

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2922 OF 2014

Techniplex & Anr.

..Petitioners.

V/s.

Central Board of Direct Taxes

New Delh & Ors.

..Respondents.

Mr.V.Sridharan, Senior Advocate with Mr.B.V.Jhaveri for the petitioners.

Mr.Arvind Pinto for the respondents.

**CORAM : S.C.DHARMADHIKARI AND
A.K. MENON, JJ.**

DATED : 23RD MARCH, 2015

P.C. :-

1. This writ petition under section 226 of the Constitution of India seeks a writ of mandamus, order or direction, directing the first respondent to grant the application of petitioner No.1 dated 22nd February, 2011 and issue a notification under section 80IA(4) (iii) of the Income Tax Act, 1961.

2. Further prayer is to quash and set aside the order dated 21st November, 2014 rejecting the application of petitioners and the order of the third respondent dated 10th September, 2014 refusing to stay the demand.

3. Since detailed arguments were canvassed and the affidavit in reply is filed, we proceed to decide this writ petition finally. Accordingly, Rule. Respondents waive service. By consent of the parties, made returnable forthwith.

4. The facts in pursuance of which the above reliefs have been claimed can be briefly summarized:-

The petitioners' Predecessor-in-title are co-owners of the land at village Pahadi, Goregaon (West), Village Chincholi and village Malad (West). Thus, some of the Predecessors-in-title and others jointly are owners and possessing these properties. They formed an Association of Persons. The name and style thereof is M/s. Techniplex. A declaration dated 30th January, 2007 was executed with a view to develop the land for constructing an Information and Techonology Park described as Techniplex-I. A letter of intent was obtained from the Joint Director of Industries (IT), Development of Commissioner (Industries) of the Directorate of Industries, Government of Maharashtra which is dated 12th June, 2007. Petitioner No.1 as the Association of Persons and No.2 as the Member of the said Association of Persons together with others developed this Information Technology Park. They constructed the floor area of 44,558 sq. mtrs. wherein the allocable area is 26,568.35 sq. mtrs. and the area for industrial use is 23,911.51 sq. mtrs., which according to the petitioners is 90% of the allocable

area wherein there are 89 industrial units. The allocable area of 26,568.35 sq.mtrs. included the constructed area for common facility and the area for infrastructure facility, including the refuge area on the 4th floor, admeasuring 4,685.04 sq. mtrs. Therefore, the allocable constructed area (without taking the area for common facility and the area for infrastructure facility) is 21,883.31 sq. mtrs., that the area for industrial use is 19,707 sq. mtrs. and for commercial use is 2176 sq. mtrs. Thus, in the aforesaid allocable area for industrial use, the area of common facilities and infrastructure facilities admeasuring 4204.51 sq.mtrs. is added to arrive at the total allocable area of 23,911.51 sq.mtrs. for industrial purpose. A Table or chart of all this is to be found on pages 6 and 7 of the petition paper-book.

5. After such demarcation, the petitioners preferred an application for approval of the Information Technology Park under the Industrial Park Scheme, 2008. This is set out in notification No.SO-51(E) dated 8th January, 2008. This application has to be made to the Secretary (ITA-1 Section) to the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, New Delhi. A copy of this application in the prescribed form is annexed at annexure-B to the petition.

6. Then, the salient features of the Scheme have been

extensively set out in the writ petition and we shall make a reference to it a little later. However, the petitioners highlight before us one of the preliminary condition and which is of procuring of an occupation certificate from the competent authority, namely, the Municipal Corporation of Greater Mumbai. The claim of the petitioners is that such a document / certificate was produced. There was correspondence with the authorities and letters in that behalf have been referred and copies thereof have been annexed from annexure-D to annexure-I of the paper-book of the petition. The petitioners referred to a survey of the premises which was carried out on 7th October, 2013 which resulted in impounding of the books of account, documents, etc. There were notices issued and eventually, deduction under section 80-IA(4)(iii) of the I.T. Act was disallowed by the assessing officer in terms of the assessment order dated 24th March, 2014. An appeal has been preferred against the order of the assessing officer before the Commissioner of Income Tax (Appeals). There was a stay application preferred. We are not as much concerned with that aspect of the matter. Suffice it to say that earlier a writ petition was filed in this Court being Writ Petition No.2315 of 2014 against the inaction on the part of the Central Board of Direct Taxes in disposing of the application of petitioner No.1 dated 22nd February, 2011 and staying the demand raised pursuant to the passing of the assessment order.

7. That writ petition was heard by a Division Bench of this Court and a statement was made on behalf of the Board that the application dated 22nd February, 2011 would be disposed of within a period of six weeks from 13th October, 2014. Till then the assessment order dated 24th March, 2014 will not be given effect to but the attachment levied on the property of the petitioners shall continue. The stay application was also rejected. Reference to the details in that regard is to be found in the writ petition from pages 15 to 17 of the paper-book.

8. The petitioners have reiterated the stand and extensively to indicate as to how the compliance have been made with the requirement stipulated in the Scheme.

9. The petitioners are aggrieved and dissatisfied with the fact that after the directions of this Court, the impugned order has been passed rejecting the petitioners' application and a copy thereof is at annexure-L to the writ petition. We are concerned in this writ petition with the rejection of the application of the petitioners on the ground that the petitioners have failed to comply with the condition of obtaining a certificate and particularly styled as occupation certificate.

10. What has been pointed out to us is that the petitioners'

application does not fulfill the conditions specified at para 4(1), 4(2A) and 4(6) of the Scheme. Therefore, the application under section 80IA(4)(iii) of the I.T. Act came to be rejected.

11. It is aggrieved by this order that the present writ petition has been filed.

12. Mr.Sridharan, learned senior counsel appearing on behalf of the petitioners submitted that the petitioners have complied with the requisite conditions pertaining to the Scheme. There is total non application of mind on the part of respondent No.1 to the condition, its nature and fulfilment of the same as asserted by the petitioners. The petitioners had pointed out the detailed correspondence and the replies as to how the earlier action of respondent No.1 was not in accordance with law. The petitioners pointed out that the project of petitioner No.1 was consisting of many buildings but completion certificate was furnished for only one building No.4, therefore, there is nothing like giving different areas of location of the industrial park. The letter of intent which has been issued by the Government of Maharashtra has been taken into consideration and together with the certificate. Petitioner No.1 had undertaken the project of constructing the Technology Park building on the plot of land belonging to petitioner No.1 and the Technology Park building was completed before 31st

March, 2011 for which three part occupation certificates were issued by the Municipal Corporation of Greater Mumbai as per the prevailing system. This fact has been reconfirmed by the Municipal Corporation of Greater Mumbai by letter dated 9th July, 2014. Thus, all the areas and which have been properly demarcated for the usage have been indicated and with sufficient clarity. The petitioners pointed out as to how there is confusion prevailing in the authorities with regard to the premises occupied by certain licensees, therefore, those are not the areas which can be considered for the purpose of the permission which has been granted in terms of the Scheme.

13. Our attention has been invited to the order namely, the order dated 10th September, 2014 which has been passed by the Joint Commissioner of Income Tax on the stay application and the impugned order dated 21st November, 2014. Mr.Sridharan submits that the occupation certificates have been granted phase-wise and floor-wise. That does not mean that the same are not in accordance with the conditions stipulated in the Scheme and the Mumbai Municipal Corporation Act, 1888. In the present case, Mr.Sridharan submits that the reasoning in para 4.3 of the impugned order would indicate that there is no discrepancy. The petitioners' project may consist of many buildings and the commencement certificate and the intimation of disapproval (IOD) may have been granted for the

entire project. However, that does not mean that the part completion certificate cannot be granted and in respect of one building. Thus, there was no discrepancy. The understanding of the authorities with regard to the grant of such certificate and compliance with the Municipal Corporation Laws would indicate that they are absolutely not aware of the same. They ought not to have therefore, questioned the contents of such certificate nor they had any authority, power or jurisdiction to do so. All this could not have been done after the clarification of the Municipal Corporation of Greater Mumbai. In that regard, Mr. Sridharan invites our attention to a communication from the Municipal Corporation and the condition stipulated in the same. For these reasons, he would submit that the petitioners' application should have been granted. The impugned order, therefore, must be quashed and set aside.

14. On the other hand, Mr. Pinto, learned counsel appearing for the respondents supported the impugned order. He submitted as to how a reply has been filed and which would indicate that the application was received one month prior to the closure of the Industrial Park Scheme, 2008. Certain queries were raised and the reports were called for that is how, the petitioners' request, including for grant of deduction has been processed. This order which has been passed in compliance with the directions issued by this Court would indicate that the authorities did not proceed in

haste. There were certain issues and specifically raised namely, the location and completion of the Industrial Park, units, ownership, activities and area, constructed floor area and allocable area. If the authority has applied these conditions in the Scheme and found that in terms of the details provided by the petitioners, it is apparent that they have included the area of common facility and infrastructure facility and it is at variance with the conditions set out in the Industrial Park Scheme, 2008. The understanding therefore, by the authorities of the compliance of the conditions in the Scheme is based on all the details and documents supplied by the petitioners themselves. Therefore, the conclusion of these authorities is not vitiated by any non application of mind nor this Court can interfere with the same and by substituting its own views. If that is how the authorities have looked at the matter, then, the expert body's consideration should not be interfered with in the writ jurisdiction. The order passed cannot be termed as arbitrary or vitiated by any error of law apparent on the face of the record. The conclusion reached cannot be termed as perverse. Mr.Pinto, therefore, relied upon the contents of the affidavit which has been filed in reply to the writ petition, the conditions in the Scheme together with the application. For these reasons, he submits that the writ petition be dismissed.

15. For properly considering the rival contentions, we would

like to refer to the Industrial Park Scheme, 2008.

16. Before we make above reference we must express our strong displeasure and deprecate the practice of what is appropriately styled as placing on record the written instructions given to the Government Advocate or Advocate for the revenue. They are being put and placed on record as if they are affidavit-in-reply to a writ petition. We are sorry to state that the person as high as the Commissioner of Income Tax filing an affidavit on behalf of the Central Board of Direct Taxes, so also, on behalf of himself and the Commissionerate is unaware that an affidavit ought to be in first person and should not make any reference to all the instructions, either given orally or in writing to the Advocate.

17. The ordinary dictionary meaning of this term is “a written statement confirmed by oath, for use as evidence in Court”. In terms of law, namely, the General Clauses Act and Oaths Act, it means a written statement in the name of a person, called the deponent by whom it is voluntarily signed and sworn to or affirmed. We would only make a reference to the following statement in this affidavit and which reads as under:-

“It may also be relevant to point out here that in another case belonging to the same group, namely M/s. Balwas Realty and Infrastructure Pvt. Ltd., involving many common issues,

the Hon'ble High Court has dismissed similar writ as informed by the Standing Counsel. This may also be brought to the notice of our Counsel deputed to argue this case after verifying the above fact.

In fine, I say that this Writ is devoid of merit and requires at the stage of admission."

18. Apart from the above, what we find is that in several paragraphs, it is indicated that the comments of the concerned officer Mr.K.C.P.Patnaik may be offered. Such statement is made in regard to paragraph Nos.30 and 31. We do not see how anybody can then make a statement and contrary to the affidavit. If this is how the Board is represented before this Court, then, we are sorry to state that the Board will have to do a lot of homework, including its Commissioner and their officers so that officers' para-wise comments to their Advocate, styled as instructions in writing is not filed as an affidavit in reply in this Court. A useful reference can be made to Order XIX of the Civil Procedure Code in this behalf. Therefore, we would appreciate that hereafter such a mistake is not committed. Else we may have to summon the deponent of the affidavit and express to him our displeasure and deprecate the practice. We hope that after this the state of affairs improve and in particular of the concerned department in the revenue. Be that as it may, if the law casts upon the the authority a duty to pass a speaking order, then, it has to be put on record. The reasons

therein cannot be supplement, substituted, supplied by filing affidavits of the Statutory Authority later on. The order speaks for itself and no improvement therein is permissible by way of filing of affidavit and setting out therein different or additional reasons.

19. In the impugned order, there is a reference made to application for notification under section 801A(4)(iii) of the Income Tax Act, 1961, the provision reads as under:-

“ Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

S.80-IA (4) - This section applies-

(i)

(ii)

(iii) *any undertaking which develops, develops and operates or maintains and operates an industrial park [or special economic zone notified by the Central Government in accordance with the scheme framed and notified by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, [2006].*

Provided that in a case where an undertaking develops an industrial park on or after the 1st day of April, 1999 or a special economic zone on or after the 1st day of April, 2001 and transfers the operation and maintenance of such industrial park or such economic zone of such industrial park or such special economic zone, as the case may be, to another undertaking (hereafter in this section referred to as the transferee undertaking) the deduction under sub-section

(1), shall be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee undertaking."

20. A bare perusal of thereof indicates how the section applies to the deductions in respect of profits and gains from infrastructure development and setting up of any industrial park. If a undertaking develops and operates or maintains and operates any infrastructural facilities which fulfills all the conditions, it would be entitled to deduction. The explanation which is set out below clause (c) of sub-section (i) of section 80IA(4) defines what is meant by infrastructural facilities. It is not disputed before us that the development of the nature carried out by the petitioners answers this definition. Thus, the development of and maintenance of infrastructure styled as Information Technology Park meets the requirement of this definition and, therefore, deduction under section 801A(4)(III) of the/* I.T. Act is permissible.

21. However, what has been indicated further is that this Scheme styled as Industrial Park Scheme, 2008 is notified on 8th January, 2008 by the Central Government in exercise of the powers conferred by clause (iii) of sub-section (4) to section 80IA of the I.T. Act. The Scheme shall be applicable for any undertaking which develops, develops or operates or maintains and operates an

Industrial Park. The term Industrial Park is defined in para 2(h) of the Scheme and which reads as under:-

“ 2(h) “industrial park” means a project in which plots of developed space or built up space or a combination, with common facilities and qualify infrastructure facilities, is developed and made available to the units for the purpose of industrial activities or commercial activities in accordance with the scheme.”

22. Thereafter, what is defined are the terms allocable area common facility, date of completion, infrastructural facilities and industrial activity. One of the definitions in para 2(b) of the scheme reads as under:-

“(b) allocable area means are available for allocation to the units for the industrial activity or commercial activity and shall exclude the area utilized for providing common facility or infrastructure facility. ”

23. Thus, perusal thereof would indicate that Industrial park means project in which the plots of developed space or built up space or combination with facilities and quality infrastructure facilities, is developed and made available to the units for the purpose of industrial activities or commercial activities in accordance with the Scheme. Industrial activity inter alia means information technology enabled products or services as certified vide the notification. The procedure for approval is set out in the

Scheme and any undertaking which develops, develops and operates and maintains and operates an industrial park may make an application for the notification under section clause (iii) of sub-section (4) of section 80IA of the I.T. Act in the prescribed form to the Secretary (ITA-1 Section) to the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, New Delhi and by calling for the report from other departments and agencies as may be deemed fit by the Central Board of Direct Taxes. Para 4 of the Scheme sets out the criteria for approval. The criteria is set out in its clauses in the following terms :

“4. An undertaking shall be considered for notification under clause (iii) of sub section (4) of section 80-1A of the Act, if it fulfills all of the following conditions namely:-”

(1) the date of commencement of the industrial park should be on or after the 1st day of april, 2006 and not later than 21st of March (2011);

(2)-----

(2A) The area allocated or to be allocated for commercial activity shall not be more than ten percent of allocable area.”

24. Thereafter, the general conditions are to be found in para 5 which indicate as to how the industrial park shall be construed as developed on the date of commencement. The tax benefits under the Act may be available to the undertaking only if

the undertaking has the minimum number of thirty units and the industrial park have been notified by the Central Board of Direct Taxes under section 80IA of the I.T. Act. They will be available only to the undertaking notified by the Central Government and not to any other person who may subsequently develop, develops and operates or maintains and operates the notified industrial park for any reason. The undertaking must keep separate books of account for the industrial park and must file its income tax returns by the due date to the Income Tax Department. There is a provision for withdrawal of approval in para 6. Thus, if the application is made in the specific form and to the authorities, then, the undertaking can be considered for issuance of notification provided the criteria for approval has been fulfilled and complied with. The criteria for approval indicates as to how the date of commencement of Industrial Park should be on or before 1st day of April, 2006 and not later than 31st March, 2011. The area allocated or to be allocated to the industrial units shall not be less than 75% of the allocable area. By clause (2A) which has been added to para 4 and which indicates the area allocated or to be allocated for commercial activity shall not be more than 10 per cent of the allocable area. The minimum number of industrial units and minimum constructed area are the conditions which ought to be complied with. When the petitioners applied for issuance of notification what they indicated therein is that they are desirous of setting up such Park and that

application complies with all the conditions. A perusal of the said application would indicate that the petitioners applied for approval in the prescribed form. They state as to how various clauses of the application / form indicates the details of the proposed industrial park, the total allocable area in square metres, the total proposed construction, the plot area, proposed allocable area for industrial area in square metres, the proposed allocable area for commercial use in square metres, the allocable area marked for industrial purpose (90%) and the allocable area marked for commercial area (10%). The intention was to use these areas of industrial park and information technology park for commercial use. The petitioners also pointed out that they have been issued what is styled as “Intimation of disapproval” by the Municipal Corporation of Greater Mumbai dated 18th November, 2006, commencement certificate dated 19th January, 2007 which is based on the plans and / or approvals received from the Municipal Corporation of Greater Mumbai. That is the planning authority for the purpose of the present location of the industrial park and the area as a whole. Then, three occupation certificates have been issued dated 21st November, 2009, 15th October, 2010 and 14th December, 2010. The table in form IPS-I of IV-I indicates the phase-wise certificates. These certificates that have been issued by the Municipal Corporation of Greater Mumbai have been issued pursuant to an application which has been made by a licensed Surveyor. The

licensed Surveyor applied on 26th October, 2009 for permission to occupy the part completed IT Building No.4 and plus sub-plot-C bearing C.T.S. No.928-A, 928 A/1-24 of the above village and the land indicated therein. The application was duly considered by the Executive Engineer, Building Proposal of the Municipal Corporation of Greater Mumbai and he certified the occupation of the development park i.e. basement plus four floors 4th floor and 8th / 9th floor of the building on the conditions indicated in the said certificate. This case is of a part occupancy certificate. Thereafter, there are detailed certificates which are issued prior to the above part occupancy certificate or commencement certificate dated 19th January, 2007 and prior thereto the intimation of disapproval. We are really surprised at the insistence of the board on furnishing certificates contrary to the provisions of the M.M.C. Act, 1888 which enable the Corporation to grant them. It is not for the Board to sit in judgment over the said certificates or the contents thereof as if it is an appellate authority.

25. There is a comprehensive development plan meant for a Town and a Region. Planning, therefore, are matters over which exclusively jurisdiction and authority is vested in the Planning Authority. The Planning Authority has before it such comprehensive development plan which is referable to section 22 containing clauses (a) to (m) thereof of the Maharashtra Regional Town

Planning Act, 1966. The title of this Act itself indicates as to how the plan is conceived, prepared for a region and a town. It is ultimately the State Government which sanctions and approves a plan. A complete exercise involving public at large is carried out in terms of the Act. The application of parties like the petitioner to develop and construct individual plots are scrutinized, accordingly in terms of the development plan proposals, by the Planning Authority and which is Municipal Corporation of Greater Mumbai in this case. Therefore, we are surprised as to how the occupation certificate could be faulted for its contents and particularly whether it is part or complete. It is common ground that the Board insists on completion or occupation certificate granted by the Municipal Corporation. There is nothing in the law which prohibits grant of a certificate of this nature phase-wise or stage-wise, based on the completion of construction of the areas. Such a certificate, completion or occupation is granted only on completion of the construction. What we find from reading of the impugned order is that this basic difference or distinction as noted above has been lost sight of. In paragraph 4 of the order, reference is made to para 4(1) of Industrial Park Scheme, 2008. It states that the date of commencement of the industrial park should be on or after 1st April, 2006 but not later than 31st March, 2011. Further, as per para 2(f) of the Scheme, the date of commencement means the date of obtaining the completion certificate or occupation certificate as the

case may be, from the relevant local authority certifying that all the required development activities for the project have been completed. We are aware of this satisfaction and which has to be reached by the board. However, in para 4.1 of the impugned order respondent No.1 has held that the petitioners were asked to furnish final occupancy / completion certificate of the industrial park. In response to the same, the petitioners filed the above three certificates. As this condition has not been fulfilled by the petitioners, notice was issued to explain as to how the above condition of the Scheme is fulfilled by it. In response thereto, the petitioners produced a letter from the Municipal Corporation of Greater Mumbai dated 9th January, 2014 and that letter reads as under:-

**" MUNICIPAL CORPORATION OF GREATER MUMBAI
CHE/9299/BNP(WS)/AP**

To,

*Shri Hussein Abdul Karim Balwa & others,
Techniplex-I, 4th Floor, Techniplex Complex,
Veer Sarvakar Flyover, Goregaon (West),
Mumbai - 400 062.*

Sub: I.T. Office Building No.4 on Sub-Plot 'C' bearing C.T.S. No.928-A, 928-A/1 to 24 village Pahadi, Goregaon (W), C.T.S. No.1390, 1390/A, 1390/1 to 11 of Village Malad (S), Old C.T.S. Nos.73-D, 73-D/10, 73-D/11-B,73-D/12, to 17 & New C.T.S. Nos.73 A/D of village Chinchavali at Goregaon (West), Mumbai.

Ref. Your letter dated 4-07-2014.

Sir,

With reference to above subject this is to inform you that the occupation permission to the I.T. Building No.4 on the plot under reference comprising of basement + stilt + 2 level podium + 1st to 9th upper floor were granted as follows:-

- a) Part occupation certificate comprising of basement + 4th floor + 7th floor + 8th floor + 9th floor on 21/11/2009.*
- b) Part occupation (for car parking) + 1st to 3rd upper floors and unit No.16-A, 16-B, 16-C & 17 at 5th floor on 15/10/2010.*
- c) Part occupation certificate comprising of remaining portion of the 5th floor and entire 6th floor on 14/12/2010.*

Hence, it is confirm that the occupation permission to the entire I.T. Building No.4 is granted since the entire building was completed in all respect on 14/12/2010."

26. We are of the opinion that if respondent No.1 had taken care to peruse this letter in its entirety, it would have been satisfied about the compliance of the condition in para 4(1) of the Scheme as noted above. This letter indicates that it was an information sought by the petitioner on 4th July, 2014. The Municipal Corporation of Greater Mumbai in response thereto replied that the occupation permission to IT building No.4 on the plot under reference comprising of basement plus stilt plus two level podium plus 1st floor to 9th upper floors were granted. Thus, how this

occupation permission was granted has been indicated. The Corporation has acknowledged that it granted part occupancy certificate and on various dates so that part portions could be occupied. However, it is stated that the occupation permission to the entire IT building No.4 is granted since the entire building has been completed in all respects on 14th December, 2010. That certificate to occupy has been granted at Pahadi Village, Goregaon (West) is not disputed so also a completion certificate as indicated in the above paragraphs. Therefore, when the Corporation construed the same as occupation certificate, then, we do not understand as to how in the impugned order it has been held that rather than a completion or occupation certificate, the petitioners have provided a confirmation certificate dated 9th July, 2014 and on that basis requested that they have complied with the conditions and, therefore, a notification be issued.

27. Then, the impugned order proceeds to scrutinise the details. The details, according to the petitioners, which are already provided are that the project consisted of many buildings. The application clearly mentions that the completion certificate and IOD (intimation of disapproval) has been filed for the entire project but the aforementioned part completion has been furnished only for one building No.4. The authorities lost sight of the fact that part of the Scheme and particularly para 3 indicates as to how there is a

distinction made between allocable area meaning area allocated to the industrial activity or commercial activity and shall exclude the area for providing common facility or infrastructural facility. They then indicate the date of commencement and with regard to the developmental activities for the project being completed. The response of the authority appears to be that even if the industrial park is set up in one building or the petitioners started or commenced an industrial activity in a portion thereof, a certificate styled as completion certificate or occupation certificate from the local authority certifying that all the required development activity for the project has been completed is required. Now, if the project envisages any undertaking which develops, develops and operates or maintains and operates an industrial park, then we do not see how the industrial park and which locates the industrial units has to be understood as a project comprising of buildings and which may or might not house the said park. If the definition of the term industrial park means a project in which developed space or built up space or a combination, with common facilities and quality infrastructure facilities is developed and made available to the units for the purpose of industrial activity or commercial activity in accordance with the Scheme, then, the insistence on the part of the authorities in calling upon the petitioners to produce a certificate which will indicate the entire project and development conceived of by the petitioners being completed. The petitioners may have in

mind several projects or Schemes of different nature in different buildings. There is a plot on which several buildings may be constructed. The plot can be developed for composite use and that is permissible. In such circumstances, what the authorities in this case are concerned with is the location of the units in which the industrial activity is carried out and whether that could classify as industrial park and for which the requisite certificate has been issued. This understanding is completely lost sight of in para Nos.4.4 & 4.5 of the impugned order, which read as under :-

“4.4. Besides building no.4, the industrial park project consisted of other buildings also. This is evident if one gleans over the 39 CTS nos. stated by the applicant to be the CTS nos over which the Building No.4 is located. At the area stated to be occupied by the industrial park such other facilities have also been developed by the applicant, which form the part of the project. Applicant has developed a club house and other residential / commercial area at the very same location, as is evident from the perusal of the Articles of Agreement of AOP.

a. The AOP agreement submitted by applicant states that the Clubhouse has rather been constructed over the area i.e. C.T.S. No.928A part, 928A/15, 928A/16 and 928/17 of Village Pahadi, which has been subsequently leased to Association Hospitality and Developers Pvt. Ltd. (as per the seventh schedule of the agreement).

b. As per the Second Schedule, on the plot of land bearing CTS No.928/A Part, 928A/18 to 24 of village Pahadi, Goregaon

(West), CT No.1390, 1390/A, 1390/1 to 11 of village Malad (West), Mumbai (admeasuring about 7097.00 sq.mtrs. other buildings, namely Medina Manzil, Balwa Nagar-I, Balwa Nagar-II, A.K. Towers have been constructed).

c. The third schedule states that the Techniplex I is located at plots of land bearing CTS No.928A part, 928A/1 to 928/14 of village Pahadi Goregaon (West) and new CTS No.73A/D of Village Chincholi, collectively admeasuring about 7877.16 square Meters.

4.5 Therefore, the three Part Occupation Certificate (POC) do not establish the completion of the Industrial park as approved by the Government or its completion as per the approved plans. The three POC no way establish that the industrial park as approved vide letter of intent was complete as on 31-03-2011. In the absence of completion or full occupation certificate it cannot be ascertained whether the project as approved by the competent authority can indeed be stated to be complete and whether the building under consideration was the only structure to be constructed under the project is not known. What appears is the fact that only one building comprising within a larger span of project could be completed."

28. A perusal of the paragraphs would indicate that three part occupation certificates do not establish according to the first respondent, the completion of the industrial park as approved by the Government or its completion as per the approved plans. These three part occupancy certificates establish that the industrial parks as approved vide letter of intent was complete on 31st March, 2011.

In the absence of completion or full occupation certificate, it cannot be ascertained whether the project as approved by the competent authority can be stated to be complete and that whether the building under consideration was the only structure to be constructed under the project. All these observations indicate as to how those dealing with Revenue and Tax matters are unaware of other laws. We do not expect them to be conversant with each and every law, but when notice was issued, they must be clear to state the law and atleast the relevant provisions of applicable law. This minimum legal knowledge and on the matter of above nature cannot be too much to expect. This minimum expectation is also not fulfilled in this regard. In this respect, we may make a reference to section 353A of the Bombay Provincial Municipal Corporation Act, 1888, which reads as under:-

“ Completion certificates, permission to occupy or use.

353A. (1) Every person who employs a licensed surveyor or person approved by the Commissioner to erect a building or execute any such work as is described in section 342 shall, within one month after the completion of the erection of such building or the execution of such work, deliver or send or cause to be delivered or sent to the Commissioner at his office, notice in writing of such completion, accompanied by a certificate in the form of Schedule T signed by the person employed under section 344A, who is hereby required immediately upon completion of the work and upon demand by the person employing him to sign and give such certificate to such person,

and shall give to the Commissioner all necessary facilities for the inspection of such building or of such work :

Provided that—

(a) such inspection shall be commenced within seven days from the date of receipt of the notice of completion, and

(b) the Commissioner may, within seven days from the date of commencement of such inspection, by written intimation addressed to the person from whom the notice of completion was received, and delivered at his address as stated in such notice, or, in the absence of such address, affixed to a conspicuous' part of the building to which such notice relates-

(i) give permission for the occupation of such building or for the use of the building or part thereof affected by such work, or

(ii) refuse such permission in case such building has been erected or such work executed so as to contravene any provision of this Act or of the bye-laws.

(2) No person shall occupy or permit to be occupied any such building, or use or permit to be used the building or part thereof affected by any such work, until—

(a) the permission referred to in proviso (b) to sub-section (1) has been received, or

(b) the Commissioner has failed for twenty-one days after receipt of the notice of completion to intimate as aforesaid his refusal of the said permission.”

29. A perusal of the same would indicate as to how completion certificates, permission to occupy or use is granted. If the licensed Surveyor has been employed, then the Surveyor or the

person approved by the Commissioner as their employee for erecting the building or executing any work as described in section 342, shall, within one month after erecting of such building or execution of such work deliver or sent or cause to be delivered to the Commissioner at his office, a notice in writing of such completion, accompanied by a certificate in the form of Schedule T signed by the person employed under section 344A, whereby this person has to facilitate the Commissioner to inspect the work or the building within a stipulated time in the proviso. Section 353A indicates as to how a licensed Surveyor has to act. No person shall occupy or permit to be occupied any such building, or use or permit to be used the building or part thereof affected by such work details of which as referred to in proviso (b) to sub-section (1) has been received or as provided in sub-section (2), if after receipt of notice for inspection as aforesaid the refusal of such permission has been intimated and within 21 days.

30. That there is difference between the commencing of a work or grant of such certificates enabling the commencing of development and provided in section 347. Thus, the development permission is sought under section 44 of the Maharashtra Regional Town Planning Act, 1966. Accordingly, it may be granted as contained in the certificate conditionally or unconditionally. Once such certificates are issued by a Competent Authority and

certifying the work has having been completed or the premises being fit to be occupied on the same being completed, then, it is not for anybody else to question the contents. They shall be under such circumstances taken as conclusive evidence of the commencement and completion of the work. Unless these certificates are obtained by perpetuating a fraud or they can be termed as suspicious, we do not see how the authorities like the Central Board of Direct Taxes or the Commissioner can question the contents and moreso by exhibiting their ignorance completely. If they have a doubt about the genuineness or authenticity of such certificates, nothing prevents them from seeking clarifications from the Municipal or Planning Authorities.

31. In the circumstances, we are unable to sustain this conclusion of the authority and that the petitioners have not complied with the provisions of para 4 of the Scheme.

32. Thereafter, what has been indicated is really a fallout of the above. The Architect's certificate dated 9th March, 2011 which was required to be furnished has then been scrutinized and according to the authorities, it contained divergent views. The whole approach appears to be that this certificate would incitate completion of the entire project comprising of many buildings or more than one and that the Corporation should not have allowed

seeking a grant of part occupation certificate when the entire building has not been completed. The part occupation certificate phase-wise may be issued but eventually even a building completion or permission occupying the entire building is also sought that it is necessary to indicate about access to the floors, certain amenities and facilities, including the staircase and lift. Until they are put in place, it would not be possible for anybody in possession of such certificate and on their strength alone, to enjoy the complete and proper user of the common amenities or the floors. Therefore, when the Architect has issued a certificate, based on which the project is undertaken and completed, then, we do not see what more is needed. The Board should have been aware of the fact that no project or construction for development can be undertaken or completed unless the plans for the same are furnished in advance and approval and sanction thereof is obtained from the Municipal Corporation. They have a full set of engineers and experts who apply their mind and sanction and approve the building construction plans and in terms of the Development Control Rules, 1991 which are in place. In such circumstances, we do not see what discrepancy can be found with the Architect's certificate. However, in relation to that as well, we do not find any application of common area for use as industrial park. The allocable area as defined in the Scheme means area available for allocation to the units for industrial activity or commercial activity and shall

exclude the area utilised for providing common facility or infrastructural facility. The common areas or facilities have to be excluded as they are common to other facility, user or activity. The authorities in this case are concerned with the industrial park scheme. This park is a project comprising development project in which plots of developed space or built up space or a combination with common facilities and quality infrastructure facilities is developed. However, the percentage of allocable areas and which are stipulated in para 4 of the Scheme, indicate that the area allocated or to be allocated to industrial unit shall not be less than seventy-five per cent of the allocable area and the area allocated or to be allocated for commercial activity shall not be more than ten percent of the allocable area and the area. Minimum number of industrial units, minimum constructed floor area and other stipulations are said to be complied with. What has been held against the petitioners is the fact that they allegedly furnished wrong figures of allocable area. However, that was a deficiency, if at all, till January, 2014. That area change has thereafter been corrected and provided by the petitioner. This is referred to in para 8, then, there was no other requirement which remained to be complied with and it was not for the Board to probe by whom the industrial park is going to be used. There is no question of any non compliance with the Scheme simply because the Scheme itself in the paragraph states 'to be allocated'. If these words are inserted,

the Park would be taken to be completed and the matter of location and for the purpose of seeking deduction are a different aspect altogether. If the revision as effected by the petitioner had been noted, then, the authorities could have not concluded as to how there is non compliance with the terms and conditions of the Scheme. In para Nos.10 & 11 of the impugned order, the Board holds that in the application dated 22nd February, 2011 (annexure 7) the total allocable area for commercial use as stated on the 4th floor and 9th floor is 2656.84 sq. mtrs. Now, this figure can be reconciled with the chart furnished by letter dated 10th March, 2011 wherein all units on the 4th floor are stated to be industrial and no mention at all was made of any commercial unit at 4th floor. Therefore, a letter was issued by the authorities on behalf of the Board to which the petitioners replied on 16th July, 2014 is also extensively referred. We do not find any justification and faulting the petitioners because they have indicated something about two units. If the two units of Nazim Hanif Palsani and others and Bashir V.Kojar and others have indicated any change in their area, then, the petitioners have, according to the Board revised the figures and indulged in window dressing of floor-wise location. That is to be scrutinized and as has been indicated with reference to the field authorities' instructions. We do not in any manner hold that the Board cannot scrutinise the details and carry out inspection at site, the inspection should not be just restricted to the documents.

However, we do not find how it can be concluded that there is a violation of condition No.4(6) of the Scheme without reference to any clarification and documents which have been provided by the petitioners themselves. In that regard, what has been provided in sub-para (6) of para 4 of the Scheme is that no industrial unit, along with the units of an associated enterprise shall occupy more than twenty-five per cent of the allocable area. The difference between the minimum floor area, area allocated for commercial activity have been totally lost sight of in arriving at such a conclusion. Further, the criteria for approval does not rule out computation of the minimum number of industrial units (thirty). Taking into consideration all the persons and their associate enterprise and terming them as a single unit, therefore, a person and his associate enterprise will be treated as a single unit that is to infer that the persons like the petitioners indicate minimum industrial units and complying with all conditions by allocating or selling them to certain person or associates. There is further stipulation that no industrial unit, along with the units of an associated enterprise shall occupy more than twenty-five per cent of the allocable area for industrial activity or commercial activity. Thus, what has to be understood with reference to the definition of term allocable as above in sub-para (2A) of para 2 of the Scheme takes care and disentitles a person from a notification if the industrial park is not owned by only one undertaking and industrial

unit did not undertake activity defined in para 2(j) of the Scheme. To facilitate industrial activity that these conditions are incorporated or inserted. In such circumstances, we do not understand as to how para 4(2a) and 4(6) of the Scheme have been violated.

33. As a result of the above discussion, we set aside the order dated 21st November, 2014. The application of the petitioners dated 22nd February, 2011 together with all further details and specifications provided by them shall be considered afresh and requisite order in accordance with law be passed as expeditiously as possible and within a period of four weeks from the date of receipt of a copy of this order. While considering this application in terms of these directions, the Board shall pass a fresh order and without being influenced by any of the conclusions recorded above. The Board shall strictly act in accordance with the Scheme and the observations made by this Court in the present order. Though a writ of mandamus as claimed or direction to the respondents to issue a notification and direction to stay the demand is claimed, we do not find that the relief claimed can be granted. Yet, if the authorities have a discretion in the matter, they can undertake a fresh exercise and pass an order in accordance with law. We do not grant prayer clause (a). However, we clarify that what has been observed by the Board earlier and which has not found favour with this Court

should not be the basis on which a fresh order can be passed. Equally, we direct that until the Board considers the application and decides the same in accordance with our directions, none of the authorities under the Income Tax Act, 1961 shall initiate coercive methods to recover the amount of taxes and in terms of the order of the assessment passed by the assessing officer. The authorities who are deciding the appeal would be well advised in holding their hands until the application is considered and decided in terms of our order and directions. We will expect the authority, namely the Board and while dealing and deciding the application afresh to permit the petitioners to appear before it and make such submissions and produce such details as are permitted in law. If the Architect's certificate or the contents are doubted, it is but fair that the petitioners can be assisted by their Architect and consultant during the course of the said hearing. Thus, before application is dealt with again, the Board must grant personal hearing to the petitioners and permit their representative to attend it on the date and time and convenient to them. However, the petitioners shall not have the luxury of seeking adjournments unnecessarily.

(A.K. MENON, J.)

(S.C.DHARMADHIKARI, J.)