IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NOS. 614 & 615 OF 2006

M/s. Velingkar Brothers,
a firm registered under the
Partnership Act, 1932 and
carrying on business from
Veling Mardol, Goa. …. Petitioners

V e r s u s

1. Assistant Commissioner
   of Income Tax,
   Circle 2(1),
   EDC Complex, Patto,
   Panaji Goa.

2. Commissioner of Income Tax,
   Panaji Goa,

3. Union of India,
   (through the Secretary
   to Government of India,
   Ministry of Finance,
   New Delhi) ….. Respondents

Mr. D. Pangam, Advocate for the petitioner.

Ms. A. Razaq, Advocate for the respondent nos. 1 and 2.

Coram:- F. M. REIS &
PRITHVIRAJ K. CHAVAN, JJ.

Date:- 13th June, 2017

<u>ORAL JUDGMENT</u> (Per F. M. Reis, J)

Heard Mr. D. Pangam, learned counsel appearing for the petitioners and Ms. A. Razaq, learned counsel appearing for the respondent nos. 1 and 2.

2. Both the above petitions are taken up together as they involve the same assessee/petitioners herein raising same issue challenging the notice under Section 147 of the Income Tax Act, 1961. The assessment in Writ Petition No. 614 of 2006 is with regard to the Assessment Year 2000-2001 and Writ Petition No.615 of 2006 is pertaining to the Assessment Year 2001-2002.

3. The brief facts in Writ Petition No. 614 of 2006 are that the petitioners had filed their return of income for the Assessment Year 2000-2001 and thereafter a notice dated 28.08.2003 was issued under Section 147 of the Income Tax Act (herein after referred to as "the said Act") inter alia on the ground that the petitioners were not entitled for deduction under Section 10B of the said Act, as the activities carried out by the

petitioners were not 100% export oriented unit. The petitioners filed their reply *inter alia* disclosing that the petitioners were carrying out 100% export oriented unit and as such entitled for deduction in terms of Section 10B of the said Act. The Assessing Officer after minutely examining the contention by order dated 15.02.2005 accepted the explanation of the petitioners and allowed deduction in terms of Section 10B of the said Act. On 28.11.2005 the respondents served another notice under Section 147 of the said Act *inter alia* contending that the petitioners were not entitled for deduction under Section 10B of the said Act on the ground that they were not carrying out manufacture or production business to avail of the benefits of the said provisions. The petitioners informed the respondents to treat the earlier return as return in terms of Section 147 of the said Act and called upon the respondents to furnish the reasons to the petitioners. But however, no reasons were communicated by the respondents for reopening of the assessment and as such the petitioners filed the above petition *inter alia* seeking to quash the notice under Section 147 of the said Act. In the meanwhile, the respondents sought permission of this Court to complete the assessment which was allowed subject to further orders in the above petition. In the Assessment Order, the respondents came to the conclusion that the petitioners were not carrying out any manufacture or production and as such were disentitled for deduction under Section 10B of the said Act and accordingly, the deduction allowed in the earlier assessment order came to be disallowed and added for the purpose of computing taxable income. The petitioners thereafter amended the petition and also raised a challenge to the said assessment carried out by the respondents.

4. The brief facts in Writ Petition No. 615 of 2006 are that the return filed by the petitioners was taken up for scrutiny under Section 143 of the said Act. During such scrutiny, an explanation was sought by the respondents calling upon the petitioners to explain as to how they were entitled for deduction under Section 10B of the said Act. The petitioners accordingly submitted the explanation which came to be accepted by the

Assessing Officer by a reasoned order thereby granting deduction to the petitioners under Section 10B of the said Act. Thereafter, the respondents chose to issue a notice under Section 147 of the said Act showing the intention to reopen the assessment of the petitioners on the ground that there was an escape income while carrying out such assessment. The petitioners informed the respondents that the earlier return filed by the petitioners be treated as a return under the said Act and called upon the respondents to furnish the reasons for such reopening of the assessment. But however, the respondents failed to furnish such reasons and accordingly, the petitioners filed the above petition challenging the notice under Section 147 of the said Act. During the pendency of the above petition, the respondents sought permission to complete the assessment and accordingly, the Assessment Order was passed thereby rejecting the claim of the petitioners for deduction under Section 10B of the said Act and computing the taxable income of the petitioners accordingly.

5. The respondents filed their reply to the said two petitions *inter alia* contending that the petitioners were not entitled for deduction under Section 10B of the said Act. It is the case of the respondents that the petitioners were not 100% export oriented unit and further they were not carrying out any production and further that the activities which were carried out by the petitioners do not come within the meaning of production as provided under Section 10B of the said Act. It is further pointed out that the petitioners also have an alternate remedy to challenge the Assessment Order carried out pursuant to the notice under Section 147 of the said Act and as such, the question of interference in the impugned Assessment Order would not arise. The respondents further contend that as there was an escape income while carrying out the regular assessment, the respondents were justified to issue the notice under Section 147 of the said Act. It is further pointed out that the petitioners do not meet the requirements of Section 10B of the said Act on the ground that the petitioners were not exporting themselves but through some other entities.

6. Mr. Pangam, learned counsel appearing for the petitioners points out that the main crux of the grievance raised by the petitioners is on the premise that the reassessment was on the basis that there was an escape income but however, it is his contention that the records would reveal that it is only a change of opinion which cannot be a ground for reopening of the assessment. The learned counsel further points out that in the order passed while disposing of the proceedings under Section 143 of the said Act, the Assessing Officer after examining the reply filed by the petitioners found that the petitioners met the conditions as contemplated under Section 10B of the said Act and accordingly, allowed the deduction to the petitioners under the said Act. The learned counsel further pointed out that once such findings had attained finality as there was no challenge to such aspect before the Appellate Authority, it was not open to the respondents to issue a fresh notice under Section 147 of the said Act *inter alia* contending that the activities carried out by the petitioners were not production in terms of Section 10B of the said Act. The learned counsel further pointed out that the

respondents have not furnished the reasons and as such on this ground alone the alleged assessment carried out by the respondents stands vitiated. The learned counsel thereafter has taken us through the Assessment Order passed by the Assessing Officer to point out that the deduction in terms of Section 10B of the said Act was refused essentially on the ground that the activities carried out by the petitioners were not manufacture in terms of Section 10B of the said Act. The learned counsel further pointed out that such extracting of iron ore is "production" in terms of Section 10B of the said Act is no longer *res integra* in view of the judgment of the Apex Court reported in ***(2004) 13 SCC 548*** in the case of ***Commissioner of Income Tax, Goa V/s Sesa Goa Ltd.*** The learned counsel further submits that the contention of the respondents that there was an escape income is totally misplaced as according to him while carrying out the assessment for the Assessment Year 2000-2001 with regard to the same activities. While disposing of the proceedings under Section 143 of the said Act, the Assessing Officer had come to the conclusion that the establishment of the petitioners was 100%

export oriented unit and as such entitled for deduction under Section 10B of the said Act. The learned counsel as such submits that the subsequent notice under Section 147 of the said Act is untenable in law and cannot be sustained. The learned counsel further pointed out that in view of the judgment of the Apex Court relied upon by the petitioners, the respondents have no justification to proceed with the proceedings under Section 143 of the said Act. The learned counsel as such points out that the petitioners were entitled for the relief in both the above petitions.

7. On the other hand, Ms. A. Razaq, learned counsel appearing for the respondent nos. 1 and 2 has submitted that the petitioners have an alternate remedy and as such, it is open for the petitioners to raise the challenge to the Assessment Order before the Appellate Forum. The learned counsel further pointed out that as there was an escape income in the Assessment Years 2000-2001 and 2001-2002, the respondents were justified to issue the notice under Section 147 of the said Act. It is further

pointed out that the escape assessment is on the basis that the petitioners were not carrying out any production within the meaning of the provisions of Section 10B of the said Act. The learned counsel further pointed out that as the respondents were justified to issue the notice under Section 147 of the said Act, the question of any interference of this Court in the impugned notice would not arise. It is further submitted that merely because the proceedings under Section 143 of the said Act culminated in the decision allowing deduction under Section 10B of the said Act would not preclude the respondents to issue a notice under Section 147 of the said Act in case there was any escaped income. The learned counsel as such points out that the petition be accordingly rejected.

8. We have given our thoughtful consideration to the rival contentions and we have also gone through the records. It is undisputed fact that the above petitions were filed immediately after the notice under Section 147 of the said Act came to be served on the petitioners. At that stage the respondents had not

proceeded to pass the impugned Assessment Order which came to be passed only subsequently upon seeking permission as stated above. The fact that there were scrutiny proceedings under the said Act for the Assessment Year 2001-2002 has not been disputed. On perusal of the findings by the Assessing Officer in the said order, it clearly reveals that the Assessing Officer after examining the reply filed by the petitioners and other material produced a definite finding was recorded that the petitioners were entitled for deduction under Section 10B of the said Act. While coming to such conclusion the Assessing Officer found that the establishment of the petitioners was a 100% export oriented unit within the meaning of the provisions of Section 10B of the said Act.

9. With regard to the Assessment Year 2000-2001, the undisputed fact disclosed that there was an assessment notice under the said Act which came to be disposed of by regular Assessing Order after examining the reply filed by the petitioners by coming to the conclusion that the unit of the petitioners was

100% export oriented. The Assessing Officer also came to the conclusion that the petitioners were entitled for relief under Section 10B of the said Act.

10. Considering the said findings arrived at by the Assessing Officer in the earlier proceedings, the question of issuing a fresh notice under Section 147 of the said Act would not at all be justified. As rightly pointed out by Mr. Pangam, learned counsel appearing for the petitioners, this is not a case of an escape assessment but a clear case of difference of opinion which cannot be a ground for reopening under Section 147 of the said Act. Apart from that, the undisputed fact of the case reveals that the respondents had not furnished the reasons to the petitioners after they were called upon to do so. On this ground also the subject proceedings under Section 147 of the said Act stands vitiated.

11. With regard to the contention of the learned counsel appearing for the respondent nos. 1 and 2 that the petitioners

have an alternate remedy, we find that in the present case the Assessment Order was passed only during the pendency of the above petitions which necessitated the petitioners to raise a challenge in the present petitions. Considering the view we have taken while examining the validity of the notice under Section 147 of the said Act, we find that the question of considering the correctness of the Assessment Order was not at all necessary. But however, on perusal of the impugned Assessment Order pursuant to the subject notice under Section 147 of the said Act, we find that the deduction under Section 10B of the said Act was refused to the petitioners essentially on the ground that the iron ore extracted by the petitioners was not manufacture within the meaning of the provisions of Section 10B of the said Act. This aspect stands now concluded in view of the judgment of the Apex Court in the case of ***Commissioner of Income Tax, Goa*** (supra) wherein the Apex Court has observed at paras 9, 10 and 11 thus :

> "**9.** The reasoning given by the High Courts, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This

Court had, as early as in 1961, in *Chrestien Mica Industries Ltd.* v. *State of Bihar* defined the word “production”, albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the *Oxford English Dictionary* as meaning “amongst other things that which is produced; a thing that results from any action, process or effort, a product; a product of human activity or effort”. From the wide definition of the word “production”, it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word “production” since ore is “a thing”, which is the result of human activity or effort. It has also been held by this Court in *CIT* v. *N.C. Budharaja & Co.* that the word “production” is much wider than the word “manufacture”. It was said: (SCC pp. 286-87, paras 7-8)

“The word ‘production’ has a wider connotation than the word ‘manufacture’. While every manufacture can be characterised as production, every production need not amount to manufacture. …

The word ‘production’ or ‘produce’ when used in juxtaposition with the word ‘manufacture’ takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods.”

10. It is, therefore, not necessary, as has been sought to be contended by the learned counsel for the Revenue, that the mined ore must be a commercially new product. The decisions and other authorities on the definition of the word “ore”, as cited by the appellant, are irrelevant.

11. Learned counsel appearing on behalf of the assessee, correctly submitted that other provisions of the Act, particularly Section 33(1)(*b*)(B) read with Item 3 of the Fifth Schedule to the Act, would show that mining of ore is treated as “production”.

> Section 35-E also speaks of production in the context of mining activity. The language of these sections is similar to the language of Section 32-A(2). There is no reason for us to assume that the word "production" was used in a different sense in Section 32-A."

12. Taking note of the said observations and considering the facts and circumstances of the present case, it is not disputed that the only ground on which the respondents are trying to sustain the impugned assessment after the notice under Section 147 of the said Act is on the basis that the petitioners were not carrying out manufacturing activities, cannot be a ground to refuse the benefits of deduction in terms of Section 10B of the said Act. The petitioners in fact as such were entitled for the said deduction which otherwise stood concluded by the Assessment Order passed in the proceedings under Section 143 of the said Act in regular Assessment Order.

13. In view of the above, we pass the following :

O R D E R

(i) The notice under Section 147 of the said Act for the Assessment Years 2000-2001 and 2001-2002 both dated 28.11.2005 and the consequent Assessment Order dated 28.12.2006 are quashed and set aside.

(ii) Rule is made absolute in the above terms.

(iii) Both the petitions stand disposed of accordingly.

PRITHVIRAJ K. CHAVAN, J. **F. M. REIS, J.**

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