IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.03.2021

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P. Nos. 17609 to 17611 of 2011

and

M.P.Nos.1, 1, 1, 2, 2 of 2011 & 1,1,1, 2, 2, 2 of 2013

(Through Video Conferencing)

Nexus Transcore Industries,
Represented by its Managing Partner
Mr.Ketan Bagadia,
Plot No.C-70, PIPDIC, Industrial Estate,
Mettupalayam, Pudducherry - 605 009. ... Petitioner in all W.Ps

Vs

The Assistant Commissioner of
Income Tax Circle I,
D.P.Thottam, Off M.G.Road,
Muthialpet, Puducherry. ... Respondent in all W.Ps

Prayer in W.P.No.17609 of 2011: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records on the file of the respondent and quash the impugned notice issued u/s 148 of the Act Pan.No.AADFN3406A dated 16.03.2010 and consequently quash the proceedings in PAN AADFN 3406A dated 11.07.2011 as illegal and without jurisdiction.

Prayer in W.P.Nos.17610 & 17611 of 2011: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records on the file of the respondent and quash the impugned notice issued u/s 148 of the Act Pan.No.AADFN3406A dated 09.03.2010 and consequently quash the proceedings in PAN AADFN 3406A dated 11.07.2011 as illegal and without jurisdiction.

For Petitioner (in all W.Ps) : Mr.R.Sivaraman

For Respondent (in all W.Ps) : Mr.A.P.Srinivas
Senior Standing Counsel

COMMON ORDER

The petitioner is aggrieved by the impugned notices dated 09.03.2010, 16.03.2010 and the impugned communication/impugned order dated 11.07.2011 seeking to reopen the assessment for the Assessment Years 2004-2005 and 2006-2007 by overruling the objection of the petitioner against re-opening of the assessment for these Assessment Years vide the second impugned order dated 11.07.2011.

2. This is the second round of litigation after the impugned notices dated 09.03.2010 for the Assessment Years 2005-2006 and 2006-2007 were issued and impugned notice dated 16.03.2010 was issued to the petitioner for the Assessment Year 2004-2005.

3. The reasons for re-opening the assessment were furnished to the petitioner vide communication dated 20.07.2010. The petitioner sent his objection. However, without passing speaking order, directly re-assessment orders dated 31.12.2010 came to be passed for these Assessment Years. These Assessment Orders came to be challenged in W.P.Nos.2583 to 2585 of 2011. By three separate orders dated 21.03.2011, all the three Assessment Orders dated 31.12.2010 were set aside with a direction to the respondent (Assistant Commissioner of Income Tax) to consider the objections raised by the petitioner and to pass separate speaking orders for the respective Assessment Years.

4. It is pursuant to the aforesaid order dated 21.03.2011 in W.P.Nos.2583 to 2585 of 2011, the impugned speaking orders has been issued to the petitioner, which is now been challenged along with two notices dated 09.03.2010 issued for the Assessment Years 2005-2006 and 2006-2007 and impugned notice dated 16.03.2010 for the Assessment Year 2004-2005 issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the Act).

5. These notices and the impugned composite communication dated 11.07.2011 for all the three assessment years are sought to be challenged in these writ petitions primarily on the ground that as far as the Assessment Year 2004-2005 is concerned, the assessment order was passed under Section 143(3) of the Act, on 29.12.2006 which considered the claim of the petitioner for exemption under Section 80IB of the Income Tax Act, 1961 and therefore there is no case made out for invoking the proviso to Section 147 of the Income Tax Act, 1961.

6. As far as the other two Assessment Years are concerned i.e., 2005-2006 and 2006-2007, it is submitted that the issue relating to non-availability of exemption under Section 80IB (2)(iv) of the Act was one of the issue specifically considered by the Joint Commissioner of Income Tax for the Assessment Year 2005-2006, vide dated 31.12.2007 and by the Income Tax Officer for the Assessment Year 2006-2007 and therefore the benefit was

denied to the petitioner against which the petitioner preferred appeal before the Commissioner of Income Tax (Appeals), who confirmed the dis-allowance of deduction under Section 80IB of the Act and that the Tribunal by its order dated 26.06.2009 reversed the order and allowed the benefit to the petitioner which was also upheld by this Court in its order dated 12.07.2010 in T.C.A.Nos.546 & 547 of 2010.

7. It is therefore submitted that the benefit of Section 80IB of the Act which was denied for the Assessment Years 2005-2006 and 2006-2007 purely on account of change of opinion and therefore the impugned proceedings were contrary to the decision of the Hon'ble Supreme Court in Commissioner of Income Tax Vs. Kelvinator of India Ltd, [2010] 320 ITR 561. It is further submitted that this court in Fenner India Limited Vs Deputy Commissioner of Income-tax, [1999] 107 TAXMAN 53, the Court has held that for invoking Section 147, there should be reasons given regarding the failure on the part of the petitioner to true and full disclosure of all material information/facts that are required for assessment and therefore the impugned proceedings for the Assessment Years 2004-2005 to 2006-2007 are liable to be quashed.

8. The learned counsel also placed reliance on the decision of the Himachal Pradesh High Court in Commissioner of Income-tax Vs Him Knit Feb, [2017] 85 TAXMAN 7, wherein, it was held as under:-

....

9. On merits also it is submitted that the so called reasons communicated for reopening of the assessment by a communication dated 20.07.2010 merely states that

> "During the courser of survey u/s 133A of the Income Tax Act, 1961 on 12.11.2009 in the premises of M/s.Nexus Electro Steel Limited, wage register for the Financial Year 2003-04 relevant to the asst.year 2004-05 in the case of M/s Nexus Transcore Industries was found and impounded. As per this register, following are the number of workers engaged, total amount of wages paid to them, number of women workers, number of workers who worked less than 20 days in a month and number of workers who worked less than 15 days in that month."

10. Thus, the stand taken earlier that the activity do not amounting to manufacture was given up once the issue had attained finality at the primary/tribunal stage and later affirmed by the Tribunal. It is further submitted that the

exemption under Section 80IB of the Act, the sub-clause 2(iv) of the Act has been satisfied inasmuch as the impugned speaking order dated 11.07.2011 itself admits that out of four processes involved in the manufacturing process, one of the process, namely 'holes notching' was with the aid of power. Therefore, as long as power was used in the manufacture of the final outcome, the number of employees required for claiming deduction under Section 80IB of the Act stood satisfied as during each of the assessment years, more than 10 workers were employed. It is therefore submitted that these orders/notices seeking to re-opening of assessment were liable to be quashed.

11. Defending the impugned order, the learned counsel for the respondent/Income Tax Department submits that for the Assessment Year 2004-2005, no material was furnished by the petitioner to justify that the petitioner was eligible for deduction under Section 80IB of the Act. It is submitted that at the time of original assessment on 29.12.2006, the petitioner merely produced books of accounts, bills, invoices, vouchers, detailed writeup of the manufacture activity and the authorization by the Director of Industry and other provisions/approvals.

12. The records relating to the number of employees were furnished by the petitioner. As far as the Assessment Years 2005-2006 and 2006-2007 are concerned, though the original order passed on 31.12.2007 for the Assessment Year 2005-2006 states that assessee had not engaged more than six workers in its business activity and the conditions under Section 80IB(2)(iv) of the Act has not been satisfied and therefore the benefit of exemption was denied. He submits that for the next Assessment Year 2006-2007, the issue was exempted at the threshold relating to the manufacturing activity and therefore the necessity for examining the other conditions prescribed under Section 80IB (2)(iv) did not arise for consideration.

13. The learned counsel for the Respondent/Income Tax Department further submits that during the course of survey under Section 133(a) of the Act, on 12.11.2009, the records of the petitioner were impounded and as per the register, the assessee has engaged less than 20 workers, thus it cannot be said that there was a change of opinion on the part of the Income Tax Department while re-opening of the assessment or that the petitioner had true and wilful disclosure of all materials required for assessment so as to quash the re-opening of the assessment for the year 2004-2005, the learned counsel for the revenue further submits that the decision of this Court in Fenner India has ignored the expressed language of Section 147 of the Act and therefore placed reliance on the decision of the Court in Jeyaram Paper Mills Limited Vs Commissioner of Income-

tax, Chennai, [2010] 191 Taxman 38.

14. I have considered the arguments advanced by the learned counsel for the petitioner and the respondent.

15. The petitioner has challenged the impugned notice seeking to re-opening of the assessment for the respective Assessment Years and the impugned communication overruled the objections of the petitioner. The issue that arises for consideration in these writ petitions is whether reopening of the assessment falls with the four corners of law settled on this aspect by the Hon'ble Supreme Court.

16. The petitioner has claimed benefit of exemption under Section 80IB of the Act. Sub-clause 2 to Section 80IB specifies four conditions for an assessee to claim deduction under the aforesaid provision. Condition No.4 stipulates that in a case where the industrial undertaking manufactures or produces articles or things and employs 10 or more workers in a manufacturing process carried on without the aid of power, or employs 20 or more workers in a manufacturing process carrying on with the aid of power can claim the benefit of deduction under Section 80IB of the Act. The assessee has to satisfy all the four requirements and not one of the requirement.

17. Admittedly, in this case, the manufacturing activity was carried out as it is evident from the reading of the impugned order that it was with the aid of power inasmuch as one of the process namely 'holes notching' was with the aid of power. Therefore, the only requirement for the petitioner to satisfy for claiming deduction was regarding the number of workers employed by it for manufacturing process.

18. In the impugned order dated 11.07.2011, there are three tabulations. Each of the tabulations gives the number of workers employed by the petitioner during the months. For the Assessment Year 2004-2005, the tabulations indicates that more than 10 employees were worked at any given point of time. In case during the Assessment Year 2004-2005, the number of employees were more than 15 per month and the average between 15 to 23.

19. Though at the time of original assessment, no documents appears to have been filed by the petitioner to substantiate the same, nevertheless, the survey conducted under Section 133(a) of the Act, indicates that there were more than 10 employees employed during the Assessment Year 2004-2005, even though not all the employees worked right through the period. There is the

substantial compliance of the conditions by the petitioner. Therefore, the invocation of Section 148 of the Act is without any merits.

20. There was no justification in re-opening of the assessment for the Assessment Year 2004-2005. Similarly, for the Assessment Year 2005-2006 also the tabulation in the impugned order indicates that there were more than 10 employees employed by the petitioner though not all of them worked right through the month. There are months which indicates that there was no production. Nevertheless, there are indications in the table that more than 10 employees were employed. That apart, at the time of passing of original assessment order on 31.12.2010, the issue regarding the number of workers employed by the petitioner was considered by the Assessing Officer.

21. The issue has also attained finality thereafter, when an order was passed in T.C.A.Nos.546 & 547 of 2010 dated 12.07.2010 by this High Court. Therefore, re-opening of the assessment for the Assessment Year 2005-2006 is not sustainable.

22. As far as the Assessment Year 2006-2007 is concerned, the tabulations indicates that during some of the months there were less than 10 workers employed by the petitioner. Therefore, there is sufficient ground for re-opening of the assessment under Section 148 read with 147 of the Income Tax Act, 1961. Therefore, I do not find any merits in the writ petition as far as the Assessment Year 2006-2007 is concerned.

23. It is therefore for the petitioner to satisfy before the officers namely the respondent that it was indeed eligible for deduction under Section 80IB of the Act, for the Assessment Year 2006-2007 with sufficient records. Therefore, the writ petition as far as the Assessment Year 2006-2007 is concerned is dismissed.

24. The petitioner is therefore directed to participate in the proceedings before the respondent. Though certain observations have been made in this order touching on the merits for the Assessment Year 2006-2007, the respondent is directed to refrain from referring to the same while passing the order on merits as the observations are merely come to a conclusion that the petitioner has not made out a case for interference at this stage.

25. Therefore, Assessment Order for the Assessment Year 2006-2007 has to be passed independently on merits in accordance with law. In fine, W.P.No.17609 of 2011 and 17610 of 2011 for the Assessment Year 2004-2005 and 2005-2006 is allowed. W.P.No.17611 of 2011 filed for the Assessment Year 2006-2007

stands dismissed with the above observations. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

/TRUE COPY/

Sub-Assistant Registrar

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To
The Assistant Commissioner of Income Tax Circle I,
D.P.Thottam, Off M.G.Road,
Muthialpet, Puducherry.

+1CC TO MR.A.P.SRINIVAS, ADVOCATE, SR.NO. 15592

W.P. Nos. 17609 to 17611 of 2011

SSN(CO)
KKN 29.04.2021