

Income initially disclosed before SetCom couldn't be said to be concealed if additions were made due to TP provisions

Summary – The High Court of Bombay in a recent case of Income Tax Settlement Commission, held that normally, income offered for tax in an application for settlement would bind parties concerned and any revision thereof, would prima facie, be evidence of original application for settlement not declaring full income, however in a case where correct determination of income is dependent upon application of appropriate transfer pricing rule which to an extent is subjective, if an additional income is declared during course of hearing in view of what emerges during debate before Commission, it cannot be said that original application did not make true and full disclosure of its undisclosed income

Facts

- The respondent was rendering I.T. related services to its holding company from its STP unit and non-STP unit at cost plus 10 per cent.
- The capital goods, *i.e.*, equipments were purchased by the respondent through its holding company. This has been illustrated by the parties with a figure of Rs. 100/- as the cost price of the equipments to the respondent no. 2. At this figure of Rs. 100/-, the equipment was recorded in the respondent no. 2's books and also depreciation taken, was on the above value. The sales were reflected at cost *i.e.* Rs. 100/- + 10 per cent. However, at the instance of the Customs department, the respondent no. 2 enhanced the value of equipments imported from 2006 onwards to Rs. 225/-, *i.e.*, the customs valuation for import and also recorded it at customs value in its books. This resulted not only in depreciation being taken at a higher figure but also the sales being recorded at Rs. 225/- + 10 per cent, *i.e.*, higher than the actual/real transaction value between the respondent no. 2 and its holding company.
- Consequent to a search operation respondent no. 2 filed its return of income for assessment years 2004-05 to 2009-10 in which it wrote back higher depreciation claimed on Rs. 225/- but the higher sales revenue, *i.e.*, Rs. 225 + 10 per cent continued to be shown. In the circumstances, the respondent filed an application for settlement with the Commission, claiming the benefit of deduction under section 10-A. The respondent had declared an additional income of Rs. 8.54 crores for assessment years 2004-05 to 2009-10 on account of transfer pricing adjustment of 5 per cent in respect of STPI unit and 6 per cent of non-STPI units as its transaction value of I.T. Services with its holding company.
- The Commission at the stage of section 245D(3), at the instance of the petitioner, allowed it to make a reference to the Transfer Pricing Officer (TPO) to determine the arm's length price and verify the satisfaction of the conditions for grant of exemption under section 10A claimed by the respondent no. 2.

- Thereafter, the petitioner filed its rule 9 report and the Commission passed the impugned order holding that the unbilled revenue (excess sales figures at Rs. 225/- + 10 per cent) was not genuine income as it was a mere book entry made by the applicant. The additional income was determined by virtue of transfer pricing adjustment at Rs. 76.03 crores and the impugned order also negated the contention of the petitioner that the benefit of section 10-A would not be available to the extent of Rs. 264 crores being extra ordinary profits.
- The petitioner filed writ petition contending that the Commission had no jurisdiction to entertain the application for settlement made by the respondent as the respondent-assessee had revised/increased the income offered for settlement which meant that it had not made full and true disclosure of its income in its application.

Held

- In view of decision of the Apex Court in *Jyotendrasinhji v. S.I. Tripathi* [1993] 201 ITR 611/68 Taxman 59 the scope of judicial review in respect of final orders passed by the Commission under section 245D(4) is indeed very limited and like in any other case of judicial review by way of a writ, the Court does not sit in appeal over the order of the Commission. Indisputably, this court does not have powers of judicial review over orders passed by the Commission and would certainly correct any miscarriage of justice or where the orders are without jurisdiction. However, in the absence of the above being established, the court would be averse to interfere. This is more so on account of the legislative intent as discerned from section 254-I which protects an order of the Commission under section 245D(4) from challenge in any other proceeding. Further, the members who are appointed on the Commission have statutorily in terms of section 245B are required to be persons of integrity and outstanding ability, having special knowledge of problems relating to direct taxes and business account. However, none of these would fetter court's jurisdiction under article 226 of the constitution to exercise powers of judicial review over orders passed by the Commission under Chapter XIXA. While exercising judicial review under article 226 of the Constitution of India the court examine the decision making process of the Commission and not *per se* the merits of the decision when the same is not shown to be perverse.
- Normally, the income offered for tax in an application for settlement would bind the parties concerned and any revision thereof, would *prima facie*, be evidence of the original application for settlement not declaring the full income in its original application. However, this is not cast in stone and will depend upon the factual context from case to case to determine whether there was any failure to disclose fully and truly the income. This is particularly so where the correct determination of income is dependant upon the application of the appropriate transfer pricing rule which to an extent is subjective, as in this case. In such a case, if an additional income is declared during the course of the hearing in view of what emerges during debate before the Commission, it cannot be said that the original application did not make true and full disclosure of its undisclosed income. It is for the Commission to consider on the basis of the facts that emerge before it, whether the original application contained a *bona fide*, true and full disclosure of the applicant's income or not.

- The respondent's application for settlement, in particular, seeks the settlement of the various issues including determining the correct taxable income under the normal provisions of the Act and under section 115JB. It has not been urged before the Commission or even before the Court that there was a deliberate failure on the part of the assessee to make full and true disclosure of its income and it was not a *bona fide* application. The additional income was offered by the assessee, only after the petitioner had filed its rule 9 report and it was only during the course of hearing under section 245D(4) that the additional income of Rs. 59.11 crores and Rs. 3 crores was offered. This is also on accepting the view of the petitioner and without prejudice to their primary contention that the same cannot be added. This acceptance of the further offer only with a view of expeditiously settle the dispute, in the peculiar facts of the case, cannot be held against the petitioner (sic) respondent.
- So far as the other objection is concerned, *viz.*, failure to disclose the manner in which this income has been derived, it is found that the application for settlement sufficiently explains the source of the income being declared. The application mentions how the additional income, which is being disclosed, has been derived, *i.e.*, on application of the ALP in respect of exports made to its associated enterprise, *viz.*, holding company. There is no merit in the above submission on behalf of the petitioner.
- The other jurisdictional objection to the impugned order urged by the petitioner is the grant of immunity from penalty and prosecution under section 245H. It is submitted that before immunity can be granted, the Statute requires the Commission to be satisfied that the person who has made an application for settlement:
 - (a) has co-operated in the proceedings before the Commission;
 - (b) has made a full and true disclosure of his income; and
 - (c) disclosed the manner in which such income has been earned.
- On consideration of the submissions made before it the impugned order records its satisfaction in respect of all the three prerequisites for grant of immunity from penalty and prosecution. Thus, the immunity from penalty and prosecution was granted only on satisfaction of the jurisdictional requirements. This satisfaction has not been shown to be perverse.
- The last grievance of the petitioner is that the impugned order is bad on merits. It is submitted that concepts like real income have been invoked when the same has no application. To support reliance is placed upon the directions/proposition of the Apex Court in *State Bank of Travancore v. CIT* [\[1986\] 158 ITR 102/24 Taxman 337](#) and *CIT v. Shiv Prakash Janak Raj & Co. (P.) Ltd.* [\[1996\] 222 ITR 583/88 Taxman 536 \(SC\)](#). The first proposition set out therein is that real income is income which has really accrued or arisen to the assessee that is taxable. Whether the income has really accrued or arisen must be judged in the light of the reality of the situation. It is on application of the above principle that the Commission has come to the conclusion that unbilled revenue was only a book entry and no real income accrued or arose. This view of the Commission in the impugned order cannot be said to

be perverse in the least. It is a possible view. Therefore, keeping in view the self-imposed limitations as set out in *Jyotendrasinhji (supra)* there is no reason to interfere with the merits of the decision in the present facts.