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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 14883 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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KOMALKANT FAIKIRCHAND SHARMA
Versus
DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 1

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Appearance:
MR B S SOPARKAR(6851) for the Petitioner(s) No. 1
MRS MAUNA M BHATT(174) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 06/05/2019

ORAL JUDGMENT
(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

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1. By this petition under article 226 of the Constitution of India, the petitioner has challenged the notice dated 31.03.2018 issued by the respondent under section 148 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") proposing to reopen the assessment of the petitioner for assessment year 2011-12.

2. The petitioner is an individual engaged in the business of real estate, transportation and ship-breaking. The petitioner filed his return of income for assessment year 2011-12 on 29.09.2011 declaring total income of Rs.20,49,590/-. The return of income was accepted without any scrutiny. A search took place at the premises of the petitioner on 17.02.2012. Thereafter, the petitioner filed an application under section 245C of the Act before the Settlement Commission. The application of the petitioner was admitted and the Settlement Commission passed an order dated 12.01.2015 under section 245D(4) of the Act.

3. Thereafter, the respondent issued the impugned notice under section 148 of the Act seeking to reopen the assessment for assessment year 2011-12. Upon receipt of the notice, the petitioner requested the respondent to supply the reasons for reopening, pursuant to which, such

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reasons came to be furnished on 28.05.2018. By a letter dated 03.07.2018, the petitioner raised various objections on merits and requested the respondent to drop the reassessment proceedings. By an order dated 20.07.2018, the respondent disposed of the objections by rejecting the objections raised by the petitioner. Being aggrieved, the petitioner has filed the present petition.

4. Mr. B.S. Soparkar, learned advocate for the petitioner, submitted that the reasons recorded suffer from various infirmities. It was submitted that reasonable belief, as contemplated under section 147 of the Act, must be that of an honest and reasonable person based upon a reasonable ground and it should not be based on some suspicious and vague reasons. Whereas, in this case, the reasons are vague and do not reveal any income having escaped assessment and furthermore, the reasons recorded make it clear that this is a case of borrowed satisfaction without any independent application of mind. It was also contended that in this case, the reopening is beyond a period of four years from the end of relevant assessment year and there is not even a whisper in the reasons recorded regarding any failure on the part of the petitioner to disclose fully and truly all

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material facts necessary for its assessment.

4.1 Elaborating upon the above submissions, it was submitted that there is no escapement of income inasmuch as the petitioner had disclosed all material facts in the books of accounts and, therefore, it is not permissible for the revenue to reopen the assessment.

4.2 It was submitted that there is no independent application of mind on the part of the Assessing Officer while recording the reasons for reopening and that merely placing reliance on the materials provided by the investigation wing for recording the reasons is impermissible. It was submitted that the Assessing Officer must record an independent finding as to how income has escaped assessment on a proper application of mind. However, in the present case, no inquiry has been conducted by the Assessing Officer based on the evidence collected in the earlier search. Referring to the reasons recorded for reopening the assessment, it was submitted that there is no independent correlation established in respect of any transaction between Shri Pradip Birewar and the petitioner – assessee. It was submitted that there is no link between the information received and formation of opinion that income has escaped assessment and that the reasons recorded do not

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indicate any relationship between the petitioner and SCN or Shri Pradip Birewar and that the reasons, as stated, do not reflect application of mind nor do they say as to how income has escaped assessment.

4.3 It was submitted that in the affidavit-in-reply filed by the respondent, the respondent seeks to supplement the reasons recorded by him, which is not permissible in law. In support of such submission the learned advocate placed reliance upon the decision of Bombay High Court in ***Hindustan Lever Limited v. R.B. Wadkar, Asst. Commissioner of Income-tax Circle,*** *2004 (268) ITR 332,* for the proposition that reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or by making oral submissions, otherwise, the reasons, which were lacking in material particulars, would get supplemented by the time the matter reaches to the Court on the strength of affidavit or oral submissions advanced.

4.4 Reliance was also placed upon another decision of Bombay High Court in ***Prashant S. Joshi; Dattaram Shridhar Bhosale v. Income Tax Officer; Union of India,*** *2010 (324) ITR 154,* wherein the court held that the reasons which are recorded by the Assessing Officer for reopening

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an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. The requirement of recording reasons is a check against arbitrary exercise of power. For, it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment is to be decided. The reasons recorded while reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits, not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well settled that the question as to whether there was reason to believe, within the meaning of section 147 of the Act, that income has escaped assessment, must be determined with reference to the reasons recorded by the Assessing Officer and that the reasons which are recorded cannot be supplemented by affidavits.

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THE HIGH COURT OF GUJARAT
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4.5 Reliance was also placed upon the decision of this court in ***Gujarat Fluorochemicals Ltd. v. Deputy Commissioner of Income Tax,*** *2009 (319) ITR 282,* wherein the court recorded that if the Assessing Officer has reason to believe that the assessee has not disclosed fully and truly

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all material facts, then it should have been stated clearly in the reasons recorded, which has not been done. Instead, the court found that the order dated 28.08.2008 rejecting the objections of the petitioner therein, sought to supplement the reasons which had been recorded, so as to fill in the lacunae, attempting to bring it within the ambit and scope of the proviso to section 147 of the Act. The court held that the order dated 28.08.2008 traveled far beyond the reasons recorded, as had been communicated, which is not permissible and therefore, the Court cannot look into the contents thereof, which seek to supplement the reasons recorded. It is the statutory duty of the Assessing Officer to record reasons for issuing notice under section 148 of the Act and the reasons recorded cannot further be supplemented or explained by a subsequent order so as to give an entirely different complexion to the case.

4.6 Reliance was placed upon the decision of Delhi High Court in ***Principal Commissioner of Income-tax-6 v. Meenakshi Overseas (P.) Ltd.,*** *[2017] 82 taxmann.com 300 (Delhi)*, wherein the court held thus:

> *"22. As rightly pointed out by the ITAT, the 'reasons to believe' are not in fact reasons*

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but only conclusions, one after the other. The expression 'accommodation entry' is used to describe the information set out without explaining the basis for arriving at such a conclusion. The statement that the said entry was given to the assessee on his paying "unaccounted cash" is another conclusion the basis for which is not disclosed. Who is the accommodation entry giver is not mentioned. How he can be said to be "a known entry operator" is even more mysterious. Clearly the source for all these conclusions, one after the other, is the Investigation report of the DIT. Nothing from that report is set out to enable the reader to appreciate how the conclusions flow therefrom.

23. Thus, the crucial link between the information made available to the AO and the formation of belief is absent. The reasons must be self evident, they must speak for themselves. The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. However, something therein which is critical to the formation of the belief must be referred to. Otherwise the link goes missing.

24. The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during

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the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.

The first part of Section 147 (1) of the Act requires the AO to have "reasons to believe" that any income chargeable to tax has escaped assessment. It is thus formation of reason to believe that is subject matter of examination. The AO being a quasi judicial authority is expected to arrive at a subjective satisfaction independently on an objective criteria. While the report of the Investigation Wing might constitute the material on the basis of which he forms the reasons to believe the process of arriving at such satisfaction cannot be a mere repetition of the report of investigation. The recording of reasons to believe and not reasons to suspect is the pre-condition to the assumption of jurisdiction under Section 147 of the Act. The reasons to believe must demonstrate link between the tangible material and the formation of the belief or the reason to believe that income has escaped assessment."

4.7 Reliance was also placed upon the decision of Delhi High Court in ***Principal Commissioner of Income-tax v. RMG Polyvinyl (I) Ltd.,*** *[2017] 83 taxmann.com 348 (Delhi)*, wherein the court placed reliance upon its earlier decision in the case of Principal Commissioner of *Income-tax-6 v. Meenakshi Overseas (P.) Ltd.* (supra).

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4.8 Referring to the reasons recorded, it was submitted that the crucial link between the information available to the Assessing Officer and the formation of belief is absent in the reasons recorded.

4.9 Another contention raised by the learned advocate for the petitioner, which goes to the root of the matter, is that this is a case where there is no original assessment under section 143(3) of the Act, but, the assessee has gone to the Settlement Commission, which passed an order under section 245D(4) of the Act. It was submitted that in view of the provisions of section 245I of the Act, the order of the Settlement Commission is conclusive and there cannot be two assessments of the assessee for the same assessment year. It was submitted that therefore, the reopening of assessment, in a case where the Settlement Commission has passed an order under section 245D(4) of the Act, is without authority of law.

4.10 In support of such submission, the learned advocate placed reliance upon the decision of the Bombay High Court in ***Mandhana Industries Ltd. v. Principal Commissioner of Income-tax Central-1,*** *[2019] 103 taxmann.com 301*

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(Bom), wherein the court has held that the Act does not envisage a return of an assessee to be split into two parts; one for consideration before the Settlement Commission by way of settlement and another for normal assessment at the hands of the Assessing Officer or the appellate or the revisional authority. In other words, if an application for settlement is allowed and the case is settled, the entire assessment for the assessment years in question would stand settled.

4.11 Reliance was also placed upon the decision of the Delhi High Court in ***Omaxe Ltd. v. Assistant Commissioner of Income Tax,*** *[2012] 25 taxmann.com 190 (Delhi)*, wherein the court held that a harmonious reading of the provisions of the statute would show that it does not postulate the existence of two orders, each of a different income-tax authority, determining the total income of an assessee for the same assessment year. The court held that if the contention of the Revenue is accepted, not only will the finality of the order of settlement be disturbed, but it will also result in different orders relating to the same assessment year and relating to the same assessee being allowed to stand. The court expressed grave doubt whether such a

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result, which is likely to create chaos and confusion in the tax administration, could have been intended. The court held that the order of the Settlement Commission can be reopened only in cases of fraud and misrepresentation and in no other case. It further held that if the order of settlement is an assessment order and under section 245I of the Act, there is a finality attached to it, it is difficult to conceive of a situation where the Assessing Officer would be empowered to reopen the assessment of the income made by the Settlement Commission on any ground. The only ground by which the finality of the order of the Settlement Commission can be disturbed is where it is subsequently found by the Settlement Commission itself that its order has been obtained by fraud or misrepresentation of facts.

4.12 It was submitted that the reopening of assessment is, therefore, without jurisdiction and hence, the impugned notice under section 148 of the Act deserves to be quashed and set aside.

5. Vehemently opposing the petition, Mrs. Mauna Bhatt, learned senior standing counsel for the respondent, invited the attention of the court to the reasons recorded for reopening the assessment to submit that the same are clear and

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reflect proper application of mind on the part of the Assessing Officer.

5.1 It was submitted that the petitioner is a beneficiary of accommodation entries through Shri Shirish Chandrakant Shah and Shri Pradip Birewar and that this is not a case where the Assessing Officer's action is without jurisdiction. The learned senior standing counsel placed reliance upon the decision of this court in ***Vicky Rajesh Jhaveri v. Deputy Commissioner of Income Tax & 1,*** *2017 (396) ITR 265*, to submit that in a similar set of facts, the court had dismissed the petition challenging the notice under section 148 of the Act.

5.2 Dealing with the contention raised on behalf of the petitioner that the reopening of assessment is bad on the ground that earlier the matter had travelled to the Settlement Commission and the Settlement Commission had passed an order under section 245D(4) of the Act and hence, the Assessing Officer has no jurisdiction to reopen the assessment, the learned senior standing counsel drew the attention of the court to the provisions of section 245I of the Act to submit that the same provides that the order of the Settlement Commission passed under sub-section (4) of section 245D of the Act shall be

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conclusive as to the matters stated therein and no matter covered by such order shall be reopened in any proceeding under the Act. It was submitted that therefore, what is conclusive is the matter stated in the order of the Settlement Commission, whereas the income, which is stated to have escaped assessment in the present case, was not a matter before the Settlement Commission, and hence, the order of the Settlement Commission would not be conclusive in respect of matters in relation to which the assessment is sought to be reopened by the Assessing Officer, as there was no consideration of the said issue by the Settlement Commission. Therefore, the reopening of assessment is valid and legal.

5.3 It was further submitted that sub-section (5) of section 245D of the Act provides that subject to the provisions of section 245BA of the Act, 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) of section 245D of the Act and in relation to passing of such order, the provisions of section 245BD shall apply. It was submitted that the material, on the basis of which the Assessing Officer seeks to reopen the assessment, was not brought on record before the Settlement

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Commission and therefore, the Settlement Commission had no opportunity to consider the same before passing the order under section 245D(4) of the Act.

5.4 Reliance was placed upon the decision of Supreme Court in ***Brij Lal & Ors. v. Commissioner of Income Tax, Jalandhar,*** *2010 (328) ITR 477,* reference to which shall be made at a later stage.

5.5 Reliance was also placed upon the decision of the Delhi High Court in ***Gupta Perfumers (P) Ltd. v. Income Tax Settlement Commission & Ors.,*** *2012 (348) ITR 86,* wherein the court held that section 245I of the Act states that the order of the Settlement Commission under section 245D(4) shall be conclusive as to the matters stated therein and save as otherwise provided no matter in the said order shall be reopened in any proceedings. The use of the words "save as otherwise provided" in that Chapter refers to the reopening of matters, which are conclusively decided. The conclusiveness attached to the orders of the Settlement Commission relates to the matters stated in the orders of the Settlement Commission.

5.6 Reliance was also placed upon the

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decision of Bombay High Court in ***Rajiv Yashwant Bhale v. The Principal Commissioner of Income Tax,*** *(2018) 401 ITR 408*, wherein the court has held that the conclusivity of the order passed by the Settlement Commission is to the matters stated in such order passed under section 245D(4) of the Act, whereas, in this case, the matters in respect of which the assessment is sought to be reopened, have not been decided by the Settlement Commission and hence, there is no bar against reopening the assessment under section 147 of the Act.

6. In the backdrop of the facts and contentions noted herein above, it is evident that in this case, the validity of the reopening of assessment by the Assessing Officer under section 147 of the Act has been called in question, principally, on two grounds. Firstly, that in this case, after the search was conducted and proceedings were initiated against the petitioner, the petitioner had approached the Settlement Commission, which had passed an order under section 245D(4) of the Act, which has become final and conclusive and, therefore, the Assessing Officer has no jurisdiction to reopen the assessment. Secondly, on merits, on the reasons recorded, the Assessing Officer could not have formed the belief that income chargeable to

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tax has escaped assessment.

7. Insofar as the first question is concerned, it may be germane to refer to the decisions relied upon by the learned counsel for the respective parties. In ***Omaxe Ltd. v. Assistant Commissioner of Income-tax*** (supra), the Delhi High Court was considering a case where the assessment was sought to be reopened by issuing a notice under section 148 of the Act. The court held that a harmonious reading of the provisions of the statute would show that it does not postulate the existence of two orders, each of a different income-tax authority, determining the total income of an assessee for the same assessment year. It was held that if the contention of the Revenue is accepted, not only will the finality of the order of settlement be disturbed, but it will also result in different orders relating to the same assessment year and relating to the same assessee being allowed to stand. The court observed that the order of the Settlement Commission can be reopened only in cases of fraud and misrepresentation and in no other case. It further held that if the order of settlement is an assessment order and under section 245I of the Act, there is a finality attached to it, it is difficult to conceive of a situation where the Assessing Officer would be

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empowered to reopen the assessment of the income made by the Settlement Commission on any ground. The only ground by which the finality of the order of the Settlement Commission can be disturbed is where it is subsequently found by the Settlement Commission itself that its order has been obtained by fraud or misrepresentation of facts. The court placed reliance upon the decision of Allahabad High Court in the case of ***CIT v. Smt. Diksha Singh***, *[2011] 201 Taxman 378*, wherein it was held that since the legislature in its wisdom had conferred powers on the Settlement Commission to reopen the proceedings in certain circumstances and to deal with the situation in the event of commission of fraud or misrepresentation and has left it to the Settlement Commission to deal with such contingencies, it cannot be postulated that the Assessing Officer or any other income tax authority will have jurisdiction to assess the tax for the same financial year despite the finality and conclusiveness of the order of settlement. It was further held that there cannot be piecemeal determination of the income of an assessee for the relevant period, one by the Settlement Commission and another by the assessing authority, and to hold otherwise would be to frustrate the very purpose of filing an application before the Settlement Commission for

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settlement. The court further observed that the question therein was what would be the position when an order under section 245D(4) is passed by the Settlement Commission and whether such an order can be construed as one dealing with the entire gamut of the return filed by the assessee and the issues raised therein, and held that since the exclusive jurisdiction to exercise the powers and perform the functions of an income tax authority in relation to the case vests with the Settlement Commission, after an order is passed under section 245D(1) till the final settlement order is passed under section 245D(4) of the Act, it is not possible to countenance a situation where it can be said that the assessee's claim for deduction was not the subject matter of the order passed by the Settlement Commission under section 245D(4) of the Act.

7.1 In ***Mandhana Industries Ltd. v. Principal Commissioner of Income-tax Central-1*** (supra), the Bombay High Court held that the provisions of section 245D read with section 245H, 245I and 245F of the Act make it abundantly clear that a case could either be dealt with by the concerned income tax authority or the Settlement Commission, but not both. The court held that the Act envisages only one order concerning a case of the assessee, it may either be an order of

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settlement passed by the Settlement Commission or an order of assessment passed by the Assessing Officer, but not both. The court further referred to the relevant provisions contained in Chapter XIX-A of the Act and came to the conclusion that once an application for settlement of a case is filed before the Settlement Commission and is allowed to pass through various stages under section 245D of the Act, it is only the Settlement Commission which can pass any order concerning such a case. At all stages, the Act refers to a case for which an application for settlement can be filed, a case which the Settlement Commission considers for settlement, a case the Commission either allows to be settled or does not allow to be so settled. The court further held that the Act does not envisage a return of an assessee to be split into two parts, one for consideration before the Settlement Commission by way of settlement and another for normal assessment at the hands of the Assessing Officer or the appellate or the revisional authority. In other words, if an application for settlement is allowed and the case is settled, the entire assessment for the assessment years in question would stand settled.

7.2 In ***Rajiv Yashwant Bhale v. The Principal Commssioner of Income Tax*** (supra), on which

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reliance has been placed by the learned senior standing counsel for the respondent, the contention was that non-compliance of the order of the Settlement Commission does not make the order itself, not a final or conclusive one. A continuing default *per se* is different from the finality and conclusiveness of the order itself and cannot affect the conclusiveness of an order of a judicial authority. The question in that case was whether the order passed by the Settlement Commission was a conditional order and that if the conditions remained satisfied, whether the order can be said to be final or conclusive? This decision, therefore, would have no applicability to the facts of the present case.

7.3 In ***Brij Lal v. Commissioner of Income Tax, Jalandhar*** (supra), the Supreme Court held thus:

> "18. Coming to Chapter XIX-A which deals with settlement of cases, it may be stated that the word "case" is defined under Section 245-A(b). It is an exhaustive definition. The definition makes it clear that an application for settlement shall lie only when any proceedings for assessment or reassessment are pending or an appeal or revision in connection with such assessment or reassessment is pending before the Income Tax Authority. Under Section 245-C(1), such

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application for settlement will not be maintainable without full and true disclosure of the income by the applicant, the manner in which such undisclosed income was derived and that the applicant had furnished his return of income and that the additional tax payable on such income exceeds the specified amount."

"23. Descriptively, it can be stated that assessment in law is different from assessment by way of settlement. If one reads Section 245-D(6) with Section 245-I, it becomes clear that every order of settlement passed under Section 245-D(4) shall be final and conclusive as to the matters contained therein and that the same shall not be reopened except in the case of fraud and misrepresentation. Under Section 245-F(1), in addition to the powers conferred on the Settlement Commission under Chapter XIX-A, it shall also have all the powers which are vested in the Income Tax Authority under the Act. In this connection, however, we need to keep in mind the difference between "procedure for assessment" under Chapter XIV and "procedure for settlement" under Chapter XIX-A (see Section 245-D). Under Section 245-F(4), it is clarified that nothing in Chapter XIX-A shall affect the operation of any other provision of the Act requiring the applicant to pay tax on the basis of self-assessment in relation to matters before the Settlement Commission."

"25. Our detailed analysis shows that though Chapter XIX-A is a self-contained code, the procedure to be followed by the Settlement Commission under Sections 245-C and 245-D in the matter of computation of undisclosed income; in the matter of computation of additional income tax payable on such income with interest thereon; the filing of

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settlement application indicating the amount of income returned in the return of income and the additional income tax payable on the undisclosed income to be aggregated as total income shows that Chapter XIX-A indicates aggregation of incomes so as to constitute total income which indicates that the special procedure under Chapter XIX-A has an in-built mechanism of computing total income which is nothing but assessment (computation of total income)."

"26. To elaborate, under Section 245-C(1-B), if the applicant has furnished a return in respect of his total income, tax shall be calculated on the aggregate of total income returned and the income disclosed in the settlement application as if such aggregate were total income. Under the Act, tax is payable on the total income as computed in accordance with the provisions of the Act. Thus, Section 143(3) provision is sought to be incorporated in Section 245-C. When Parliament uses the words "as if such aggregate would constitute total income", it presupposes that under the special procedure the aggregation of the returned income plus income disclosed would result in computation of total income which is the basis for the levy of tax on the undisclosed income which is nothing but "assessment". Similarly, Section 245-C(1-C) provides for deductions from the total income computed in terms of Section 245-C(1-B)."

"30. Now, Section 245-C(1) is voluntary disclosure by the assessee of his undisclosed income. Under Section 245-C(1), the assessee has to mention in his settlement application the additional amount of tax payable by him on such undisclosed income. Under proviso (a), the application for settlement shall not

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be entertained till the assessee has furnished the return of income which he was required to file under the Act to the extent of his income. Under proviso (b), the assessee has to declare the additional amount of tax payable. Thus, the two provisos to Section 245-C(1) show that Chapter XIX-A, which prescribes a special procedure for assessment by settlement, contemplates a pre-assessment collection of tax."

"31. With the filing of the settlement application and after such application is allowed to be proceeded with under Section 245-D(1), intimation under Section 143(1), regular assessment under Sections 143(3)/144 and reassessment under Section 147 lose their existence as under Sections 245-C(1-A) and (1-B) it is only the income disclosed in the return of income before the AO alone which survives for consideration by the Settlement Commission for settling the amount of income which is not disclosed in the return."

"37. As held hereinabove, under Section 245-C(1) read with Section 245-C(1-B)(ii) and Section 245-C(1-C)(b), the additional amount of income tax payable is to be calculated on the aggregate of total income returned and the income disclosed in the settlement application as if such aggregate is the total income. Thus, the scheme of the said sections is based on computation of total income and in that sense we have stated that such application for settlement is akin to a return of income. The said provision deals with "total income". Thus, as stated above, Sections 234-A, B and C are applicable up to the stage of Section 245-D(1) order passed by the Settlement Commission. However, Parliament has not extended the provisions and the liability to pay interest beyond the

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date of application for settlement. This is the position even after the Finance Act of 2007."

"39. Moreover, as stated above, under the Act, there is a difference between assessment in law [regular assessment or assessment under Section 143(1)] and assessment by settlement under Chapter XIX-A. The order under Section 245-D(4) is not an order of regular assessment. It is neither an order under Section 143(1) or Section 143(3) or Section 144. Under Sections 139 to 158, the process of assessment involves the filing of the return under Section 139 or under Section 142; inquiry by the AO under Sections 142 and 143 and making of the order of assessment by the AO under Section 143(3) or under Section 144 and issuing of notice of demand under Section 156 on the basis of the assessment order. The making of the order of assessment is an integral part of the process of assessment. No such steps are required to be followed in the case of proceedings under Chapter XIX-A. The said chapter contemplates the taxability determined with respect to undisclosed income only by the process of settlement/arbitration. Thus, the nature of the orders under Sections 143(1), 143(3) and 144 is different from the orders of the Settlement Commission under Section 245-D(4).

40. Even in CIT v. Anjum M.H. Ghaswala[6] there is no finding by this Court that the order of the Settlement Commission under Section 245-D(4) is an order of assessment under Section 143(3) or under Section 144. In Ghaswala case[6] the only question decided by this Court is that the interest under Section 234-B is mandatory in nature and that the Settlement Commission, therefore, had no authority to waive it."

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> "41. xxxxxx Once the case stands admitted, the Settlement Commission shall have exclusive jurisdiction to exercise the powers of the Income Tax Authority."
>
> "42. The order of the Settlement Commission under Section 245-D(4) shall be final and conclusive under Section 245-I subject to two qualifications under which it can be recalled viz. fraud and misrepresentation but even here it is important to note that under Section 245-D(7) where the settlement becomes void on account of fraud and misrepresentation the proceedings with respect to the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission."

7.4 Thus, in ***Brij Lal v. Commissioner of Income Tax, Jalandhar*** (supra), the Supreme Court has held that under the Act, there is a difference between assessment in law [regular assessment or assessment under section 143(1)] and assessment by settlement under Chapter XIX-A. The order under section 245D(4) of the Act is not an order of regular assessment. It is neither an order under section 143(1) or section 143(3) or section 144 of the Act. Under sections 139 to 158, the process of assessment involves the filing of return under sections 139 or 142 of the Act; inquiry by the Assessing Officer under sections 142 and 143 and making of the order of

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assessment by the Assessing Officer under sections 143(3) or 144 and issuing of notice of demand under section 156 on the basis of the assessment order. The making of the order of assessment is an integral part of the process of assessment. No such steps are required to be followed in the case of proceedings under Chapter XIX-A. The said Chapter contemplates the taxability determined with respect to undisclosed income only by the process of settlement/arbitration. Thus, the nature of the orders under sections 143(1), 143(3) and 144 is different from the orders of the Settlement Commission under section 245D(4) of the Act.

7.5 Moreover, the Supreme Court, in the above decision has held that the scheme of the said section is based on computation of total income and in that sense it has stated that such application for settlement is akin to a return of income. The said provision deals with 'total income'. Therefore, when section 245C deals with total income, all matters falling within the ambit of total income would stand concluded once the Settlement Commission settles a case and passes an order under section 245D(4) of the Act. The order of the Settlement Commission would be final and conclusive subject to two qualifications, viz. fraud or misrepresentation.

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Moreover, when the settlement becomes void under section 245D(7) of the Act, the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission.

7.6 Section 245-I of the Act, which bears the heading "Order of settlement to be conclusive", postulates that every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in that Chapter, be reopened in any proceeding under the Act or under any other law for the time being in force.

7.7 An application under section 245C of the Act is akin to a return of income, wherein the assessee is required to make a full and true disclosure of his income and the order under section 245D(4) of the Act is in the nature of an assessment order. Therefore, assessment of the total income of the assessee for the assessment year in relation to which the Settlement Commission has passed the order under section 245D(4) of the Act stands concluded and in terms of section 245I of the Act, such order shall be

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conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in Chapter XIX-A, be reopened in any proceeding under the Act or under any other law for the time being in force. Therefore, once an order is passed by the Settlement Commission under section 245D(4) of the Act, the same is conclusive insofar as the assessment year involved is concerned. When the section refers to matters not covered by such order, it refers to matters other than that covered under the assessment, viz. other than determination of the total income of the assessee for that assessment year. There may be matters in respect of the very assessment year which do not touch the determination of the total income of the assessee, like non-payment of advance tax or the like, which have no direct connection with the determination of the total income for that assessment year, which would not stand concluded by the order of the Settlement Commission. However, when section 245C of the Act requires the assessee to make a full and true disclosure of his income for the period in respect of which he has made such application, the order under section 245D(4) of the Act would relate to the determination of the total income of the assessee for that assessment year and such order is conclusive and cannot be reopened except as

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provided in that Chapter.

7.8 As to how the proceeding can be reopened is provided under section 245D(6) of the Act, which says that every order passed under section 245D(4) of the Act shall provide for the terms of settlement, including any demand by way of tax, penalty or interest, the manner in which any sum due under the settlement shall be paid and all other matters to make the settlement effective and shall also provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts. Therefore, the only ground on which an order of settlement made under section 245D of the Act can be reopened is that if it is subsequently found by the Settlement Commission that the order under section 245D(4) of the Act had been obtained by fraud or misrepresentation of facts. Therefore, once an order has been passed under section 245D of the Act by the Settlement Commission, the assessment for the year stands concluded and the Assessing Officer thereafter has no jurisdiction to reopen the assessment.

7.9 This court is in agreement with the view of the Bombay High Court in ***Mandhana Industries Ltd. v. Principal Commissioner of Income Tax***

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(supra) and the Delhi High Court in case of ***Omaxe Ltd. v. Deputy Commissioner of Income Tax*** (supra) wherein, the court held that the provisions of Chapter XIX-A of the Act make it abundantly clear that a case could either be dealt with by the concerned income tax authority or the Settlement Commission and not by both. The Act does not envisage a return of an assessee to be split into two parts, one for consideration before the Settlement Commission by way of settlement and another for normal assessment at the hands of the Assessing Officer or the appellate or revisional authority. In other words, if an application for settlement is allowed and the case is settled, the entire assessment for the assessment year in question would stand settled. The court held that the Act does not envisage parallel proceedings for the same assessment year concerning the same assessee.

7.10 The upshot of the above discussion is that once an order has been made by the Settlement Commission under section 245D(4) of the Act, the same is conclusive and final in respect of the assessment for the assessment year in relation to which such order was passed and the Assessing Officer has no jurisdiction under section 147 of the Act to reopen an assessment made under section 245D(4) of the Act. That,

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however, does not mean that the Revenue is without remedy if at a subsequent stage it is noticed that the assessee had suppressed its actual income before the Settlement Commission. In view of the provisions of sub-section (6) of section 245D of the Act, an order made by the Settlement Commission under section 245D(4) of the Act shall provide for the terms of settlement, which should inter alia provide that the settlement shall be void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation. Section 245D(7) of the Act provides that where the settlement becomes void, as provided in sub-section (6) of section 245D, the proceedings in respect of the matters covered by the settlement shall be deemed to have been revived from the stage at which the application was allowed to be proceeded with by the Settlement Commission. The remedy, therefore, is not under section 147 of the Act, but under section 245D(6) read with section 245D(7) of the Act.

7.11 In the facts of the present case, since the Settlement Commission has passed an order under section 245D(4) of the Act in respect of the assessment year in relation to which the assessment is sought to be reopened, the

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Assessing Officer has no jurisdiction to invoke the provisions of section 147 of the Act and reopen an assessment, which has become conclusive. Such concluded assessment can only be reopened in case of fraud or misrepresentation of facts, as contemplated under sub-section (6) of section 245D of the Act. The assumption of jurisdiction on the part of the Assessing Officer under section 147 of the Act by issuing the impugned notice under section 148 of the Act is, therefore, invalid and without authority of law.

8. Coming to the second question, namely, whether on the reasons recorded, the Assessing Officer could have formed the belief that income chargeable to tax has escaped assessment, it would be necessary to briefly refer to the reasons recorded by the Assessing Officer. A perusal of the reasons recorded reveals that the Assessing Officer has recorded that a search had been carried out at the office premises of SCS on 09.04.2013 wherein MS Excel Sheet “pradeep abad” in the excel file “ac.1.xis” was found and seized from the computer (Rajen computer) in that office in form of computer backup. As per: (i) the evidence found during the course of search in the case of Shirish Chandrakant Shah, and (ii) the appraisal report, it is seen that Shri Pradip Birewar had facilitated entries for Ahmedabad

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based beneficiaries. Along with search in the Barter Group, Shri Pradip Birewar and some of the main beneficiaries, who had availed accommodation entries through him, were also searched/surveyed. As per the evidences seized in the search of SCS, Shri Pradip Birewar had made cash payment of Rs.70 crores to SCS. These cash payments were made to arrange bogus LTCG/loss entries in the scrip of Shri Ganesh Spinners Ltd. and Praneta Industries Ltd. In the appraisal report, the DDIT has discussed in detail the modus operandi of SCS for arranging bogus LTCG.

8.1 In the reasons recorded, the Assessing Officer has then referred to the contents of appraisal report wherein, it has been stated that bogus LTCG entries were made to the beneficiaries to whom shares were allotted through private placement of convertible shares recorded as 'PHY' in the 'pradeep abad' sheet. 'PHY' refers to the transactions where shares of SGSL (Ganesh) have been acquired by the beneficiary clients in physical certificate form. Thus, in this case, shares are not purchased through exchange. A perusal of the entries recorded shows that the assessee has received payout of Rs.68,33,460/- for 3,62,000 shares in assessment year 2011-12, which is not genuine sale consideration, but mere accommodation entries.

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8.2 Thus, from the reasons recorded, it emerges that the material, which formed the basis for the formation of belief that income chargeable to tax has escaped assessment is the evidence found during the course of search in the case of SCS and the appraisal report. The search had been conducted in the case of Barter Group and Shri Pradip Birewar. Search had also been conducted in case of the main beneficiaries of accommodation entries, one being SCS [Shirish Chandrakant Shah]. The material on record shows that Shri Pradip Birewar had paid Rs.70 crores in cash to SCS. Such cash payment was made to arrange LTCG/Loss entries in the scrip of (i) Shri Ganesh Spinners Ltd. and (ii) Praneta Industries Ltd. The modus operandi is discussed in detail in the appraisal report. The material on record shows that bogus LTCG entries were made to the beneficiaries to whom shares were allotted through private placement of convertible shares recorded as 'PHY' in the 'pradeep abad sheet'. 'PHY' refers to the transactions where shares of SGSL (Shri Ganesh Spinners Ltd.) have been acquired by the beneficiary clients in physical certificate form. That in this case, the shares are not purchased through exchange. A perusal of the entries recorded shows that the assessee has received payout of Rs.68,33,460/- for 3,62,000

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shares in assessment year 2011-12. On the basis of the evidence found during the course of search and the appraisal report, the Assessing Officer has formed the belief that the amount of Rs.68,33,460/- received by the petitioner towards consideration for sale of 3,62,000 shares in assessment year 2011-12 is not genuine sale consideration, but accommodation entries. So, the case is that the petitioner did not receive any share sale consideration, but it was in the nature of mere accommodation entries. To put it briefly, the Assessing Officer, in the reasons recorded, has referred to the evidence on record and the appraisal report and has recorded that the same show that the LTCG shown by the petitioner was in the nature of accommodation entries and that in fact, there was no genuine sale consideration.

8.3 In this case, the Assessing Officer has filed a detailed affidavit and has also placed on record the appraisal report on the basis of which he has formed the opinion that income chargeable to tax has escaped assessment in the case of the assessee. It has been emphatically argued on behalf of the petitioner that the reasons have to be considered on a standalone basis and that the Assessing Officer has to make out a case on the basis of reasons recorded and not on the basis of

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the affidavit. In this regard, reference may be made to the decision of this court in case of ***Aayojan Developers v. Income Tax Officer,*** *335 ITR 234 (Gujarat)*, wherein, the court has referred to the decision of the Calcutta High Court in case of *East Coast Commercial Company Ltd. v. Income Tax Officer and Ors., (1981) 128 ITR 326 (Calcutta),* wherein it was held that the Income Tax Officer, in his affidavit filed in the court, could explain or elaborate or clarify the reasons recorded by him, but he could not thereby introduce new grounds or new reasons or new materials, which were not to be found in the recorded reasons, either expressly or by implication.

8.4 Thus, it is open for the Assessing Officer to explain or elaborate or clarify the reasons recorded by him, but he cannot introduce new grounds or new reasons or new materials, which were not found in the recorded reasons, either expressly or by implication. Moreover, the reasons recorded do not have to be very elaborate, but should reflect application of mind on the part of the Assessing Officer to the evidence available and should show that on the reasons recorded, he could have formed the belief that income chargeable to tax has escaped assessment.

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8.5 Therefore, while the reasons recorded should reflect the basis for forming the opinion that income chargeable to tax has escaped assessment on the material relied upon, such reasons can be elaborated in the affidavit-in-reply. In the present case, along with the affidavit-in-reply, the respondent has placed on record the appraisal report, which finds reference in the reasons recorded. The appraisal report is detailed and elaborate and gives a clear picture of the modus operandi by which accommodation entries were provided to convert unaccounted money into white money, however, the reasons recorded are not so elaborate and rightly so, inasmuch as the reasons have to satisfy that there was sufficient material for the Assessing Officer to form the belief that income chargeable to tax has escaped assessment. Evidently, the reasons would not set out the entire modus operandi as recorded in the appraisal report, but would briefly set out the gist of the facts and material which led the Assessing Officer to form the requisite belief that income chargeable to tax has escaped assessment. However, the reasons as they stand should be sufficient to show that on the reasons recorded the Assessing Officer could have formed the belief that income chargeable to tax has escaped assessment. Once

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that requirement is fulfilled, the Assessing Officer can certainly clarify and explain the reasons recorded by him in the affidavit-in-reply and place the material relied upon by him for the purpose of forming the belief that income chargeable to tax has escaped assessment.

8.6 The decisions on which reliance has been placed upon by the learned advocate for the petitioner would not be applicable to the facts of the present case, inasmuch as in those cases, the court found that on the reasons recorded the Assessing Officer could not have formed the requisite belief that income chargeable to tax has escaped assessment, and held that such reasons could not be supplemented by the order disposing of the objections and in the affidavit-in-reply.

8.7 A perusal of the appraisal report, on which reliance has been placed by the Assessing Officer, reveals that there was sufficient material for the Assessing Officer to form the belief that income chargeable to tax has escaped assessment. The material also refers to the petitioner so as to establish a link between the relied upon materials and the petitioner. Considering the nature of material available with the Revenue, it is not possible to state that on

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the reasons recorded, the Assessing Officer could not have formed the belief that income chargeable to tax has escaped assessment.

9. Thus, though on the reasons recorded for reopening the assessment, the Assessing Officer could have formed the belief that income chargeable to tax has escaped assessment, in this case, as discussed earlier, since there is an order of the Settlement Commission under section 245D(4) of the Act in relation to the assessment year in respect of which the assessment is sought to be reopened, the Assessing Officer has no jurisdiction to reopen the assessment. The impugned notice under section 148 of the Act, therefore, cannot be sustained.

10. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 31.03.2018 issued by the respondent under section 148 of the Act is hereby quashed and set aside. It is, however, open for the respondent/Revenue to move the Settlement Commission for appropriate relief of declaration that the previous order under section 245D(4) of the Act is void, setting out the relevant facts and circumstances. In the event the Revenue approaches the Settlement Commission with an application for such relief, it shall be decided

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on its own merits in accordance with law. Rule is made absolute to the aforesaid extent with no order as to costs.

(HARSHA DEVANI, J)

(BHARGAV D. KARIA, J)

PRAVIN KARUNAN

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