

(2017) 09 CAL CK 0047
In the Calcutta High Court
Case No : 33 of 2016

Assistant Commissioner of Income Tax,	APPELLANT
Vs	
Emta Coal Limited	RESPONDENT

Date of Decision : 15-09-2017

Acts Referred:

[Income Tax Rules, 1962](#), [Rule 9](#),
[Rule 9](#)

Citation : (2017) 09 CAL CK 0047

Hon'ble Judges : Debangsu Basak

Bench : SINGLE BENCH

Advocate : Kaushik Chandra, Prithu Dudhuria, J.P. Khaitan, Akhilesh Gupta, P.K. Jhunjhunwala, S. Rudra

Judgement

1. The Income Tax Department has challenged an Order dated June 10, 2014 passed by the Settlement Commission (Income Tax and Wealth Tax), Additional Bench, Kolkata in these writ petitions. The three writ petitions, all at the behest of the Income Tax Department, involve similar issues and have been heard analogously.
2. The parties have treated W.P. No. 33 of 2016 as the lead case and have advanced their respective submissions thereon.
3. Additional Solicitor General appearing for the writ petitioners has submitted that, the impugned order is perverse. It does not give any reasons as to why the Settlement Commission has added the quantum of expenditure as done in the impugned order. There is no basis for adding such small quantum given the nature of the transactions that

the Settlement Commission has considered in the Impugned Order. The Settlement Commission did not consider the report of the Department filed under Rule 9 of the Income Tax Rules. It should not have added the entire amount as claimed by the private respondent. It has not given any reasons as to why it has added a sum of Rs.32 crores only. It could have been any other amount other than the sum of Rs.32 crores. It has failed to exercise best judgment. On the issue of best judgment, Additional Solicitor General relies upon 1978 Volume 115 Income Tax Reports page 524 (Brij Bhushan Lal Parduman Kumar v. Commissioner of Income-Tax, Haryana, Himachal Pradesh and New Delhi-III) and All India Reporter 1977 AP page 36 (Additional Commissioner of Income Tax v. Trikamji Punia & Sons).

4. Drawing the attention of the Court to the various portions of the impugned order, learned Additional Solicitor General has submitted that, the assessee had offered a sum of Rs.126.05 crores. The Settlement Commission has added a sum of Rs.36 crores. The Settlement Commission has noted that, there is a claim of expenditure which is bogus for a sum of Rs.236.68 crores and Rs.8.47 crores. It has failed to take into consideration that, there was a shortfall of Rs.110.01 crores. He has submitted that, the Settlement Commission has relied upon the assessment order for the assessment year 2008-2009 to 2010-2011. He has submitted that, the same is not a correct basis, as the assessment orders have since been reopened. Therefore, the basis on which the Settlement Commission has proceeded is faulty.

5. Since the Settlement Commission has proceeded on wrong premises, it would be appropriate that, the matter be remanded to it for fresh consideration. Remand is possible. Learned Additional Solicitor General has relied upon 2010 Volume 8 Supreme Court Cases page 739 (Ajmera Housing Corporation & Anr. v. Commissioner of Income Tax) in support of such contention. Relying upon 2011 Volume

1 Supreme Court Cases page 1 (Brijlal & Ors. v. Commissioner of Income Tax, Jalandhar) learned Additional Solicitor General has submitted that, since the Settlement Commission has deviated from the procedure and has acted as an assessing officer, the impugned order stands vitiated. For the grounds as canvassed, the impugned order should be quashed and the matter may be remanded to the Settlement Commission for fresh consideration.

6. Learned Senior Advocate appearing for the private respondent has submitted that, the Settlement Commission has taken a realistic view on the expenditures claimed. He has drawn the attention of the Court to the fact that, the Settlement Commission has not taken the assessment of the shell companies into consideration. He has drawn the attention of the Court to the various findings recorded in the impugned order as also the stand taken by the Department in the affidavit in opposition. He has submitted that, the Department did not point out to the Settlement Commission that, the assessment orders of some of the assessment years have been reopened.

7. On the issue of best judgment assessment, learned Senior Advocate for the private respondent has relied upon 1973 Volume 90 Income Tax Reports page 271 (Commissioner of Sales Tax, Madhya Pradesh v. H.M. Esufali H.M. Abdulali), 1978 Volume 115 Income Tax Reports page 524 (Brij Bhushan Lal Parduman Kumar v. Commissioner of Income-Tax, Haryana, Himachal Pradesh and New Delhi-III) and an unreported decision of the Division Bench of this Hon"ble Court dated April 29, 2015 rendered in ITAT No. 253 of 2010 (Triyogi Narayan Singh v. CIT, Kolkata-X, Kolkata). Referring to 2014 Volume 364 Income Tax Return page 446 (Delhi) (Commissioner of Income-Tax v. Gopal Gupta) learned Senior Advocate for the private respondent has submitted that, all orders of the Settlement Commission need not be interfered with by a Writ Court.

Where two interpretations are possible, the Writ Court should not substitute its view with that of the Settlement Commission unless it is so outlandish so as to be categorized as arbitrary or perverse.

8. Does the impugned order passed by the Settlement Commission dated June 10, 2014 warrant an interference under Article 226 of the Constitution of India, in the facts of the present case, is the issue falling for consideration in the present writ petition.

9. The private respondent claims to be engaged in the business of developing and operating coal mines. It claims to have formed five Joint Venture (JV) Companies with various Public Sector Power Utility Companies. The private respondent and its promoters claim to hold 74% shares in such Joint Venture Companies while the respective Public Sector Power Utility Companies hold 26%. The private respondent extracts coal for the Joint Venture Companies. The Joint Venture Companies supply such extracted coal to the Public Sector Power Utility Companies at Coal India price less the specified discount. Coal mines are allotted on a long term basis to a Power Utility. The Power Utilities forms the Joint Venture Company as a strategic partner. The private respondent as a part of the arrangement takes care of the entire mining operation including planning, deployment of manpower and equipment, fund mobilization, extract and supply of coal.

10. The group of companies to which the private respondent belongs was the subject-matter of several search and seizure procedures. The private respondent had, thereafter, applied for settlement before the Settlement Commission.

11. According to the Department, the private respondent claims to have paid Rs.263 crores and odd for the questionable work done by them under a contract with the shell companies.

12. The private respondent claims that, it had sub-contracted the contract between the private respondent and the Public Utilities to

Bardhaman Excavators Private Limited, Zoom Transport Private Limited, Venus Excavators Private Limited, Landmark Excavators Private Limited and a fifth legal entity. These five companies had actually excavated the coal for the Public Utilities. The private respondent had to reimburse the expenditure for such coal excavation to those five companies which the private respondent has done.

13. According to the revenue, the four companies are actually shell companies. The person in control and management of the private respondent is in control and management of these four companies as also other legal entities. Such person had utilized the four companies as the first layer and the other entities as the second layer to escape Income Tax liability of huge amount.

14. The Settlement Commission has considered the rival contentions. It has noted that, the four companies are companies incorporated under the Companies Act, 1956 and that, they are subject to assessment as separate assessees. It has also noted that, the four companies did not resort to settlement under Chapter XIXA of the Act of 1961. In paragraph 16 of the impugned order, the Settlement Commission has expressed the view that, it is left with no option but to estimate the income of the private respondent. According to the Department, a sum of Rs.263.68 Crores and Rs.8.47 Crores aggregating to Rs.272.15 Crores have been diverted and siphoned off through these four companies. The Settlement Commission negates the claim of adding the sum of Rs.272.15 Crores as the income of the private respondent on the ground that, there is no evidence of such sum coming back to the private respondent. The Settlement Commission has opined that, it is not in a position to assess whether the payments made to the five entities are genuine or otherwise. With respect, if the accounts of the private respondent is so vague so as not to establish conclusively the expenditure made and which is the accepted position before the

Settlement Commission, then in all fairness, the Settlement Commission ought to have given reasons for the arrival of the quantum of expenditure allowable to the private respondent. It ought to have given reasons why it was not adding the sum of Rs.272.15 Crores as an income of the private respondent and assessing Income Tax thereon. It has held that, it is not inclined to hold that the entire payment of Rs.272.15 Crores to the five entities can be added to the assessment years in question of the private respondent. It has added Rs.15 Crores each for the Assessment Years 2011-2013 and Rs.6 Crores for the Assessment Year 2013-2014 aggregating to Rs.36 Crores. It has not given any reason as to why such a quantum is arrived at. On the percentage of gross profit, the Settlement Commission has taken its own calculation. Again the reasons are specious.

H.M. Esufali H.M. Abdulali (supra) has considered the distinction between a best judgment assessment and assessment based on the accounts submitted by an assessee. It has held that, when the assessing officer comes to the conclusion that, no reliance can be placed on the accounts maintained by the assessee, he has to proceed to assess on the basis of a best judgment. In doing so, the assessing officer may take such assistance of the accounts of the assessee that it may afford. The assessing officer may also rely upon other information as well as the surrounding circumstances of the case. The assessment may on the basis of assessee's accounts and those made on the best judgment basis are totally different. Trikamji Punia & Sons (supra) has held that, the assessing officer has to make an assessment of the total income to the best of his judgment after taking into account the relevant materials which he has gathered. Brij Bhushan Lal Parduman Kumar (supra) has reviewed the authorities on the subject and has held that, a best judgment assessment must make an honest and fair estimate of the income of the assessee and though arbitrariness cannot be avoided in

such estimate, the same must not be capricious but should have a reasonable nexus to the available materials and the circumstances of the case.

15. Triyogi Narayan Singh (*supra*) has held that, a wrong judgment and a judgment containing a mistake do not share the same pedestal. A judgment containing a mistake may not necessarily render the judgment wrong but a wrong judgment is wrong by all means.

16. In the facts of the present case, as noted above, instead of adding a sum of Rs.263.68 Crores in respect of four entities, the assessing officer has added an aggregate sum of Rs.36 Crores for the three Assessment Years concerned for each of the four shell companies. The assessing officer did not give any reason as to why such a quantum has been added. It has not given any reasons as to why the sum of Rs.263.68 Crores has not been added to the income of the private respondent. In the facts of the present case, it cannot be said that, the Settlement Commission has applied the principles of best judgment. The impugned order is, therefore, arbitrary and capricious.

17. Gopal Gupta (*supra*) has held that, where two interpretations are possible, the Writ Court should not substitute its view in place of that of the Settlement Commission. The issue in the present case, is not one of substitution or non-acceptance of one possible view. The issue is of no reasons being given for the calculation of the sum of Rs.36 Crores by the Settlement Commission as the amount required to be added to the income of the private respondent for each of the four shell companies.

18. Ajmera Housing Corporation & Anr. (*supra*) has held that, where the Settlement Commission has passed a final order without taking into consideration huge amount of unexplained expenses, loans and surplus and imposed penalty less than that leviable on Commission's own assessment, the Court should interfere. The Court can make an order for remand.

19. Brijlal & Ors. (supra) has noted the difference between assessment in law which is a regular assessment or assessment under Section 143(1) and the assessment by settlement under Chapter XIXA of the Act of 1961. It has held that, an order under Section 245(D) is not an order of regular assessment. Chapter XIXA contemplates the taxability determined with respect to undisclosed income only by the process of settlement/arbitration.

20. The process of arrival of the liability of the assessee to pay tax under Chapter XIXA of the Act of 1961 being different to that of a regular assessment, the Settlement Commission should factor the same while considering an application for settlement. It is obliged to give reasons for arriving at a particular figure. It is open to the Settlement Commission to use best judgment in arrival of the figure. Nonetheless it has to explain the manner in which the best judgment figure has been arrived at by the Settlement Commission.

21. In the facts of the present case, the Settlement Commission not having disclosed the reasons for arriving at the figures which to its best judgment are the figures to be added to the income of the private respondent, the impugned order is set aside. The settlement application is remanded to the Settlement Commission for fresh consideration. The issue is answered accordingly.

22. W.P. No. 33 of 2016, W.P. No. 34 of 2016 and W.P. No. 35 of 2016 are disposed of. No order as to costs.