

(2012) 02 DEL CK 0170

In the Delhi High Court

Case No : Writ Petition (C) No. 10198 of 2009

Commissioner of Income Tax

APPELLANT

Vs

M/s. Godwin Steels Pvt. Ltd.

RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

Constitution of India, 1950 — Article 136, 226

Income Tax Act, 1961 — Section 115JB, 133(A), 234B, 234C, 245B(3)

Income Tax Settlement Commission (Procedure) Rules, 1997 — Rule 9

Citation : (2012) 6 AD 349 : (2012) 188 DLT 148 : (2013) 353 ITR 353

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Kamal Sawhney, for the Appellant; Kaanan Kapur and Mr. Y.K. Kapur, for the Respondent

Final Decision : Allowed

Judgement

R.V. Easwar, J.—This is a writ petition filed by the CIT (Appeal) IV, New Delhi praying for issue of a writ of certiorari and or any other writ, order or direction for quashing the order dated 20th October, 2008 passed by the Income Tax Settlement Commission(hereinafter referred to as "ITSC"), Principal Bench on 4th Floor, Lok Nayak Bhawan, Khan Market, New Delhi-110003. It is also prayed that a writ or order or direction in the nature of mandamus be issued directing the ITSC, the second respondent herein, to pass a speaking order after giving adequate opportunity to the Income Tax Department to make enquiries into the affairs of the assessee.

2. The first respondent is M/s Godwin Steels Pvt. Ltd. (hereinafter also referred to as "assessee" or "Godwin") of Rajouri Garden, New Delhi. It is a private limited company. On 27th August, 2004, the income tax authorities conducted a survey u/s 133A of the Income Tax Act, 1961, hereinafter referred to as "the Act", on the premises of M/s Kumar & Company carrying on business at Ludhiana. In the course of the search 48 pocket diaries were found, including

one diary containing various details of cash transactions between Kumar & Company and the first respondent herein. One Naresh Kumar Dhawan who was concerned with the affairs of Kumar & Company stated in his statement recorded on oath that the transactions in the diary reflected unaccounted sales of Rs. 1,20,47,040/- made by Godwin. On the basis of the statement a survey was made by the income tax authorities on the premises of Godwin the very next day, that is, 28th August, 2004 in the course of which several documents and papers were found which allegedly contained details of large scale sales made by Godwin outside the books of accounts.

3. On 27th October, 2005 Godwin filed its return of income for the assessment year 2005-06 declaring income of Rs. 4,10,184/- u/s 115JB. The return was scrutinised by the Assessing Officer who issued a detailed questionnaire seeking information from the assessee. He also gave as many as 26 opportunities to the assessee to furnish the relevant particulars which were necessary for completing the assessment. Apparently, these details were not submitted to the Assessing Officer.

4. On 24th December, 2007 the assessee filed an application before the ITSC u/s 245C of the Act seeking a settlement of its income for the assessment year 2005-06. In the application, the assessee stated that the nature and extent of the business carried on outside the books of accounts, if any, needs to be established and the income therefrom has to be worked out, and the tax payable on the same may be determined. A request was made for waiver of interest chargeable u/s 234B and 234C as well as the penalties imposable under the various clauses of Section 271 of the Act. The assessee also sought immunity from prosecution for any offence under the Income Tax Act, the Indian Penal Code and any other Central Act for the time being in force. It was further stated in the application before the ITSC that the assessment was pending before the Assessing Officer and that there was an apprehension in the mind of the assessee that a high pitched and arbitrary assessment would be made leading to protracted litigation and undue harassment to the assessee. It was pointed out that in the questionnaire the Assessing Officer had even proposed to estimate the undisclosed income of the assessee at Rs. 1,50,000/- per day per party which was devoid of any valid reasoning. The assessee also submitted that its case involved complexity of investigation arising because of the fact that various loose papers were seized during the survey and heavy additions would in all probability be made leading to protracted litigation. Complexities of investigations, it was stated, were also involved in determining the source of income of the assessee on the basis of the disclosure made in the application before ITSC and utilisation of the declared amount in various moveable and immoveable assets. The genuineness and reliability of the books of accounts maintained by the assessee were also stated to be factors to be taken into account in assessing the complexity of the investigation. In the application before the ITSC the assessee, after stating the aforesaid facts, offered an amount of Rs. 15 lacs for taxation on which the income tax payable was Rs. 5,16,583/- and the

interest payable was Rs. 1,95,896/- , together amounting to Rs. 7,12,479/-

5. On 4th February, 2008 the CIT filed a report before the ITSC under Rule 9 of the Settlement Commission (Procedure) Rules, 1997. In this report the CIT objected to the admission of the application of Godwin before the Settlement Commission. The objection was made on the following grounds:-

(a) The assessee had not made a full and true disclosure of its income, even having regard to the materials which are in the possession of the Assessing Officer.

(b) No additional income, which is not in the knowledge of the income tax authorities, has been offered for taxation in the application.

(c) The statement of Naresh Kumar Dhawan made in the course of the survey of the premises of Kumar & Company shows that Godwin was making unaccounted cash sales not only to Kumar and Company but also to M/s. Jai Iron and Steel and M/s. Harbhajan Singh & Co. Income from these sales have not been disclosed in the application to the ITSC.

(d) There is evidence and material collected during the survey which reveals unaccounted cash transaction to the tune of Rs. 15 lacs on a single day with 10 parties. There is no disclosure of income from such transactions in the settlement application.

(e) The data from the impounded computer revealed net profit of Rs. 29,55,535/- for the first four months against which the assessee had shown only Rs. 4,10,184/- as profits for the full year. There is no disclosure of additional income by the assessee on this point.

6. The CIT also commented upon the statement of facts filed by the assessee before the ITSC. He brought to the notice of the ITSC certain pertinent facts which required consideration before the application of the assessee is allowed to be proceeded with. In brief, these facts are the following:-

(a) Though the assessee had declared only Rs. 15 lacs as its undisclosed income, in the paper book a figure of Rs. 57 lacs is noted. It is not clear whether the assessee intended to declare Rs. 57 lacs or only Rs. 15 lacs.

(b) The assessee itself had admitted in its letter dated 7th December, 2007 filed in the course of the assessment proceedings that the unaccounted cash sales represented sales against production for which purchase of raw material and other incidental expenses have to be taken into account. But no income on this score was admitted in the application before ITSC. On the contrary only the gross profit rate was applied on such unaccounted cash sales which does not reflect the true undisclosed income.

(c) In the same letter the assessee has admitted that there has been power consumption as well as labour payments which are all recorded in the books of accounts. If this is the correct factual position then the offer of mere gross profit

on the sales made outside the books of accounts cannot be accepted and the only course open is to add the entire cash sales as the unaccounted income of the assessee. The CIT also referred to certain other material facts in support of his claim that the entire cash sales should be added as undisclosed income of the assessee and these facts are mentioned in detail in paragraph 1.8 of the report.

(d) A statement on oath was recorded from one Brij Mohan, employee of the assessee-company who admitted that he collected cash from Kumar & Co., Jain Iron Steels and Harbhajan Singh & Co. Despite opportunities the assessee did not furnish details of these transactions and in the application before the ITSC the assessee merely referred to cash sales of one day to M/s Kumar & Co. The transactions with other two parties were not denied. Even so, no income was offered in the application from unaccounted transactions with the other two parties.

(e) There is no justification for computing the undisclosed income of the assessee by applying the "peak theory". The computation of the peak cash of Rs. 5,22,900/- furnished before the Assessing Officer in the course of the assessment proceedings has no basis. The assessee itself has revised the computation of the peak cash to Rs. 11,50,337/- before the ITSC. It is thus evident that there is no scientific basis for calculating the peak cash.

(f) Evidence was unearthed during the survey operation that the assessee was in the habit of issuing the same invoice number to more than one party and when this was put to it, there was no convincing reply. Despite this, the assessee has merely stated before the ITSC that this aspect has been taken into consideration in calculating the peak cash.

(g) There are entries discovered during the survey which indicated that the assessee has paid cash in exchange for cheque and one such entry was in the ledger account of M/s Sardar Associates. This aspect has not been covered in the application before the ITSC.

(h) During the relevant accounting year the assessee has received share application monies aggregating to Rs. 13 lacs which are reflected in its books of account. During the survey of the assessee's premises, blank share transfer deeds were found and they were signed in the column where the transferor is required to sign, by the same persons who were shown to have applied for the shares and in whose names monies were credited. The application before the ITSC did not cover this aspect at all. The reply given by the assessee in the course of the assessment proceedings was devoid of merit and unconvincing.

(i) Several discrepancies were noticed in the maintenance of the stock records. There was difference between the actual stock declared by the assessee and the stock that was found during the survey. The assessee admitted during the survey that the actual physical stock found at the time of the survey represented the true stock. This corroborates the claim of the revenue that the assessee was indulging in unaccounted sales.

(j) The books of accounts maintained by the assessee were totally unreliable. The assessee had even admitted that it had inserted entries of back dates which indicated that the books of accounts were not closed on a daily basis but were kept open to facilitate manipulation. The financial transactions recorded in the computer were captured and as per the data on the date of the survey the gross profit earned by the assessee was Rs. 84,24,8099/- and the net profit was Rs. 73,26,353/- After adjusting the opening and closing stock the gross and net profit figures came to Rs. 40,53,851/- and Rs. 29,55,535/- just for the first four months, that is, from the 1st April, 2004 to 28th August, 2004 which is the date of survey. As against this profit of only Rs. 4,10,184/- was offered.

(k) The other aspects which have not been covered by the assessee in the application before the ITSC were the applicability of Section 40A(3) of the Act, excise duty evasion etc.

7. After bringing the aforesaid facts to the notice of the ITSC, the CIT referred to the judgment of the Madras High Court V.M. Shaik Mohammed Rowther Vs. Settlement Commission (IT and WT) and Others, where it was held that there is no right in an assessee to invoke the jurisdiction of the ITSC even while continuing with his dishonest conduct. The CIT thus contended in his report that the application of Godwin before the ITSC is not maintainable and was beyond the jurisdiction of the ITSC. Without prejudice to the preliminary objection, it was submitted by the CIT that further enquiry was required to determine the correct undisclosed income on the following lines:

(a) Enquiry u/s 68 to examine the share capital receipts;

(b) Impact of the bills raised on the same invoice number on the income of the assessee;

(c) Enquiries with whom the assessee entered into cash transactions worth several crores of rupees to establish the true extent thereof;

(d) Comparison of the books of account manually maintained with computerised accounts to enquire and establish the correct profits for the year;

(e) Enquiries to ascertain the actual production, electricity consumption etc. to ascertain the quantum of excise duty evasion and income tax evasion;

8. On the above basis the CIT strongly objected to the admission of the application of Godwin before the ITSC. The ITSC was also invited to make further enquiries by virtue of its powers u/s 245D(3).

9. The ITSC took note of the report submitted by the CIT and forwarded the same to Godwin for comments. It would appear that after hearing both the sides the ITSC allowed the application filed by the Godwin to be proceeded with. There is not much reasoning in the impugned order passed by the ITSC on 20th October, 2008 and there is no point-by-point consideration of the various objections raised by the CIT in his report under Rule 9. The entire matter was

disposed of in short paragraphs. Para No. 5 contained only the following reasoning for admitting the application:-

On careful consideration of both the judgments referred to by the CIT (DR), we find substance in the arguments of the Ld. A.R. that the application filed by the applicant is maintainable in law and that the Settlement Commission is fully within its powers to proceed with the same in accordance with provision of Section 245D(4). Hence, the contention of the department stands rejected.

10. After allowing the application of the assessee to be proceeded with u/s 245C(1), by the same order the ITSC proceeded to dispose of the application on merits.

11. We have carefully gone through the reasoning of ITSC. It has proceeded to discuss the issue in the following compartments:-

- (1) Computation of net profit;
- (2) computation of income u/s 68 in respect of the share capital received;
- (3) computation of income by way of cash paid for cheque;
- (4) computation of income in respect of cash collected for unaccounted sales to Kumar & Co., Jai Iron and Steel and Harbhajan Singh & Co.

In respect of the aforesaid main issues the procedure adopted by the ITSC, by and large, was to get the document and evidence verified by the Joint Director of Income Tax (JDIT) in the presence of the Assessing Officer. Thereafter the ITSC has gone by the report submitted by JDIT on 25th September, 2008 and 1st October, 2008.

12. So far as the computation of the net profit is concerned, the ITSC has noted that before the JDIT and the Assessing Officer, no difference and disputes arose in respect of explanation furnished by the assessee nor was any objection raised by the department. The ITSC has also noted that the CIT(DR), in view of the necessary verification done, did not make any further comments on this account. In paragraph 13 of its order the ITSC concluded that no adjustment was required to be made on account of net profit. This paragraph is quoted below:-

We have heard both the parties and have also perused the observations by the CIT in Rule 9 report as well as the evidence available on the record. We have also looked into the report of the JDIT dated 25.09.2008 and 01.10.2008 that the JDIT has verified relevant material along with evidence furnished by the applicant in the presence of the A.O. It has also been stated that both the parties i.e. the applicant and the respondent-department were allowed opportunities to cross examine the relevant details. At the time of verification, the department has not objected to the explanation furnished by the applicant that there was any discrepancy in the factual position provided by the applicant. Having regard to the facts and circumstances of the case, no adjustment is required to be made on this account and the issue stands settled, accordingly.

13. In the case of share capital the assessee submitted before the ITSC that confirmations/affidavits from the companies have been obtained, that the investments made by the companies were reflected in the assessee's balance sheet, that the companies investing in the shares were assessed to tax and the payments were received by account payee cheques. Reliance was placed on the judgment of the Supreme Court in the case of CIT vs. Lovely Exports (Pvt.) Ltd. (2008) 216 CTR 195.

14. In respect of the cash paid in exchange for cheque received, the assessee had put forth the submission before the ITSC that it made purchases for Rs. 2,40,800/- from Sardar Associates for the accounting year relevant to the assessment year 2004-05 and that the dues were cleared by making payment by cheque. It had further submitted before the ITSC that due to some inadvertent error, instead of the word "cheque", the word "cash" was mentioned in the seized papers. In support of the contention the assessee had furnished a confirmed copy of account of Sardar Associates and its income tax file number. The ITSC after taking note of the above and the vehement objection of the CIT(DR) concluded in para 21 as follows:-

The submissions made by both the parties have been considered and the relevant papers along with evidence have also been perused. We find substance in the submissions of the Ld. AR that the mistake has occurred inadvertently and instead of "cheque" the word "cash" has been mentioned. Even otherwise, the entry under consideration does not relate to the year before us. For the reasons stated above, we do not see any reason to make further adjustment on this account.

15. As regard the cash collected from the three firms on account of unaccounted sales made to them, the contention put forward by the assessee before the ITSC was that the transactions of sales to Kumar & Co. and Jai Iron and Steel Corporation, were not in dispute but they have been duly taken into consideration while working out the peak cash and, therefore, no further consideration was necessary. With regard to the statement of Brij Mohan, the employee of the assessee company who had confirmed that he had collected the cash from the three firms for unaccounted sales made by the assessee, the contention before the ITSC was that there was no other evidence to corroborate the statement of Brij Mohan and that there were confirmed copies of accounts from the three parties to indicate that the assessee had no transactions with Harbhajan and Co. It was also submitted that Harbhajan & Co. was assessed to tax.

16. After hearing the assessee and the revenue and after considering the report of the CIT under Rule 9, the ITSC accepted the submission of the assessee observing as under:-

We have considered the submission made by both the parties. On careful consideration of the observations made by the CIT in the report as well as

documentary evidence furnished by the applicant along with the SOF at the time of hearing, we find that cash collections from M/s Kumar & Co. and M/s Jai Iron & Steel stand covered in the peak chart of pages 620-633 of SOF. As regards M/s Harbhajan Singh & Co., no adverse inference can be drawn in the light of discussion made above. Accordingly, the issue stands settled.

17. Besides the above main issues, the ITSC also noted that other issues related to difference in stock position, entries of M/s Kundan Iron Steel and Mahajan Alloys and determination of income on account of issuing sale invoice containing the same number to two different parties.

18. In respect of the discrepancies in the stock, the submission of the assessee before the ITSC was that the same was very minimal and amounted to only Rs. 4,67,000/- and that was covered in the offer of Rs. 15 lacs. As regards the entries with Kundan Iron Steel and Mahajan Alloys the submission of the assessee was that it sold goods directly to those parties or on the instructions of those parties the goods were directly sent to the other parties concerned. The copy of the accounts of these two parties in the assessee's books were relied upon to show that they dealt with the seized paper. In respect of an entry of Rs. 3 lacs appearing in the account of Kundan Iron Steels, it was submitted that this has been duly considered while calculating the peak cash. As regards the sale invoices of the same number issued to two different parties and income earned therefrom, the submission of the assessee before the ITSC was though the bill was originally made in favour of Prabhu Steels the actual sales were made to M/s Mohan Suspensions, since Prabhu Steels had cancelled the order. A Copy of the order placed by M/s Mahajan Suspensions was submitted before the ITSC. In the alternative it was contended that the sales were covered by the offer of Rs. 15 lacs made in the application.

19. In respect of these three issues, the ITSC accepted the assessee's submission and concluded as follows:-

On careful consideration of the submission made by both the parties as well as the observations made by the CIT in the report and the evidence furnished during the course of hearing, we are of the view that no adjustment is required to be made on the above accounts. These issues, accordingly, stand settled.

20. After accepting all the submissions of the assessee as noted above, the ITSC settled the additional income of the assessee at Rs. 15 lacs as per the statement of facts filed by the assessee. The ITSC also granted immunity to the assessee from prosecution and penalty under the Income Tax Act to the extent and in regard to the issues raised and discussed in its order. Interest u/s 234B was directed to be charged in accordance with law as the ITSC has no power to waive the same as held by the Supreme Court in Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, . The assessee had sought capitalization of Rs. 12 lacs in respect of the cash disclosed before the ITSC and this request was allowed in para 38. The tax as per the computation together with interest

was directed to be paid within 35 days of the receipt of the order of the ITSC. It was provided that the immunity may be withdrawn if the tax is not paid as directed and also if it is found that the order was obtained from the ITSC by falsity or by concealing material particulars relating to the settlement.

21. The revenue assails the order of the ITSC in the writ petition.

22. We have heard the rival contentions. We have also carefully perused the written submissions filed by the learned counsel for the respondent, with our leave.

23. The limits of judicial review of an order of a Tribunal under Article 226 have been laid down by the Supreme Court in several judgments. Suffice to refer to the observations of S.B.Sinha, J. in *State of U.P. and Another Vs. Johri Mal*, . The following observations sum up the entire legal position:-

It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappraise the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian administrative law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.

24. We may now notice a few judgments of the Supreme Court in which the decision of the ITSC was under challenge. In *R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another*, , the Supreme Court observed that the power of judicial review is concerned not with the decision but with the decision making process. In that case the Supreme Court was concerned with the correctness of the order of the ITSC in an appeal under Article 136. It was further observed that the Court is concerned only with the legality of the order. Referring to this judgment, it was observed by Jeevan Reddy, J. speaking for the Supreme Court in the case of *Jyotendrasinhji Vs. S.I. Tripathi and others*, that the only ground upon which the court can interfere

against the orders of the ITSC is that the orders are contrary to the provisions of the Act and such contravention has prejudiced the appellant. At page 623 the Court dealt with the contention that the ITSC is not required or obligated to pass a reasoned order. Vis-a-vis this contention, the court observed as under:-

Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the commission to make a particular order, unless of course the commission itself chooses to give reasons for its order. Even if it gives reasons in a given case, the scope of inquiry in the appeal remains the same as indicated above viz., whether it is contrary to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (*audi alternant partem*) has been incorporated in Section 245-D itself. The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same - whether the order of the Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant apart from ground of bias, fraud & malice which, of course, constitute a separate and independent category.

25. In *Shriyans Prasad Jain vs. ITO* (1993) 2004 ITR 616 the Supreme Court, speaking through the same learned Judge, observed as follows:-

Mr. Poti, learned Counsel for the Revenue, is right in submitting that in this appeal this Court would not go onto questions of the fact or review the findings of fact recorded by the Commission. As pointed out by this Court in *Jyotendrasinhji v. S.I. Tripathi*'s case, (*supra*) this Court can interfere with the Commission's order only if it is found to be "contrary to any of the provisions of the Act". To the same effect is the earlier decision of this Court in *Shreeram Durga Prasad & Fatehchand Nursing Das v. Settlement Commission I.T. and W.T.* (1989) ITR 169

26. In *Kuldeep Industrial Corporation etc. Vs. Income Tax Officer and others*, again the Supreme Court reiterated the view propounded as above. The same learned judge who made the aforesaid observations in the cited judgments, reiterated them in the following words:-

It has been held by this Court that the nature of jurisdiction exercised by this Court over the orders of the Settlement Commission is in the nature of judicial review. (See *Alleppy Co. Ltd. Vs. Commissioner of Income Tax*, and *Jyotendrasinhji Vs. S.I. Tripathi* and others, . In these cases, we find that the impugned orders of the Commission are vitiated by more than one misdirection in law. Firstly, the Commission held, wrongly, that the Income Tax Officer had no power to proceed with or collect any material after the date of submission of the

application u/s 245-C. Secondly, having rightly rejected to admit the case relating to assessment year 1977-78 for settlement, it (the majority) made out a new case for the assessee by creating a distinction between 1977-78 and 1978-79 and 1979-80, when no such distinction was suggested even by the assessee; indeed such a distinction is contrary to the case put forward by the assessee in its application u/s 245-C. The Commission (the majority) also ignored the several statements, admissions and averments made by the assessee before the Commission while admitting the case relating to assessment year 1978-79 and 1979-80 for settlement.

27. Applying the ratio laid down in the aforesaid judgments to the case before us, we find that the ITSC has not disposed of the application before them in the manner required by law. The report of the CIT filed before the ITSC under Rule 9 of the Settlement Commission (Procedure) Rules is very elaborate and we have also made a reference to the same. It would appear that the ITSC has not accorded due weightage, credibility or consideration to the serious objections taken by the CIT in his report. Section 245D(5) reads as under:-

(5) Subject to the provisions of Section 245BA, the materials brought on record before the Settlement commission shall be considered by the Members of the concerned Bench before passing any order under Sub-section (4) and, in relation to the passing of such order, the provisions of Section 245BD shall apply.

(underlining ours)

The aforesaid sub-section requires that the materials brought on record before ITSC shall be "considered" by the members before passing any final order under sub-section (4). The word "consideration" means an independent examination of the evidence and materials brought on record before the ITSC by the members and application of mind thereto with a view to independently assess the materials and evidence, whether adduced by the assessee-applicant or by the CIT and come to a conclusion by themselves. In *Bhikhubhai Vithlabhai Patel and Others Vs. State of Gujarat and Another*, the Supreme Court considered the expression "as considered necessary" and opined that the term "consider" means to think over and it connotes that there should be "active application of the mind". Earlier in *Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria*, , a three judges Bench of the Supreme Court, while dealing with the power of the first appellate authority under the Income Tax Act to enhance the assessment, observed that the word "consideration" (in its verb form) means that there must be something in the assessment order to show that the income tax officer "applied his mind" to the particular subject matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection. It is necessary to remember that the ITSC is not deciding a case inter-parties; they are assessing or estimating the amount on which, in the interests of the country at large, the tax payer ought to be taxed. The observations made by the Court of Appeal in England in *King Vs. Income Tax Special Commissioners* [1936] 1K.B. 487 are relevant. Lord Wright

observed that the Special Commissioners were not in the position of judges deciding an issue between two particular parties, that their obligation is wider than that, that they were exercising statutory authority and statutory duty which they are bound to carry out and it is their obligation "to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make." These observations made in relation to the proceedings before the Special Commissioners of income tax, who proceeded to hear the appeal filed by the assessee despite notice given by him to withdraw the appeal, apply with equal force to the ITSC which has been given a special position and authority under the Income Tax Act. However, in the present case, the ITSC seems to have entrusted the job of verification and application of mind to the officers assisting it. It may be true that in all cases it may not be expected of the members constituting the Bench to themselves verify every material or evidence brought before them in the matter of settling the case. However, in cases where there are copious material and evidence collected by the income tax authorities in respect of which an in-depth examination of the explanation of the assessee-applicant is called for, it is necessary that the members constituting the Bench themselves examine the materials and evidence and come to their own conclusion. In such cases they are not expected to merely endorse the report of the officers assisting them.

28. Section 245B(3) provides for appointment of members of the ITSC from amongst "persons of integrity and outstanding ability, having special knowledge of, and experience in, problems relating to direct taxes and business accounts". This requirement is obviously designed not only to take advantage of such knowledge, ability and experience but also to ensure that cases involving complexity of business accounts are properly unravelled and the significance of the accounts is properly appreciated and incorporated in the settlement. Section 245-I provides for finality of the order of the ITSC in respect of matters covered by the order of settlement. This section casts a duty upon the ITSC to thoroughly examine the evidence and material placed before them in order to ensure that unscrupulous assesseees do not take undue advantage of the finality of the order of settlement. It is no doubt open to the ITSC to take the assistance of its officers in the matter of doing the ground work and carrying out the verification of the record, seized materials, documents, account books etc., but in the present case, having regard to the grave charges levelled against the assessee-applicant in the report of the CIT, the ITSC ought to have itself examined independently the claim of the assessee-applicant and the officers of the Income Tax Department that everything stood reconciled or explained by the assessee. This important step in the decision making process does not appear to have been carried out by the ITSC.

29. We have referred to the relevant paragraphs in which the conclusions of the ITSC in respect of various aspects of the entire case have been recorded. It may be readily appreciated that the conclusions are rather cryptic and merely endorse

the report of the JDIT dated 1st October, 2008 and 25th September, 2008 submitted by him to ITSC. In the report dated 25th September, 2008, the JDIT has only referred to the assessee's explanation with regard to the opening stock, excise duty, purchase ingots and applicability of Section 40A(3). No independent opinion has been expressed by him. His report merely shows what the explanation of the assessee was with regard to the aforesaid points. The JDIT himself has not expressed any opinion about the veracity or correctness of the explanation. He has further recorded that the verification has been conducted on the directions of the ITSC and in the presence of the concerned Income Tax Officer, Ward-12(2), New Delhi and the authorised representative of the assessee. It has also been recorded that the proceedings were conducted in his chamber on 22nd September, 2008.

30. The second report dated 1st October, 2008 is a very brief report and the same is reproduced below:-

In continuation to the earlier supplementary report, it is further clarified and stated that during the course of hearing before the undersigned on Representative of the A.O. representing the I.T. Department and the Authorised Representative of the applicant had appeared and produced/filed relevant details and evidences. Both the parties i.e. the applicant and the respondent were allowed opportunities to cross examine the facts and figures. There after neither any dispute/differences remained with the applicant and the respondents on the issues discussed in the supplementary report nor any objection letter have been filed by the Department till date. Under the circumstances, the facts and figures as discussed therein may be treated as undisputed and verified.

(R.R.Prasad)

Joint Director of Investigation

Unit-I, II & III

1.10.2008

31. When the aforesaid two reports were placed before the ITSC, it was in our opinion incumbent on the ITSC to have examined them and formed an independent opinion about the correctness of the same. In fact it was incumbent upon the ITSC to have examined the materials placed in the present case because the reports of the JDIT were non-committal. Not only this, we also do not find anything in the reports addressing the various other important and crucial aspects of the case such as the data found in the computer, unaccounted cash sales made by the assessee, the statements of the employee of the assessee, discrepancy in the stocks, additions to share capital, cash paid in exchange of cheques etc. The material found during the survey prima facie pointed to the possibility of substantial undisclosed income and, therefore, it was for the ITSC itself to have examined each and every document/materials in order to examine the assessee's claim that it earned undisclosed income of only Rs. 15

lacs for the assessment year 2005-06. There is dearth of material in the reports submitted by the JDIT as to how the assessee explained the data in the computer. There are also no details to show as to what was the explanation given by the assessee with regard to unaccounted cash sales to three firms, namely, Jay Iron Steels, Kumar & Co. and Harbhajan Singh & Co. There is also nothing in the said reports to show what explanation was advanced by the assessee with regard to cash paid in exchange of cheque. On this aspect, the ITSC has merely observed and accepted the assessee's explanation that the word "cash" has been erroneously mentioned instead of the word "cheque". Though the ITSC has stated in para 21 of its order that the entry does not relate to the year before us, the entry was sufficient to excite suspicion and a deeper probe was called for. With regard to the discrepancy between the data found in the computer and the account books maintained by the assessee for production before the income tax authorities, what the ITSC has stated in para 13 of its order is merely that the revenue has not objected to the explanation furnished by the applicant. The report of the JDIT has been simply relied upon to state that since he has verified the relevant material along with the evidence furnished by the applicant in the presence of the Assessing Officer, nothing further was required to be done. Having regard to the fact that there was a difference of more than Rs. 25 lacs, even for the period of four months for which data was available, between the figure of net profit shown by the computer data and the figure of net profit shown in the books of accounts meant for production before the income tax authorities, it was expected of the ITSC to independently apply their mind to the assessee's explanation, whatever that was, and to the materials found and relied upon by the CIT in his report and cross verify both in an attempt to find out whether the explanation was plausible or acceptable. This important step in the decision-making process has been omitted to be done.

32. So far as share capital receipts are concerned, the ITSC has proceeded to accept the assessee's explanation somewhat superficially, if we may so with respect. It has relied upon the documentary evidence in support of the share subscriptions. In the reports of the JDIT there is no specific reference to any explanation given by the Assessee. That itself was sufficient to excite the inquisitiveness of the ITSC. The ITSC has not applied its mind to the blank transfer forms, duly signed by the companies, found in the assessee's premises during the survey. We cannot believe that the ITSC was unaware of the practice of some assessee's misusing the provisions of Section 68 of the Act and creating documentary evidence in support of alleged share-subscription receipts. The income tax department itself, in several cases, is in possession of information regarding the role played by entry providers who issue cheques in return for cash and for a commission. It is in this context also that the entry found in one of the ledger accounts of Sardar Associates, in the assessee's books, that cash was paid for cheque, assumes significance. The ITSC ought to have conducted an examination of the alleged share capital receipts, having regard to the entry in ledger account of Sardar Associates. The role played by Sardar Associates ought

to have been examined. All these things were not done.

33. So far as the unaccounted cash sales made to Kumar & Co., Jai Iron Steels and Harbhajan Singh & Co. are concerned, the statement of the assessee's employee is revealing and he has confirmed that he collected the cash from the aforesaid firms. The assessee had admitted the cash receipts from only Kumar & Co. The CIT in his report has objected to the assessee's application on the ground that full disclosure had not been made in respect of the unaccounted cash sales made to the other two firms. The only explanation of the assessee before the ITSC was that the cash sales made to the three firms have been duly taken into account while working out the peak amount to be added. This aspect has been elaborated in the report filed by the CIT under Rule 9 wherein he has stated that the theory of peak cannot be applied in respect of this aspect of the matter and we have referred to his objections in some detail earlier. The question before the ITSC, therefore, was whether the entire cash sales ought to have been added to the undisclosed income of the assessee instead of the peak amount or merely the gross profit from the sales. The CIT had submitted in his report that since the assessee has accounted for all the expenditure, it is only logical to add the entire amount of unaccounted sales as the undisclosed income of the assessee without giving allowance to further expenditure or by applying the peak amount theory. There is nothing in the order of the ITSC to show that this objection of the CIT was given any consideration. All that has been stated by the ITSC in para 26 of its order is that considering the documentary evidence furnished by the applicant along with the SOF (statement of facts) at the time of the hearing, the cash collections from Kumar & Co. and Jai Iron Steels have been covered by the peak theory, details of which have been given at pages 620 to 633 of the SOF filed by the assessee before the ITSC. To say the least, this appears to us to be an unsatisfactory way of disposing of a very serious and seemingly valid objection raised by the CIT in his report. Again on this aspect also there is nothing in the reports of the JDIT to show as to what was the assessee's explanation and how it merited acceptance.

34. In respect of the other issues, namely, difference in stock, entries of Kundan Iron Steels and Mahajan Alloys and issue of same sales invoice to two different parties, all that the ITSC says in para 32 of its order is that, having considered the statements of the parties and the report of the CIT and the evidence furnished in the course of the hearing, no adjustment was required to be made on account of the addition. On these three aspects also the reports of the JDIT did not throw any light.

35. We have highlighted the aforesaid aspects in some detail only to show that the procedure followed by the ITSC is contrary to the well settled principles to be adopted in the decision making process. We are constrained to observe that no reasons have been given by the ITSC in support of their conclusions. The ITSC has also ignored the several statements, admissions and materials referred to in the report of the CIT filed before them under Rule 9. The manner in which the

ITSC has set out to dispose of the assessee's application before them and the report of the CIT shows that the procedure adopted by them is vitiated and is certainly not in accordance with law. The materials referred to in the report of the CIT have not been directly addressed by the ITSC. They have merely relied on the reports of the JDIT who is stated to have conducted an enquiry in his chamber in the presence of the Assessing Officer as well as the authorised representative of the assessee. Per se, this perhaps cannot be objected to since, as we have already mentioned, the ITSC has senior officers of the revenue to assist them and who may be, in appropriate cases, entrusted with the task of verifying the materials. However, in the present case the ITSC ought to have itself actively applied its mind to the report of the CIT and the copious materials adverted to therein having due regard to the seriousness of the objections taken by the CIT and the nature of the documents found during the survey of the assessee's premises. Moreover the ITSC lost sight of the fact that the reports of the JDIT were vague and did not throw light as to what was the explanation of the assessee which merited acceptance. The reports merely summarised the explanations stated to have been made by the assessee in the presence of the Assessing Officer. The ITSC could not have been satisfied as to the acceptability of the assessee's explanation with regard to the various issues raised before it in the report of the CIT merely on the basis of the reports of the JDIT. Without applying its mind directly to the report of the CIT and the materials referred to therein, it could not have reached the conclusion that nothing more was required to be added over and above the undisclosed income of Rs. 15 lacs disclosed by the assessee. The ITSC thus ignored relevant evidence and material which it ought to have taken into account while processing the assessee's application.

36. The learned counsel for the petitioner has submitted, with our leave, copies of the application and statement of facts filed by Godwin before the ITSC as well as the documents, accounts etc. filed before the ITSC in connection with the settlement. These are to be examined by the ITSC; we refrain from looking into them having regard to the limited jurisdiction that vests in us in judicial review under Article 226. We cannot substitute our view on the merits of the matter for the view of the ITSC. Our jurisdiction is only to examine if the decision-making process has suffered from some fundamental errors. The judgment of the Division Bench of the Karnataka High Court in N. Krishan (Decd. by Legal representative, K. Badrinarayan and Others) Vs. Settlement Commission and Others, , cited by the learned counsel for the respondent actually supports our decision. In para 21 of the judgment, Rama Jois, J, speaking for the court held:-

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

(i) if grave procedural defects such as violation of the mandatory procedural requirements of the provisions in Chapter XIX-A and/or violation of the rules of

natural justice is made out;

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

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

The first two grounds of judicial review mentioned above fortify our decision in the present case.

37. For the aforesaid reasons we are satisfied that the order passed by the ITSC on 20th October, 2008 requires to be quashed. Accordingly, a writ of certiorari would issue to quash the said order. The matter is remitted to the ITSC which shall pass a fresh order in accordance with law. The writ petition is accordingly allowed. The revenue will be entitled to costs which we assess at Rs. 20,000.