

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.06.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.6542 of 2014
and
M.P.Nos.1 & 2 of 2014

Indus Teqsite Private Limited,
Represented by its
Managing Director Mr.S.Rangarajan,
Plot H 9, Fourth Main Road, SIPCOT IT Part,
Siruseri, Off Rajiv Gandhi Salai (OMR)
Chennai – 603 103.

..Petitioner

vs

1.Ministry of Finance,
Represented by Secretary,
Department of Revenue,
North Block,
New Delhi – 110 001.

2.Central Board of Direct Taxes,
Represented by Chairman,
North Block,
New Delhi – 110 001.

3.Ministry of Commerce & Industry,
Represented by Secretary,
Department of Commerce,
Udyog Bhawan,
New Delhi – 110 107

4.Ministry of Communications & Information Technology

Represented by Secretary,
Department of Electronics & Information Technology,
Electronics Niketan, CGO Complex,
Lodhi Road,
New Delhi – 110 003.

5.Software Technology Parks of India,

(an autonomous society under Government of India
Department of Electronics & IT)
Represented by Director, STPI-Chennai,
No.5, Rajiv Gandhi Salai, Taramani,
Chennai – 600 113.

..Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records on the file of the respondent No.2 as regards CBDT Instruction No.2/2009 dated 9.3.2009 r/w Corrigendum to the said Instruction No.2/2009 dated 8.5.2009 (F.No.178/19/2008-ITA-1) issued by the respondent No.2 herein and quash the CBDT Instruction No.2/2009 dated 9.3.2009 r/w Corrigendum to the said Instruction No.2/2009 dated 8.5.2009 (F.No.178/19/2008-ITA-1) issued by the respondent No.2 herein insofar as 100% Export Oriented undertakings (EOUs) under the Software Technology Parks (STP) scheme/Electronic Hardware Technology Parks (EHTP) scheme are concerned.

For Petitioner : Mr.Vaibhav R Venkatesh

For Respondents : Mr.Prabhu Mukunth Arunkumar
Standing counsel(Income Tax)
[For R2]

No appearance : R1, R3 to R5

ORDER

The writ on hand is filed, challenging the CBDT Instruction No.2/2009 dated 9.3.2009 r/w Corrigendum to the said Instruction No.2/2009 dated 8.5.2009 (F.No.178/19/2008-ITA-1) issued by the second respondent and further, to quash the CBDT Instruction No.2/2009 dated 9.3.2009 r/w Corrigendum to the said Instruction No.2/2009 dated 8.5.2009 (F.No.178/19/2008-ITA-1) issued by the second respondent insofar as 100% Export Oriented undertakings (EOUs) under the Software Technology Parks (STP) scheme/Electronic Hardware Technology Parks (EHTP) scheme are concerned.

2. The petitioner / Indus Teqsite Private Limited was incorporated in the year 1998, has proven expertise and experience in manufacture of highly reliable electronic products and systems. The petitioner company is a Government of India approved “100% Export Oriented Undertaking” [in short 'EOU'] under the “Electronic Hardware Technology Park” [in short, 'EHTP'] Scheme, and has been duly granted such an approval by the “Software Technology Parks of India” [in short 'STPI'] through the powers delegated to it by the Department of Electronics, Government of India.

3. The issue raised in this writ petition is that the Deputy Commissioner of Income Tax, Chennai, who is the Assessing Officer of the Income Tax Department under respondents 2 and 1 Ministry has re-opened the assessment of the petitioner company (Assessee) for the Assessment Year 2006-2007 for the reasons noted in the files, that for the relevant Assessment Year, the petitioner company is not entitled to Section 10-B of the Income Tax Act, 1961 exemption as an 100% EOU.

4. The re-opening of the assessment has been initiated by the Revenue Department on the sole ground that as per Central Board of Direct Taxes [in short 'CBDT'] Instruction No.2/2009 dated 09.03.2009, approvals granted to 100% EOUs by Development Commissioners will be considered valid, once such an approval is ratified by the Board of Approval for the EOU Scheme.

5. The learned counsel for the petitioner contended that it is an erroneous decision taken by the respondents because in the case of approvals for 100% EOUs under Software Technology Parks / Electronic Hardware Technology Parks [in short 'STP/EHTP'] scheme, the concerned Ministry of the Government of India has delegated the powers of Board of

Approval i.e., the Inter-Ministerial Standing Committee to the Development Commissioners i.e., the Director of Software Technology Parks of India and therefore, the approval granted by the Development Commissioner i.e., the Director of Software Technology Parks of India is deemed to have been granted by the Board of Approval i.e., the Inter-Ministerial Standing Committee. Thus, a post-approval ratification from the alleged Board of Approval is not mandated anywhere under the law in the case of 100% EOUs under STP/EHTP Scheme.

6. In view of the said position, the learned counsel for the petitioner reiterated that the approval granted in favour of the petitioner for all purposes is deemed to have been granted by the Board of Approval i.e., the Inter-Ministerial Standing Committee and therefore, no further ratification is contemplated and thus, the circulars impugned issued in this regard are in violation of Section 10-B r/w Section 14 of the Industries (Development and Regulation Act) 1951. In other words, the validity of the clarification impugned is questioned mainly on the ground that it is violative of the provisions of the Income Tax Act and no such ratification is contemplated under the provisions of the Income Tax Act. The approval contemplated

under Section 10-B of the Income Tax Act has already been granted in favour of the petitioner by the competent authority by virtue of exercise of powers of delegation. Thus, the said approval is deemed to be a valid approval for all purposes and there is no further ratification needs to be granted under the provisions of the Income Tax Act.

7. The learned Standing counsel appearing on behalf of the second respondent / Central Board of Direct Taxes disputed the said contentions by stating that the petitioner has misconstrued the issues by erroneously interpreting the provisions of the Act. There is no ambiguity in respect of the grant of approval and for grant of ratification.

8. The second respondent filed a counter affidavit, holding that Notification SO 117 (E) dated 22.02.1993 states that for the purpose of the various paras 111 to 117 in Chapter IX of the Export and Import Policy (1992-97) mentioned in the said notification, Board of Approval shall be substituted by the Inter-Ministerial Standing Committee. The said paragraphs of the Export and Import Policy (1992-97) deal with issues such as subcontracting by EOU/EPZ, Sale of imported materials, disposal of

scrap, Private bonded warehouses, period of bonding, and de-bonding and it is only with respect to these issues that the Board of Approval has been substituted by the IMSC. The Exim Policy does not substitute the BOA with IMSC for the purpose of exemption under Section 10-B of the Income Tax Act. The said notification only extended incentives to EOUs to set up units under the STP Scheme.

9. Relying on the counter affidavit, the learned counsel for the second respondent reiterated that the Board of Approval has been substituted by the IMSC only for certain restricted purposes and therefore, for the purpose of grant of exemption under Section 10-B of the Income Tax Act, a specific ratification is required to be obtained from Board of Approval. These two aspects are now misinterpreted as if one approval from the Software Technology Parks Government of India is sufficient for the purpose of seeking exemption under Section 10-B of the Income Tax Act.

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10. The learned counsel for the second respondent further relied on the judgment of the High Court of Delhi in the case of *the Commissioner of Income Tax Vs. Regency Creations Limited*, reported in [2012] 27

taxmann.com 322 (Delhi), wherein the issues involved in the said case is similar to that of the issues raised in the present writ petition and the relevant paragraphs 13 to 17 are extracted hereunder:

“13. There is no dispute about the essential facts. Both assesses had received approval to start 100 per cent EOU under STP scheme. The question is whether this approval can be deemed one under Section 10-B of the Act. For that purpose a 100 per cent EOU is only that which is so approved by the Board appointed by Central Government in exercise of powers conferred under Section 14 of IDAR Act, 1951. The pre-conditions that govern units set up under STP scheme are different from those that govern the units set up as 100 per cent EOUs and so approved by the Board. Some conditions may undoubtedly overlap yet, criteria, such as fulfilment of the employment criteria, foreign exchange, etc., are not common.

14. The Inter-Ministerial Standing Committee set up for granting licences under STP scheme is also appointed by the Central Government in exercise of powers conferred under, Section 14 of IDAR Act. However, the question is whether that part of the Board's function (under Section 14 IDr. Act) - to grant approval under Section 10-B also stands delegated. The assesses submit that the Inter-Ministerial Standing Committee has been replaced by the Board on the basis of the contents of para 2 of the notification of the Ministry of Commerce dt.

22nd March, 1994, is unpersuasive. That notification states that for the purpose of paras 111 to 117 of Chapter IX of the Export and Import Policy (1992-97), Board of Approval shall be substituted by the Inter-Ministerial Standing Committee. Paras 111 to 117 of Chapter-DC of Export and Import Policy (1992-97) do not deal with that aspect, but other questions such as subcontracting by EOU/EPZ, Sale of imported materials, Disposal of scrap, Private bonded warehouses, period of bonding, and de-bonding. The notification therefore extended incentives to EOUs to set up units under the STP scheme. However, for the Court to conclude that the Interministerial Committee was authorized to issue approval under Section 10-B and that its imprimatur or approval under Section 10-A ought to be deemed as an approval under Section 10-B, there ought to be more direct, or express authorization.

15. Section 10A extends the exemption to the units set up under STP scheme which start production of goods during the previous year relevant to the assessment year commencing on or after 1st April, 1994. The assessee's plea about eligibility of a 100% EOU STP eligible for exemption would render the amendment brought about by the Finance Act, 1993 (extending the benefit under Section 10A of the Act to the STPs from 1st April, 1994) superfluous. There is no reason for Parliament to amend the law, and extend benefits of Section 10A to units under STP scheme and, restrict the benefits to those

commencing their operations in the year of account relevant to the Assessment year 1994-95, if a STP unit is otherwise eligible for exemption under Section 10B of the Act on the ground of its being 100 per cent EOU.

16. It is a settled principle of law that unless there is express authorization, in terms of a statute, and an actual delegation of power, a statutory authority in whom jurisdiction or power is reposed, is alone vested with it, to the exclusion of others (Ref. Hari Chand Agarwal v. Batala Engineering Co. Ltd AIR 1969 SC 483; and Ajaib Singh v. State Of Punjab AIR 1965 SC 1619). In the absence of a statutory power to delegate, and further to that power, an actual delegation in accordance with law, such functions cannot be performed or deemed to have been performed by a third agency or authority. Another cardinal rule which binds the court to interpret statutes is that “where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all, and other methods of performance are necessarily forbidden...” (See Nazir Ahmed v. King Emperor (1936) I.L.R. 17 Lah 629).

17. In the present case, there is no notification or official document suggesting that either the Inter Ministerial Committee, or any other officer or agency was nominated to perform the duties of the Board (constituted under Section 14 of the IDr. Act), for purposes of approvals under Section 10-B. Though the considerations which apply for granting approval

under Sections 10-A and 10-B may to an extent, overlap, yet the deliberate segregation of these two benefits by the statute reflects Parliamentary intention that to qualify for benefit under either, the specific procedure enacted for that purpose has to be followed. There is nothing in any of the Circulars or instructions relied on by the Tribunal in all the orders, implying that approval for purposes of an STP also entitled the unit to a benefit under Section 10-B. The orders of the Tribunal are consequently erroneous, and its reasoning, unsupportable.”

11. Relying on the Delhi High Court judgment cited supra, the learned counsel for the second respondent reiterated that the position is now clear, it is insufficient to get an approval from the Software Technology Parks of India for setting up of EHTP Unit. The said approval is valid only for certain limited purposes and for the purpose of exemption under Section 10-B of the Income Tax Act, a further ratification from the Board of Approval is required and therefore, there is no confusion in respect of the clarification issued and the said clarifications cannot be said to be in violation of the provisions of the Income Tax Act.

12. This Court is of the considered opinion that admittedly, the petitioner obtained an approval from the Software Technology Parks of India and it is an autonomous society under Government of India, Ministry of Communications & Information Technology, Department of Information Technology. The petitioner has obtained the said approval in proceedings dated 17.04.2008. The approval states that the application submitted by the petitioner for setting up of 100% Export Oriented Unit under the Electronic Hardware Technology Park scheme of Government of India has been approved by this office under the delegated powers to the Directors of STPI by IMSC vide MIT letter No.5(100)/93-Export dated 24.06.1993.

13. The approval granted further clarified that the petitioner has to maintain a separate bank account for EHTP operations. Separate annual balance sheet will have to be made for the unit. A legal agreement along with Rs.60,000/- by Demand Draft in favour of the Director, Software Technology Parks of India, Chennai, is to be furnished and other terms and conditions are also stated in the order of approval itself. It is contended in the approval order that the petitioner has to submit a list of capital goods to be imported for attestation, which is required to obtain the bonded

warehouse license from Custom's authorities. It was intimated that separate proforma invoice from the supplier has to be submitted to the office of the Software Technology Parks of India for attestation as and when the petitioner intend to import duty free capital goods. The list of capital goods to be imported for attestation, which is required to obtain the bonded warehouse license from Custom's authorities. Separate proforma invoice from the supplier has to be submitted for attestation as and when the petitioner intend to import duty free capital goods.

14. Perusal of the approval order issued in favour of the writ petitioner in proceedings dated 17.04.2008 reveals that the approval has been granted for setting up of 100% Export Oriented Unit under the Electronic Hardware Technology Park Scheme of Government of India has been approved by the fifth respondent under the delegated powers to the Directors of STPI by IMSC.

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15. Thus, such an approval cannot be validated for the purpose of claiming exemption under Section 10-B of the Income Tax Act.

16. The approval granted for setting up of a 100% Export Oriented Unit is entirely under a different scheme and by the fifth respondent / Software Technology Parks of India and for the purpose of claiming exemption under Section 10-B of the Income Tax Act, further ratification is to be obtained from Board of Approval. Therefore, the contention of the petitioner that the approval granted by the STPI is valid for the purpose of claiming exemption under Section 10-B cannot be accepted as the provisions of the Income Tax Act is independent and cannot be linked with the grant of approval for setting up of 100% Export Oriented Unit under the Electronic Hardware Technology Park Scheme of India.

17. The scope of Income Tax Act is entirely different. The provisions of the Income Tax Act is to be interpreted with reference to the purpose and object and the clarifications are issued, in view of the fact that the approval granted by the Software Technology Parks of India cannot be utilized for claiming exemption under Section 10-B of the Income Tax Act. Thus, the petitioner would be entitled to claim exemption under Section 10-B of the Income Tax Act, only if a ratification order is obtained from the Board of Approval.

18. Regarding the validity of the impugned clarifications, this Court is of an opinion that Explanation 2(iv) to Section 10-B of the Income Tax Act contemplates that “hundred per cent export-oriented undertaking” means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and the rules made under that Act.

19. The learned counsel for the petitioner made a submission that the word “approval” alone is contemplated under the said explanation and therefore, the approval granted by the Software Technology Parks of India is valid for the purpose of Section 10-B of the Income Tax Act. In this regard, it is to be considered, whether the word “approval” denoted in Explanation 2(iv) to Section 10-B can be confined with reference to the approval granted by Software Technology Parks of India.

20. This Court is of the considered opinion that the order of approval granted in favour of the petitioner in proceedings dated 17.04.2008 itself reveals that Software Technology Parks is an Autonomous Society under Government of India, Ministry of Communications and Information Technology. Further, the application for setting up of 100% Export Oriented Unit under the Electronic Hardware Technology Park Scheme of Government of India has been approved by the said autonomous society under the delegated powers to the Directors of STPI by IMSC. Further, the approval order reveals that certain conditions are also stated for the purpose of the approval. A perusal of the entire approval order would reveal that the said approval is no way connected with the provisions of the Income Tax Act nor such an approval can be directly relied upon for the purpose of seeking exemption under Section 10-B of the Income Tax Act. For grant of exemption under Section 10-B of the Act, further ratification is required under the Board of Approval and such a ratification cannot be construed as inconsistent to the Explanation clause under Section 10-B of the Act. Approval by one authority i.e., Software Technology Parks of India cannot be construed as an approval as contemplated under Explanation 2(iv) to Section 10-B of the Income Tax Act. Therefore, the Ministry of Finance

clarified that the approval contemplated under Explanation 2(iv) to Section 10-B is to be considered only if a ratification is issued by the Board of Approval. Thus, the word “Approval” is to be equated with the ratification to be granted by the Board of Approval and the original approval granted by the Software Technology Parks of India in the present case is only for the restricted purposes for 100% Export Oriented Unit under the Electronic Hardware Technology Park Scheme and such an approval granted is to be further ratified for grant of exemption under Section 10-B of the Act. Thus, such a procedure cannot be held as inconsistent to the spirit of Section 10-B of the Income Tax Act. In order to ascertain the entitlement and to verify the other transactions, such a ratification is contemplated by the Ministry of Finance through the impugned clarification letter and therefore, this Court is of an opinion that there is no infirmity or perversity as such and further, there is no inconsistency as such contended by the petitioner. Thus, the petitioner has to get an approval from the competent Board as contemplated for claiming exemption under Section 10-B of the Income Tax Act. Even in case, there is a change of authorities / Board by the Ministry, it is for the petitioner to approach the Ministry or the Department concerned for the purpose of the procedures, which all are in force for claiming exemption

under Section 10-B of the Income Tax Act.

21. With these clarifications, this Court is of an opinion that the petitioner has not established any acceptable ground for the purpose of granting the relief as such sought for in the present writ petition and thus, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

16.06.2021

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Internet: Yes/No
Index: Yes/No
Speaking/Non-Speaking order

To

1. The Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi – 110 001.

2. The Chairman,
Central Board of Direct Taxes,
North Block,
New Delhi – 110 001.

- 3.The Secretary,
Ministry of Commerce & Industry,
Department of Commerce,
Udyog Bhawan,
New Delhi – 110 107
- 4.The Secretary,
Ministry of Communications & Information Technology
Department of Electronics & Information Technology,
Electronics Niketan, CGO Complex,
Lodhi Road,
New Delhi – 110 003.
- 5.The Director,
Software Technology Parks of India,
(an autonomous society under Government of India
Department of Electronics & IT)
STPI-Chennai,
No.5, Rajiv Gandhi Salai, Taramani,
Chennai – 600 113.

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