

PETITIONER:
KULDEEP INDUSTRIAL CORPORATION ETC.

Vs.

RESPONDENT:
INCOME TAX OFFICER AND OTHERS

DATE OF JUDGMENT: 10/12/1996

BENCH:
B.P. JEEVAN REDDY, K.S. PARIPOORNAN

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

B.P. Jeevan Reddy, J.

The order of the Settlement Commission dated October 15, 1980 has given rise to these appeals. Kuldeep Industrial Corporation had filed an application under Section 245-C of the Income Tax Act in respect of three assessment years 1977-78, 1978-79 and 1979-80. The Settlement Commission refused to admit the case relating to assessment year 1977-78 for settlement, against which the assessee has filed Civil Appeals 233-35 of 1982 (Civil Appeals 236-237 of 1982). The Settlement Commission has, however, admitted the case relating to the other two assessment years for settlement, against which the Revenue has preferred Civil Appeals 238-239 of 1982.

During the previous years relevant to the said three assessment years, the assessee received substantial quantities of stainless steel sheets from M.M.T.C. claiming to be a manufacturer of sterilizers. It filed returns for the said three assessment years disclosing losses in a sum of Rs.1,31,143/- (for A.Y. 1977-78), Rs.39,939/- (for A.Y.1978-79) and a profit Rs.7,340/- (for the A.Y. 1979-80). Certain inquiries were made by the Income Tax Officer in the Month of December 1979. She also impounded the account books of the assessee. On February 13, 1980 the Income Tax Officer visited the premises of the appellant where the assessee was said to be carrying on the manufacturing activity. She found no such activity being carried on there. On February 14, 1980 the Income Tax Officer issued a notice proposing addition of three items of income. At this stage i.e., on February 29, 1980, the assessee filed an application before the Settlement Commission seeking settlement of his case relating to all the said three assessment years. By its letter dated March 1, 1980 the assessee informed the income Tax Officer that it has filed an application before the Settlement Commission in respect of the said three assessment years and, on that basis, called upon the Income Tax Officer to stop all further proceedings. To this letter, the assessee enclosed a photocopy of the acknowledgement from the office of the Settlement Commission. By her letter dated March 3, 1980, the Income Tax Officer requested the

assessee to furnish copies of the application filed by it before the Commission. The assessee declined to do so on the ground that his application was a secret document. The Income Tax Officer refused to stay the assessment proceedings and called upon the assessee to submit his replies/explanation to the notices already issued by her. The Income Tax Officer once again requested for copies of the application filed by the assessee before the Commission. The assessee complained to the Commission about the refusal of the Income Tax Officer to stay the assessment proceeding but at the same time refused to furnish copies of its application to the Income Tax Officer. By letter dated March 11/12, 1980, the Income Tax Officer again requested for the copies of the application. She also called upon the assessee once again to furnish replies to the notices already issued. The assessee still refused. In these circumstances the Income Tax Officer made a draft assessment order on 19th March, 1980 and communicated the same to the assessee, as required by Section 144-B, which was then in force. This assessment order pertains to the assessment year 1977-78 only. Under this order the Income Tax Officer determined the income of the assessee at Rs.44,40,500/- as against the loss of Rs.1,28,691/- returned by the assessee. It was received by the assessee on 31st March, 1980.

By its letter dated March 14, 1980, the Settlement Commission forwarded a copy of the assessee's application filed under Section 245-C to the Commissioner of Income Tax for his objections. This communication was received by the Commissioner on 3rd April, 1980. On 5th June, 1980 the Commissioner filed his objections enclosing therewith a copy of the draft assessment order dated March 19, 1980 pertaining to the assessment year 1977-78. After hearing the parties, the Commission unanimously refused to admit the assessee's application for settlement with respect to the assessment year 1977-78. So far as the other two assessment years are concerned, the majority (two out of three members) admitted the case for settlement while one member dissented. The dissenting member was of the opinion that the application for settlement should be rejected for the other two assessment years also.

In its application under Section 245-C, the assessee stated the following facts: the assessee, a partnership firm, is engaged in manufacture and sale of stainless steel utensils, sterilizers and other items in its factory located at Chandigarh. For the two assessment years 1977-78 and 1978-79 it had filed returns disclosing loss in a sum of Rs.1,31,113.06 and Rs.39,939/- respectively. For the assessment year 1979-80 it returned a profit of Rs.7,340/-. It is holding a quota for the purchase of stainless steel sheets from M.M.T.C During the accounting years relevant to the said three assessment years, the assessee could not carry on the manufacturing activity on account of acute shortage of funds. With a view to ensure that its quota does not lapse, it obtained the quota and sold it to various brokers in Bombay, Delhi and Madras. The assessee set out the arrangement with those brokers. From these sales, the assessee said it derived a profit of Rs.1,28,691/- in all the three assessment years put together. It offered the said amount to tax.

In his objections filed to the assessee's application, the Commissioner stated the following facts. The investigations made for the assessment year 1977-78 revealed that the assessee has tried to evade tax on a massive scale. It had fabricated its account books to defraud the Revenue and had filed a return showing a loss of Rs.1,31,113/-. On

the basis of investigations, the Income Tax Officer has proposed an addition of Rs.45,71,703/- in her draft assessment order sent to the assessee for objections under Section 144-B. The story of manufacturing and the sale of manufactured products to certain named concerns is all fictitious. The parties, to whom the manufactured products were allegedly sold, denied having made such purchases. Their account books also did not disclose any such transactions. The verification of the sales tax record shows that no trucks carrying stainless steel sheet ever crossed the sales tax barriers enroute to Chandigarh. The goods receipts produced by the assessee did not contain the stamp of sales tax barriers. The spot inspection of the factory disclosed that no manufacturing activity was being carried on there. The books of account for the assessment years 1978-79 and 1979-80 were not produced inspite of summons issued under Section 131. The inquiries revealed that the stainless steel sheets were never brought to Chandigarh but were sold at premium at Bombay, Madras and Delhi. The various entries in the account books which were produced latter were found to be fictitious. Indeed, the assessee was in the habit of manipulating its account-books to defraud the Revenue. In 1974 a search and seizure operation was conducted in the assessee's premises which disclosed mis-utilisation of the stainless steel sheets. On the above facts the Commissioner stated that he strongly objects to the application under Section 245-C being proceeded with. He submitted that in view of the fraud perpetrated by the assessee having already been established, the assessee's application may be rejected.

So far as the assessment year 1977-78 is concerned, all the three members of the Commission unanimously rejected the application on the following reasoning:

"83. Viewing the facts of this case against the observations made by us above, it appears to us that for the A.Y. 1977-78, the Department has a very strong case to raise objection on the ground that concealment of particulars of income or perpetration of fraud by the applicant has been or is likely to be established - particularly so in regard to the perpetration of fraud. In so far as this year is concerned, there is clear fabrication of accounts, the balances in the account have been fudged; the sale vouchers and goods receipts have been cooked up, and a false facade is created to mislead the Department and cover up the real state of the assessee's business transactions. It strains our sense of credulity too far to accept the applicant's claim that all this was being done only to save its skin from some other departments and its intentions vis-a-vis the Revenue were nothing but honourable. If that be so, how does the assessee in any case explain the inflation by Rs.10 lacs of the carried forward balance in "Kuldip Parkash Imprest Account". To our

minds, the Department has also succeeded in substance in rebutting the assessee's claim of so-called inaccuracies in the Commissioner's report. We do not find any distortion or misconception of facts in the Commissioner's report, nor can we subscribe to the view that it involves any colourable exercise of his powers. In fact, the Commissioner would have failed in his duty enjoined upon him by law, if he had not raised objection for the year 1977-78."

The findings recorded by the Commission are too eloquent to call for any emphasis. They could not have been expressed in more stronger language.

So far as the other two assessment years (1978-79 and 1979-80) are concerned, there was a difference of opinion between the three members. The majority held that the case with respect to these two assessment years stands on a different footing, inasmuch as no inquiries appear to have been made by the Income Tax Officer in respect of these two assessment years. No bogus sales have also been conclusively established by the Income Tax Officer by the date of filing of the application under Section 245-C, said the majority, except the entries regarding sale of scrap in the account books of the assessee. The were of the view that there is no adequate material on the basis of which it can be said that the concealment of income has been established or is likely to be established. The inspection of the factory premises by the Income Tax Officer on February 8, 1980 too is not of much relevance, they said, since the inspection is long after the expiry of the relevant previous years. The non-production of the account books for these years was also said to be not of much relevance because the department itself has been giving repeated adjournments for their production.

The dissenting member, however, based his opinion on the following reasoning. The facts placed before the Commission conclusively establish that no manufacturing activity was being carried on by the assessee during the relevant years. The account books for all the three years were fabricated with a view to conceal the assessee's true activity. It is not even the assessee's case that it carried on any manufacturing activity during the previous years relevant to assessment years 1978-79 and 1979-80. In the course of hearing before the Commission it was categorically admitted by the counsel for the assessee that the losses claimed by it in its returns were not true and that no manufacturing activity was carried on during the relevant years. The assessee has also admitted that it has sold the stainless steel quota at Bombay, Delhi and Madras and that it never transported the same to Chandigarh. It is also admitted that the books of account, showing the sale of manufactured goods to various parties are admittedly untrue. The assessee itself has made no distinction as between these three assessment years. Its case is common to all the three assessment years. No distinction is, therefore, permissible as between these three assessment years. The facts and record clearly prove that the assessee refused to produce its account books for the two subsequent assessment years in spite of notices and summons; they were produced later and were found to be fabricated. The inspection by the Income Tax Officer on February 8, 1980 disclosed no manufacturing

activity at the alleged factory premises except some small scale electro-plating work being done there. The dissenting member further observed: "I do not see any reason why the admission made on behalf of the applicant that there was no manufacturing activity carried on and that the losses claimed as per return are not genuine can be or should be ignored. These admissions have been made in the papers filed along with the application and also in the course of the hearing before us..... I also feel that the applicant should not be allowed to take advantage of his own deliberate default before the Income Tax Officer and he should not be heard to plead before us that the Income Tax Officer has not examined the books or pointed any defects or deficiencies therein so as to be able to establish any concealment for these years. The applicant should not be allowed to take advantage of his own deliberate default to find a short-cut to approach the Commission and to circumvent the normal processes of law prescribed in the Income-tax Act." The dissenting member emphasised that making a distinction between assessment year 1977-78 on one hand and 1978-79 and 1979-80 on the other would lay the Commission open to charge of inconsistency, particularly when it is not even the case of the assessee itself.

Another proposition stated in the impugned order is that the Commissioner cannot refer in his objections to any material collected after the filing of the application under Section 245-C and that any material collected after the filing of such application cannot be lollod into while deciding the question whether to admit the application or not.

Mr. Harish Salve, learned counsel for the assessee submitted that this is a case where the assessee has genuinely repented for his lapses and has made a clean breast of all its wrong-doing. It has admitted that it had not carried on any manufacturing activity during the relevant years, that it had sold the entire stainless steel quota at Bombay, Delhi and Madras, that the returns filed by it were untrue, that the books of account maintained by it were untrue and fabricated and that it had disclosed its true income for the said assessment years before the Commission. Indeed the assessee has disclosed many other items of income apart from the three items mentioned in the notice dated February 14, 1980 issued by the Income Tax Officer. Mr. Salve complained that the Income Tax Officer has drawn several facts mentioned in the assessee's application under Section 245-C and made them the basis of her draft assessment order. This was wholly unfair, said Mr. Salve. Having regard to the candour with which the assessee approached the Commission, the Commission should have admitted the case relating to assessment year 1977-78 also for settlement. Counsel further submitted that the very statements made and facts stated by the assessee in its application cannot be made a basis for rejecting it. Mr. J. Ramamurthy, learned counsel for the Revenue on the other hand assailed the order of the majority insofar as they admitted the assessee's case for the two latter assessment years for settlement. He submitted that in view of the facts and circumstances of the case which have been fully and clearly pointed out by the dissenting member on his opinion, the application of the assessee should have been rejected outright and should not have been admitted for any assessment year. The distinction made between the three assessment years, the counsel submitted, is equally untenable.

The scheme of chapter XIX-A has been set out in the

earlier decisions of this Court including Commissioner of Income-Tax, (Central;), Calcutta v. B. N. Bhattacharjee and Another [1979 (118) I.T.R. 461] and Commissioner of Income Tax v. Express Newspapers Limited [1994 (206) I.T.R. 443] and need not be reiterated here. For the purpose of this case it is sufficient to notice subsections (1) and (1-A) of Section 245-D. They read:

"245D. (1) On receipt of an application under section 254C, the Settlement Commission shall call for a report from the Commissioner and on the basis of the material contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved therein, the Settlement Commission may, by order, allow the application to be proceeded with or reject the application:

Provided that an application shall not be rejected under this sub-section unless an opportunity has been given to the applicant of being heard.

[Second proviso omitted by the Finance Act, 1979, w.e.f. 1.4.1979.]

[(1A) Notwithstanding anything contained in sub-section (1), an application shall not be proceeded with under that subsection if the Commissioner objects to the application being proceeded with on the ground that concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax or other sum chargeable or imposable under the Indian Income-tax Act, 1922 (11 of 1922) or under this Act, has been established or is likely to be established by any income-tax authority, in relation to the case:

Provided that where the Settlement Commission is not satisfied with the correctness of the objection raised by the Commissioner, the Settlement Commission may, after giving the Commissioner an opportunity of being heard, by order, allow the application to be proceeded with under sub-section (1) and send a copy of its order to the Commissioner.]"

The meaning and purport of these Sections has also been dealt with and set out in Express Newspapers. The said decision rejects the argument that once an application is filed by an assessee under Section 245-C, no further investigations or inquiries can be carried on by the Income Tax Officer and that he is obliged to stop all further proceedings with effect from the said date. It has been held that the Income Tax Officer is not bound to do so and that he can continue with the proceedings before him till the

date of submitting the report by the Commissioner under sub-section (1-A) of Section 245-D - and may be, even beyond. The Commission was, therefore, in error in holding to the contrary.

The contention of Mr. Salve that the assessee sent a copy of his application filed under Section 245-C to the Income Tax Officer immediately and that the Income Tax Officer acted unfairly in drawing upon the facts in said application to make the draft assessment order (relating to the assessment year 1977-78) is factually incorrect as pointed out hereinabove. The truth is that not only did the assessee not send a copy of its application to the Income Tax Officer but it refused to supply copies thereof inspite of repeated requests by the Income Tax Officer. A copy of the application was communicated by the Commission to the Commissioner only on 14th March, 1980 and was received by the Commissioner on April 3, 1980, as would be evident from the statement in the preamble to the objections filed by the Commissioner. The draft assessment order was made on March 19, 1980 and communicated to the assessee alongwith a covering letter on March 20, 1980. Even by the date of the making of the draft assessment order the Income Tax Officer had made elaborate inquiries and had discovered that there was no manufacturing activity, that there was no transport of stainless steel sheets to Chandigarh, that they were sold in Delhi, Bombay and Madras, that the alleged sale of manufactured goods to various parties is false and that the account books were totally fabricated. The draft assessment order states all these facts. Mr. Salve could not point out any particular fact or facts which have been taken from the assessee's application and used as a basis for making the draft assessment order. It is significant to notice that according to the application filed by the assessee its total income for all the three years put together is Rs.1,28,691/-, whereas according to the draft assessment order the income of the assessee is in the region of Rs. 45 lacs during the first assessment year alone. The allegation of unfairness levelled against the Income Tax Officer is, therefore, factually incorrect and is unwarranted.

The dissenting member is right in emphasizing the fact that the assessee itself did not make a distinction between the assessment year 1977-78 on one hand and the assessment years 1978-79 and 1979-80 on the other. A Perusal of the application filed by the assessee before the Commissioner shows that it has set out facts and figures relating to stock received from M.M.T.C., their sale to different parties, the expenses and brokerage paid in that connection, the profits made from such sales and all other relevant particulars. Neither the application nor the particulars stated therein are confined to one assessment year (1977-78) but extend to all the three assessment years. In short, whatever was stated or disclosed in the said application related to all the three years; no distinction was made or suggested as between assessment year 1977-78 and other two assessment years. As a matter of fact, the "computation of Income" (Annexure C) at the end of the application gave the figures of "Total sale of stainless steel sheets", "gross sale value", "cost of purchase", "transport charges" and "brokerage" for all the three years combined. The total profit from the sale of stainless steel sheets for all the three years was worked out at Rs. 1,28,698.10 p. It was one package and indivisible. We are, therefore, inclined to agree with the opinion of the dissenting member that by making such a distinction, the Commission laid itself open to the charge of inconsistency. Indeed it must be said that

the majority of the members of the Commissioner have tried to make out a new case for the assessee not put forward by it in its application. We are also of the opinion that the facts found proved and stated in the draft assessment order aforesaid and the facts admitted by the assessee in its application before the Commission and during the course of hearing before the Commission do clearly show that the "concealment of particulars of income on the part of the applicant or perpetration of fraud by him for evading any tax or other sum chargeable or impossible under this Act has been established." Now, so far as the assessment year 1977-78 is concerned, the draft order does bear out the aforesaid facts and since the assessee's case and all the material facts are one and the same for all the three assessment years (as set out in its own application filed under Section 245-C) it must be said that the very same facts also established the said factors even with respect to the two latter assessment years. In the circumstances it must be said that the main limb of subsection (1-A) was fully satisfied in this case. No valid or relevant reasons have been assigned by the Commission, within the meaning of the proviso to subsection (1-A) to admit the application for the two latter assessment years. It was a gross case where the assessee brazenly and deliberately perpetrated fraud upon the Revenue with a view to evade the taxes legitimately and lawfully payable by him. The fraud played by him, which was discovered by the Income Tax Officer even by the date of submission of report by the Commissioner, disentitles the assessee from claiming that his case should be admitted for settlement by the Commissioner. There is neither law in its favour nor equity. The fact that it has admitted its fraud in its application is of no consequence since its fraud was already discovered by the Income Tax Officer by her own extensive and elaborate inquiries.

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 *Sriram Durga Prasad v. Settlement Commissioner* (176 I.T.R. 169) and *Jyotendra Singhji v. S.I. Tripathi* (A.I.R. 1993 S.C. 1991)]. 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 under Section 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 assessed 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 under Section 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.

For the above reasons the Civil Appeals 238 and 239 of 1982 filed by the Revenue are allowed with costs and the Civil Appeals 233-235 of 1982 (and Civil Appeals 236-237/1982) filed by the assessee are dismissed with costs. The cost payable by the assessee in all the appeals put together are assessed at Rs. 50,000/- consolidated.

JUDIS