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

Reserved on:23.01.19

Pronounced on: 15.04.2019

\+ W.P.(C) 11859/2016

PRINCIPAL COMMISSIONER OF INCOME TAX-9

..... Petitioner

Through: Mr. Zoheb Hossain, SSC with Mr. Piyush Goyal, Advocate.

versus

OM PRAKASH JAKHOTIA & ANR.

..... Respondents

Through: Mr. Prashant Shukla, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN
%
S.RAVINDRA BHAT, J.

1. The Income Tax Department (hereinafter referred to as the Revenue) is aggrieved by the order of the Income Tax Settlement Commission (ITSC) dated 26.11.2014 which accepted the application made by the respondent assessees (collectively referred to as the Jakhotias) and issuing consequential directions.

2. The search was conducted in the premises of the assessee and related companies together with that of the Dalmia Group on 20.01.2012. Cash to the tune of ₹35 lakhs and an incriminating register containing details of cash loans was also recovered and seized. The first respondent, Om Prakash Jakhotia made a statement recorded under oath under Section 132(4) of the Income Tax Act. The relevant details disclosed over pricing of bags/sacks of cement sold to the Dalmia Group. The statement regarding loan credits *inter alia,* is as follows:

> *"No, the loan credits are genuine. However, it is not feasible to me to prove it. The raw materials I sold to various parties to" meet the unexplained expenditure of my business. This amount has not been entered into my books of accounts. These total transactions come to Rs. 16.5 Cr. I am voluntarily offering this amount in my group and in my personal hands. I ·will pay the taxes thereon. The detailed break up of Rs. 16.50 Cr will be submitted in due course. (Reply to query 16)"*

In reply to the query regarding the loan credits which emerged from the books of accounts seized, the statement on oath stated as follows:

> … *"I have not maintained this type of account books for unaccounted transactions for previous years. I have maintained only for this year.* "

3. The first respondent submitted an entity-wise and year wise bifurcation of the surrendered amount aggregating ₹21.5 crores on 08.05.2012. Subsequently, an order centralising the assessment made in the case after search was issued under section 127(2) transferring the entire search proceeding to Delhi from Hyderabad. Later, notices were issued under Section 153A to all the Jakhotias requiring them to file returns for AY 2006-2007 to AY 2013-14. The returns were filed for some years by some respondents and for some other years by the other respondents. However, none of the assessees filed returns in respect of all the years. Notice issued under Section 142(1) indicates that the questionnaire to the Jakhotias was in respect of the assessment years for which the returns were furnished. At that stage, the assessees approached the ITSC with an application. On 29.10.2013, in the application under Section 245C of the Act, the disclosure made was of the income to the tune of ₹1,93,04,200/-. An affidavit in addition was filed by the first respondent Jakhotia, and he retracted from his statement made on 20.01.2012, citing two grounds; that the surrender was made without referring to the seized documents and

entirely on *ad hoc* basis without the help of any professional and secondly that the statement was untenable in law in light of a CBDT Circular dated 10.03.2003.

4. The disclosure made under Section 245C of the Act before the Settlement Commission, on 31.10.2013, was to the tune of ₹38,15,000/- on behalf of the second respondent and ₹34,30,000 on behalf of third respondent. On 11.11.2013, the Commission passed an order under Section 245D(1) allowing the settlement application to proceed

5. Subsequently, on 16.12.2013, a report was filed by Revenue under Section 245D(2B) of the Act highlighting firstly, that the surrender made by the first respondent was in his own hand through his voluntary statement on oath under Section 132(4) on 20.01.2012; secondly, an entity wise and year-wise break-up of the bifurcation of surrendered amount was disclosed on 08.05.2012. Thirdly, in tune with surrendered amount, deposit of tax during 2012-13 were made to the tune of ₹52 lakhs. It was highlighted therefore that the retraction was more than 1 year and 10 months after the search, this showed that it was an afterthought and the surrender made before the commission was much lower in comparison to the surrender made during the search. It was stated that this did not amount to true and full disclosure as required by Section 245C(1).

6. On 30.12.2013, the Jakhotia's application was allowed to be proceeded with by an order under Section 245D(2C). As a consequence, Revenue sought permission from the commission to conduct an enquiry under Section 245D(3) regarding the genuineness of the loan transaction, share capital and share premium. A Report prepared by the Revenue under Rule 9 of the Settlement Commission (Procedure) Rules, 1997, was sought

– which was given on 25.04.2014. It was again urged that the disclosure of Rs.2.65 crores was far too low compared to the voluntary statement and disclosure made during the search to the tune of more than Rs.2.65 crores. Permission sought was for conduct of inquiry by the AO. However, this was declined and the Settlement Commission asked the parties to remain present before the Joint Director, Income Tax, of the Settlement Commission for verification and enquiry.

7. The JDIT filed a report on 12.09.2014, stating that the claims made by the assessee in the course of the proceedings could not remain unverified. The material part of the report dated 12.09.2014 is retracted below:

> *"5. The DCIT produced the seized register A/OPJ/03 on 26.08.2014. He also produced the original surrender latter dated 08.05.2012. The seized register was perused. The accounts of the cash loans were seen. The A.R was asked to provide the details of cash Loans stated-that-the applicant feasible to -give-the addresses of the loan-creditors as most of the loans were arranged through brokers who only gave names of the creditors without the addresses. It was stated by the AR that the seized register A/OPJ/03 contains all the details of the loans taken by the applicant and it also shows that interest has been paid on the same, which is reflected in the seized register in the Interest account, which is at pages 208, 210, 211, 212, 213, 214. The A.O stated that they are disputing the fact that these are loan accounts. The AR pointed to the Rule9 report page 6 para 2, wherein the A.O himself has stated that the chart enclosed as Annexure 2 reveals that the assesse has received cash loans and has repaid the loan in cash. The A.O stated that it was his internal report and was not to be treated as Rule 9 report.*

6. The seized register was perused and it was observed that interest account is there on these pages. Rate of interest is also mentioned against the names of the persons to whom the interest has to be paid. However, the applicant has not provided the name and addresses of the creditors or their PAN as he has stated that these loans were organized through brokers who only provide names of these creditors and the applicant has therefore kept the account of these loans in the seized register A/OPJ/03 in the names provided by the broker.

7. Further, during the hearing on 14.08.2014 the AR was asked to submit ledger account of all the claimed loan accounts. The AR filed his reply vide his letter dated 25.08.2014 wherein he submitted a chart of interest paid to loan creditors. The chart submitted was verified with the pages 208, 210, 211, 212, 213, 214 of the seized register A/OPJ/03. It is seen that no interest has been paid to accounts of Ajay Garg and Mishra ji. The interest of six parties namely Balaramji, Govind Gilda, Hari Prasad Badruka, Infusion, Nand Kishore Gorkha and Raghuram have been clubbed in the name of Balaram ji Group.

8. As regards the issue of Share Capital and share premium of Rs 4.92 Crores invested in Jhakotia Plastic Pvt. Ltd., the AR stated that the same was done out of the cash loans taken by the applicant. He explained that the cash loans taken were to the tune of Rs.13.89 crores. Out of that amount Rs. 4.92 Crores was invested in the share capital. Rest of the amount was used in the business. As on the date of search the cash available (as per Annexure A2 of Rule 9 report} was Rs. 13.94 Crores. But there was no recovery of cash, nor was any asset found. This happened as the cash was used to repay the outstanding loan accounts. The A.O stated that the stand of the applicant taken now is an afterthought and should not be accepted. He relied on the offer made by the applicant in 132(4) statement and on the letter submitted by the applicant on 08.05.2012.

> *9. As regards the study of each and every entry, the Annexure A2 of the Rule 9 report was perused and compared with the seized register A/OPJ/03. The A.O stated that the same has been made from the seized register and the CIT relies on the same. The Rule 9 report has been made after considering all the entries in the seized register."*

8. After hearing the parties, on 26.11.2014, the Settlement commission passed the impugned order accepting the offer made by the assessee and granting immunity from penalty and prosecution and other sanctions.

9. The Revenue contends that the impugned order is unsustainable because the disclosure made was not true and full which is *sine-qua-non* for maintainability of application before ITSC. It was submitted that the Settlement Commission's acceptance of the assessees' explanation with respect to the statement, is unreasonable. Learned counsel highlighted that the alleged retraction was made nearly two years after the statement itself was recorded in January 2012. Furthermore, given that the statement was under Section 132 in the course of search proceedings, there was probative and evidentiary value which could not be cast aside as the Settlement Commission did. It was submitted further that the reliance on the CBDT Circular of 10.03.2003 was no ground for the retraction because a distinction was made between the voluntary statement and one under duress. The object of that Circular was to prevent recording of statement under duress. Once it was declared that the statement was not recorded under duress, the question of ignoring it or allowing retraction could not arise.

10. Serious objection to the Commission's order was taken on the ground that the disclosure did not offer any explanation as to the

genuineness or the creditworthiness of the parties in respect of the credits reflected in the ledger that were considered and on which the Joint Director made a report. The entire loan claimed to be genuine in fact was not and so had to be treated as undisclosed income and brought to tax under Section 68. It was emphasized in this regard that the onus of proving the genuineness of the transaction in law lay upon the assessee; it could not discharge it because no particulars or details with respect to the creditors or within the shareholders and creditworthiness was produced.

11. It is argued on behalf of the assessee that the Revenue's charge that no full disclosure was made is untenable. In this context, it was stated that the retraction of statement, was correctly accepted. The assessee relied upon an answer to a question, by Jakhotia, stating that the loan and credits were genuine and at the same time observing that it was not feasible to prove it. Further, he stated in the answer that raw material sold to various parties made to unexplained expenditures of the business which were not entered in the books of accounts. These transactions aggregated to ₹ 16.5 crores. It was submitted that the statement itself clearly showed that unexplained expenditure had to be incurred and consequently that the veracity of the expenditure could not be proved, as was not feasible at that point of time.

12. Learned counsel also highlighted that the Revenue never attempted to verify whether the various entries in the Register, aggregated to ₹16.5 crores and each of them related to loans, sale proceeds or other transactions. No attempt was even made to ascertain from the assessee how much of that amount related to which year. It is also urged that the statement could not be relied upon because at the tenure of the question to be clearly showed that undue mental pressure was exerted upon Jakhotia. Learned counsel relied upon Commissioner of *Income Tax v Sunil Aggarwal*, (2015) 379

ITR 367 (Del), which held that the retracted statement had to be corroborated by some material if the revenue were to rely upon it. It was stated that similar view was expressed by the Gujarat High Court in *Kailashben Manhar Lala Choksi v Commissioner of Income Tax,* (2008) 174 Taxman 466 (Gujarat), and *M. Narayanan and Brothers v Additional Commissioner of Income Tax,* (2011) 13 Taxmann.com 49 (Mad).

13. The income declared by three Jakhotia entities after search, is retracted in a tabular statement, which is as under: -

Asstt. Year	Om Prakash Jakhotia		Jakhotia Plastics Pvt. Ltd.		Jakhotia Polymers Pvt. Ltd.	
	Returned Income	Additional Income disclosed	Returned Income	Additional Income disclosed	Returned Income	Additional Income disclosed
2006-07	17190	50000	2658320	20000	0	0
2007-08	176380	50000	3199650	25000	671861	50000
2008-09	171800	50000	2555490	30000	581080	75000
2009-10	0	407600	3948290	40000	624860	80000
2010-11	383600	50000	7396560	55000	1010750	85000
2011-12	0	443610	7335910	1800000	1256890	1090000
2012-13	0	17527180	6705630	1845000	1069600	2050000
2013-14	0	725810	0			
Total	848970	19304200	3399985	3515000	5215041	3430000

14. The first respondent was the director of two Jakhotia entities. The respondents are engaged in manufacture of polypropylene woven sack bags supplied to sugar and cement companies. The report under Rule 9 was filed on 20.05.2014, which was forwarded to the Jakhotias. The Commission after noting all the relevant facts, including the comments of the assessee to the report under Rule 9 and revenue's argument on that score, noted with respect to the cash loans surrendered in the settlements as follows: -

> *"Regarding the first issue of cash loans surrendered in the statements dated20.01.2012 and 08.05.2012, as discussed above, all the loans reflected in the seized diary are genuine. The loan creditors have been paid interest and the interest payment is reflected at pages 208 and 210 to 214 of the seized diary. Both the JCIT and the Assessing Officer have verified the loan creditors and interest payments reflected in the seized diary and found them to be genuine. As regard furnishing of confirmation from the loan creditors, it may be submitted that the loans were arranged through broker who only provided names of the creditors without their addresses.*
>
> *Further the provisions of section 132(4A) and 292C of the Act raise presumption that entries recorded in the seized diary are correct and the loans cannot be treated as non-genuine and cannot, therefore, be treated as undisclosed income of the applicant:-*
>
> *(a) CIT v. Indeo Airways Pvt. Ltd. (2012) 349 ITR 85 (Delhi)*
>
> *(b) T. S. Kumaraswamy v. ACIT (1998) 65 ITO 188 (Mad)*
>
> *(c) CIT v. S.M.S. Investment Corporation (1988) 173 ITR 393 (Raj*
>
> *(d) Surendra M. Khandhar v. ACIT (2010) 321 ITR 254 (Born)*

(e) *Fifth Avenue v. CIT(2009) 319 ITR 127 (Karn) - (This judgment of the Karnataka High Court was upheld by the Hon'ble Supreme Court of India in the case of Fifty Avenue v.CIT(2009) 319 ITR 132 (SC).*

(f) *CIT v. D.R. Bansal &Ors (20 1 0) 327 ITR 44 (CHG)*

(g) *CIT v. P.R. Metrani (HUF) (200 1) 251 ITR 244(Karn)*

As regards investment of Rs. 4.92 crores in the share capital and share premium of M/s Jakhotia Plastics Pvt. Ltd, the same was made out of cash loan of Rs. 13.89 crores. This aspect was examined by the JCIT as mentioned inpara-8 of his report.

It has further been stated that as on the date of search, the actual cash available was Rs. 13.94 crores. This cash balance of Rs. 13.94 crores was confirmed by the Assessing Officer who was present at the time of verification/enquiry. The Assessing Officer has further confirmed that the CIT was in agreement to this calculation. The relevant extracts of the report is reproduced below:-

> *"As regards the study of each and every entry, Annexure-2 of the Rule-9 Report was perused and compared with the seized register A/OPJ/03. The AO stated that the same has been made from the seized register and the CIT relies on the same. The Rule-9 Report has been made after considering all the entries in the seized register ".*
>
> *The applicant's submission that the entire cash loans were repaid out of the cash balance of Rs. 13.94 crores available on the date of search as worked out the. Department. He has also endorsed the submissions of the applicant that since no other outgoings and cash was found on the date of search, the cash available was not*

physically found on the date of search. On a consideration of the observation of the JCIT in paras 8 & 9 and as no adverse comments has-been offered in the report, the report may be accepted."

The CIT (DR) Sh. S.K Dash stated that the applicants were directed to appear before the JDIT and to provide the names and addresses of the creditors. He further argued that applicants have not done so. Further, the applicants have not been able to explain why the cash available to him of Rs 13.94 crores as per the cash flow drawn by the A.O was not found during the course of search. The CIT (DR) also objected to the claim of the A.R that the same was repaid to the creditors, as the said cash was available even a month before the date of search and the same was not repaid when interest was being charged by the creditors. He claimed that this is an afterthought and a bogus claim and the applicant must honour the surrender made by the applicants during the statement u/s 132(4).

The A.R of the applicants stated that as per seized diary there was cash available to the applicant and from the same cash the outstanding loans were repaid by the applicant. The entries were recorded only when the part time accountant was available, therefore, the diary was not updated after 13.01.2012. The date of search was 20.01.2012, the repayments must have been done in the period between 13.01 .2012 and 20.01.2012.

We have considered the Rule 9, 9A and verification report submitted by the DIT (Inv.) and the reply filed by the applicant. It is seen that all the loans are reflected in the seized diary and that the applicant has paid interest on these loans. This fact of interest payment is reflected at pages 208 and 21 0 to 214 of the seized diary. However it is to be noted that the applicants have not provided names or addresses of the creditors, in-spite of ample opportunities provided to them. Further, they have not been able to fully

explain the repayment of loans. In such circumstances we are left with no alternative but to settle the matter on the basis of the net assets of the applicant. The statement of affairs of the applicant as on 13.01.2012 is as under:-

STATEMENT OF AFFAIRS AS AT 13.01.2012

Liabilities	Amount	Amount	Assets	Amount	Amount
Capital Account		1713982	Fixed Assets		29052145
Profit	17002461		Land	17040000	
Estimated @ 15% on Turnover of Rs.1133449737/-			New Building	8987145	
			Constructions new property	3025000	
Add: Other Income offered	27900.00		Investment Investment in share capital	49200000	49200000
Advertisement recoveries	11250.00		Current Assets, loan and advances (circulating capital, stock, debtors etc.)		77570250
Consultancy	5850.00				
Charges recover	89521.00				
Telephone Expenses –	17136892				

Recoveries					
Travelling Expenses recoveries		138685415			
UNSECURED LOANS	400000 1000000 1050000				
Ajay Garg	1000000				
Ajit Patel	120000000				
Annu Sharma	200000				
Aswaji	4000000				
Balaramji	625000				
Chanda Bai	2000000				
Baheti	800000				
Damodar Heda	486000				
D.P. Agarwal	50000000				
Givubd Gilda	4000000				
Hari Prasad	1000000				
Infusion	11300000				
KCJ	4400000				
Kejriwalji	500000				
Krishna Bhavi	1800000				
Late Opp	6000000				
Latha	1500000				
Lathur	9000000				

Mami Shri	2500000				
Mishraji	7500000				
Nand Kishore	5074415				
Gorkha	300000				
O.P. Jakhotia	250000				
O.P. Sharma					
P.C. Jain					
Pramod Kumar					
Raghuram					
Sadanandji					
Shruthi Daga					
Total		155822397	Total		155822397

If the current assets of Rs.7.75 Crores are ignored (as no such assets could shown by the applicant, nor any cash was recovered during the search) and if the creditors/loans of Rs.13.868 Crores are also ignored, for the reasons stated above then the net assets of the applicants is Rs.7.82 crores only. The applicants have declared income as under:-

(i) Mr. Om Prakash Jakhotia 1.93 crore
(ii) Jakhotia Polymers Pvt. Ltd. 0.34 crore

(available funds as per Settlement application)

Total 2.27 crore

Taking the total disclosure of Rs.2.27 crores the difference in the net asset and the income declared is of Rs. 5.55 crores. The applicant accepted the difference as their undisclosed income computed in the

> *above manner and in the spirit of settlement agreed to offer additional income of Rs.5.55 crores. A letter was filed on 10.11.2014 offering additional income ofRs.5.55 crores, which is placed on record.*
>
> *9. As discussed in the foregoing paras, we have considered the submissions of the applicant and the Department. All the issues were discussed one by one during the course of hearing. After carefully considering the submissions of the department and the applicant and the facts of the case, we are of the view that the offer made by the applicant in the SOF and the additional offer of Rs. 5.55 crores made during the course of proceedings u/s2450(4) before this commission adequately cover all the issues. Therefore, the offer of additional income of Rs. 5.55 crores is accepted.*

15. The stark facts emerging from the above discussion and the discussion in the impugned order thus are that statement was made voluntarily on 20.01.2012, in the course of search proceedings. There is presumptive value to such statement by virtue of Section 132(4) of the Act. Moreover, it is not merely the statement that is material in the present case; in fact ledgers and other books of accounts were seized. The first respondent candidly stated that the amounts constituted unanticipated or sudden expenditure and that it was not feasible for him to indicate the veracity of the statement.

16. This Court is of the opinion that the approach of the ITSC was flawed throughout. Apart from brushing aside the fact that the retraction took place close to two years after the statement was made, the commission overlooked that nowhere did the assessees complain that the statement of the first respondent was recorded under coercion. His explanation for retraction was that the disclosures were not feasible, because he did not

have the benefit of the records. But that is the point: if indeed someone is involved in clandestine activities, but is aware of its monetary magnitude and indeed discloses it voluntarily, he is in the best position to say if it is supported by evidence. At the stage of voluntary disclosure there was candour on the part of the first statement, that he could not support the "out of book" transactions with evidence. Later too, the position did not alter. Furthermore, the other important fact is that the assessee made no attempt to support the claim that the loan credit and other credits were genuine; the parties concerned, their creditworthiness and the reason for the credit was not substantiated in any manner.

17. This Court, in *Commissioner of Income Tax v Divine Leasing & Finance Ltd.*, (2008) 299 ITR 268 held that:

> *..."In this analysis, a distillation of the precedents yields the following propositions of law in the context of Section 68 of the IT Act. The assessed has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber. (4) If relevant details of the address or PAN identity of the creditor/subscriber are furnished to the Department along with copies of the Shareholders Register, Share Application Forms, Share Transfer Register etc. it would constitute acceptable proof or acceptable Explanation by the assessed. (5) The Department would not be justified in drawing an adverse inference only because the creditor/subscriber fails or neglects to respond to its notices; (6) the onus would not stand discharged if the creditor/subscriber denies or repudiates the transaction set up by the assessed nor should the AO take such repudiation at face value and construe it, without more, against the assessed. (7) The Assessing Officer is duty-bound to investigate the*

creditworthiness of the creditor/subscriber the genuineness of the transaction and the veracity of the repudiation."

18. Long ago, in *A. Govindarajulu Mudaliar v CIT, Hyderabad (1958) 34 ITR 807*, an argument similar to what was advanced by the assessee was rejected by the Supreme Court. The court held that-

"Now the contention of the appellant is that assuming that he had failed to establish the case put forward by him, it does not follow as a matter of law that the amounts in question were income received or accrued during the previous year, that it was the duty of the Department to adduce evidence to show from what source the income was derived and why it should be treated as concealed income. In the absence of such evidence, it is argued, the finding is erroneous. We are unable to agree. Whether a receipt is to be treated as income or not, must depend very largely on the facts and circumstances of each case. In the present case the receipts are shown in the account books of a firm of which the appellant and Govindaswamy Mudaliar were partners. When he was called upon to give explanation he put forward two explanations, one being a gift of Rs. 80,000 and the other being receipt of Rs. 42,000 from business of which he claimed to be the real owner. When both these explanations were rejected, as they have been it was clearly upon to the Income-tax Officer to hold that the income must be concealed income. There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amount of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipt are of an assessable nature. The conclusion to which the Appellate Tribunal came appears to us to be amply warranted by the facts of the case. There is no ground for interfering with that finding, and these appeals are accordingly dismissed with costs."

19. In *Commissioner of Income Tax v Durga Prasad More* (1971) 82 ITR 540, *Commissioner of Income Tax (Central), Calcutta v Daulat Ram* Rawatmull, (1973) 87 ITR 349 and other decisions, the court observed that what is shown can be considered real until it is shown that there are reasons to believe that the apparent is not real and that caution must be exercised on self-serving statements made in the documents as they are easy to make and rely upon in case an assessee wants to evade taxes. It was also held that proof must be called for and the assessing authorities should not put blinkers while looking at the documents before them and that all surrounding circumstances are important.

20. In the light of the above discussion, the ITSC should have not lightly brushed aside the Revenue's concerns about the genuineness of the retraction given the inability of the assessees to support by any reasonable material that such credit entries were plausible, even genuine.

21. The second and equally important reason for this Court to hold that the ITSC gravely erred in its approach is an utter disregard to the condition that the assessee always has the duty to come clean *and make full disclosure.*

22. In *Ajmera Housing Corporation and another v Commissioner of Income Tax* (2010) 326 ITR 642, the Supreme Court had emphasized the mandatory nature of the duty to fully disclose all income, which the assessee claims it is liable to report, failing which the settlement application cannot be maintained. It was observed that:

> *"21. Proceedings under the said Chapter commence on the filing of an application by an assessee*

under Section 245C (1) of the Act, which reads as follows:-

"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:

....."

A bare reading of the provision would reveal that besides such other particulars, as may be prescribed, in an application for settlement, the assessee is required to disclose: (i) a full and true disclosure of the income which has not been disclosed before the assessing officer; (ii) the manner in which such income has been derived and (iii) the additional amount of income tax payable on such income.

22. 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 pre-requisites for a valid application under245C (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 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.

--- ---

26. The procedure laid down in 245D of the Act, contemplates that on receipt of the application under 245C (1) of the Act, the Settlement Commission is required to forward a copy of the application filed in the prescribed form (No. 34B), containing full details of issues for which application for settlement is made, the nature and circumstances of the case and complexities of the investigation involved, save and except the annexures, referred to in item No. 11 of the form and to call for report from the Commissioner. The Commissioner is obliged to furnish such report within a period of 45 days from the date of communication by the Settlement Commission. Thereafter, the Settlement Commission, on the basis of the material contained in the said report and having regard to the facts and circumstances of the case and/or complexity of the investigation involved therein may by an order, allow the application to be proceeded with or reject the application. After an order under Section 245D (1) is made, by the Settlement Commission, Rule 8 of the 1987 Rules mandates that a copy of the annexure to the application, together with a copy of each of the statements and other documents accompanying such annexure shall be forwarded to the Commissioner and further report shall be called from the Commissioner. The Settlement Commission can also direct the Commissioner to make further enquiry and investigations in the matter and furnish his report. Thereafter, after examining the record, Commissioner's report and such further evidence that may be laid before it or obtained by it, the Settlement Commission is required to pass an order as it thinks fit on the matter covered by the application and in every matter relating to the case not covered by the application and referred to in the report of the Commissioner under sub-section (1) or sub-section (3) of the said Section. It bears repetition that as per the scheme of the Chapter, in the first instance, the report of the Commissioner is based on the bare information

furnished by the assessee against item No. 10 of the prescribed form, and the material gathered by the revenue by way of its own investigation. It is evident from the language of 245C (1) of the Act that the report of the Commissioner is primarily on the nature of the case and the complexities of the investigation, as the annexure filed in support of the disclosure of undisclosed income against item No. 11 of the form and the manner in which such income had been derived are treated as confidential and are not supplied to the Commissioner. It is only after the Settlement Commission has decided to proceed with the application that a copy of the annexure to the said application and other statements and documents accompanying such annexure, containing the aforesaid information are required to be furnished to the Commissioner. In our opinion even when the Settlement Commission decides to proceed with the application, it will not be denuded of its power to examine as to whether in his application under 245C (1) of the Act, the assessee has made a full and true disclosure of his undisclosed income. We feel that the report(s) of the Commissioner and other documents coming on record at different stages of the consideration of the case, before or after the Settlement Commission has decided to proceed with the application would be most germane to determination of the said question. It is plain from the language of sub-section (4) of 245D of the Act that the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to in the report of the Commissioner under sub-section (1) or sub-section (3) of the said Section. A "full and true" disclosure of income, which had not been previously disclosed by the assessee, being a pre-condition for a valid application under 245C (1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No. 11 of the form. Moreover, if an assessee is permitted to revise

his disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. In this regard, 245C (3) of the Act which prohibits the withdrawal of an application once made under sub-section (1) of the said Section is instructive in as much as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Therefore, by revising the application, the applicant would be achieving something indirectly what he cannot otherwise achieve directly and in the process rendering the provision of sub-section (3) of 245C of the Act otiose and meaningless. In our opinion, the scheme of said Chapter is clear and admits no ambiguity.

27. It is trite law that a taxing statute is to be construed strictly. In a taxing Act one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax. (See: Cape Brandy Syndicate Vs. Inland Revenue Commissioners7 and Federation of A.P. Chambers of Commerce & Industry &Ors. Vs. State of A.P. & Ors.8). In interpreting a taxing statute, the Court must look squarely at the words of the statute and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statute. (Also see: Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd.)9.

28. As afore-stated, in the scheme of Chapter XIX-A, there is no stipulation for revision of an application filed under 245C (1) of the Act and thus the natural corollary is that determination of income by the Settlement Commission has necessarily to be with reference to the income disclosed in the application filed under the said Section in the prescribed form."

23. In the present case, after noting and brushing aside the Revenue's objections with regard to the complete lack of explanation by the assessee with respect to credits claimed, the ITSC proceeded to compute the amounts offered and observed that the difference in the net asset and the income declared was ₹ 5.55 crores. Jakhotia accepted the difference as their undisclosed income computed in the manner given (in the order) and *"in the spirit of settlement agreed to offer additional income of Rs.5.55 crores. A letter was filed on 10.11.2014 offering additional income of Rs.5.55 crores, which is placed on record."* The ITSC thereafter recorded:

> *"9. As discussed in the foregoing paras, we have considered the submissions of the applicant and the Department. All the issues were discussed one by one during the course of hearing. After carefully considering the submissions of the department and the applicant and the facts of the case, we are of the view that the offer made by the applicant in the SOF and the additional offer of Rs. 5.55 crores made during the course of proceedings u/s 2450(4) before this commission adequately cover all the issues. Therefore, the offer of additional income of Rs. 5.55 crores is accepted."*

24. Clearly, the decision of the ITSC was untenable in law. Once the assessee approached it with a certain amount, representing that it constituted full and true disclosure (and had maintained that to be the correct amount till the date of hearing) the question of "offering" another higher amount as a "full" disclosure is impermissible. *Ajmera Housing* (supra) clearly held that

> *"there is no stipulation for revision of an application filed under 245C (1) of the Act and thus the natural corollary is that determination of income by the Settlement Commission has necessarily to be with*

reference to the income disclosed in the application filed under the said Section in the prescribed form.

25. The amount offered in this case, clearly could not have been considered or accepted. The ITSC, in this regard, fell into error as there was no full and true disclosure by the assessees. Consequently, the impugned order is hereby set aside and quashed. The AO shall proceed hereafter, in accordance with law and complete the block assessments. The time taken during the pendency of proceedings before the commission and the time during which the commission's order was in force, shall be ignored for the purpose of limitation.

26. The writ petition is allowed in the above terms. No costs.

S. RAVINDRA BHAT
(JUDGE)

PRATEEK JALAN
(JUDGE)

APRIL 15, 2019
pkb