Remaining all other aspects the impugned order remains undisturbed.
- iii) The matter is remanded to the second respondent - Settlement Commission for limited purpose of reconsidering the question of penalty, prosecution and the order of assessing officer levying penalty after providing an opportunity to both the parties.
- iv) Ordered accordingly.

Sd/-
JUDGE