BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

CORAM

DATED:13.10.2015

THE HONOURABLE MR.JUSTICE R.SUBBIAH

W.P.(MD)Nos.2951 to 2953 of 2015
and
M.P.(MD).Nos.1 and 2 of 2015

M/s.Peacock Apparels (P) Ltd,
Plot No.2, Meenakshi Nagar,
GST Road, Pasumalai,
Madurai-625 004. ... Petitioner in all WPs

Vs.

(i) The Income-Tax Officer,
Corporate Ward-4,
Madurai-625 002.
(ii) Development Commmisser,
MEPZ Special Economic Zone &
HEOUs in Tamil Nadu Pondicherry,
Andaman & Nicobar Island,
National Highway-45, Tambaram,
Chennai.

(R.2 impleaded vide this Court order dated 13.10.2015)

... Respondents in all WPs

Writ Petitions filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records in the matter of assessment of the petitioner in file No.AACCP2308P for the assessment year 2007-2008,2008-2009 and 2009-2010 wherein a notice dated 27.03.2014 under Section 148 of the Income Tax Act 1961 has been issued and an order dated 18.02.2015 rejecting or objections passed without jurisdiction and quash the notice and the order dated 18.02.2015.

For Petitioner : Mr.R.Srinivasan

For R.1 : Mrs.S.Srimathi

For R.2 : Mr.R.R.Laxman
(impleaded party)

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COMMON ORDER

The Writ Petitions have been filed praying for issuance of a Writ of Certiorari to call for impugned notice dated 27.03.2014, issued under Section 147 of the Income Tax Act, 1961, (for short 'the Act') for re-opening of assessment years **2007-2008, 2008-2009 and 2009-2010** of the petitioner Company and consequential rejection orders dated 18.02.2015 and quash the same.

2. All the three Writ Petitions have been filed for each of the different assessment year. The case of the petitioner is that the petitioner is a Private Limited Company (for short 'the Company') registered under the Companies Act, 1956 carrying on business in the manufacture and sale of ready-made garments and export the same. The said Company is an approved 100% (Export Oriented Unit) EOU with Green Card. The Company is assessed to Income Tax by the respondent in file No.AACCP2308P. The Company has filed

its return of income for the assessment years 2007-2008, 2008-2009 and 2009-2010. So far as accounting year ended on 31st March 2007 is concerned, the return was filed after admitting a total income of Rs.33,88,540/- and after claiming exemption of Rs. 2,46,67,944/- under Section 10B of the Income Tax Act, 1961 for the sixth year. Similarly, for the accounting year March 2008 return was filed after admitting a total income of Rs.32,98,240/- and after claiming exemption of Rs.1,92,42,955/- under Section 10B of the Income Tax Act,1961 for the seventh year. Likewise, for the accounting year March 2009, the return was filed after admitting a total income of Rs.49,70,350/- after claiming exemption of Rs.3,73,49,456/- under Section 10B of the Income Tax Act,1961 for the eighth year. The same were accepted under Section 143(1)(a) of the I.T.Act, 1961. Thereafter, each case was selected for a detailed scrutiny and an assessment was made under Section 143(3) on 24.11.2009 allowing recomputed exemption under Section 10B and determining the total income of Rs.40,10,740/-. Similarly, in the case of W.P.(MD).No.2951 of 2015, it was determined as Rs. 33,15,360/- and in the case of W.P.(MD).No.2952 of

2015, it was determined as Rs.70,66,080/-. While so, the petitioner received a notice dated 27.03.2014 for the assessment years **2007-2008, 2008-2009 and 2009-2010,** under Section 148 of the Income-tax Act, 1961 requiring the petitioner to submit a return of income in the prescribed form within 30 days of receipt of the said notice on the ground that the Assessing Officer has reason to believe that the income of the petitioner company chargeable to tax as it had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961. By a letter dated 17.04.2014, the Company responded to the respondents stating that the return already filed may be taken as one filed in response to the said notice and requested the Assessing Officer to disclose the reasons recorded for initiating action under Section 147 of the Income-Tax Act, 1961 so as to file objections, if any, to the said notice in accordance with the decision of the Supreme Court in ***GKN Driveshaft (India) Ltd Vs. ITO (2589 ITR 19 (SC)].*** The Assessing Officer, by a letter, dated 25.04.2014, had furnished the reasons recorded by him for the reopening the assessment. According to the said letter, the Assessing Officer has mentioned the following reasons which prompted him to believe that income of the Company has escaped assessment:-

> **"Deduction under Section 10B has been claimed and allowed for Rs.2,40,45,743/-. However, it is noticed that assess's EOU had not been approved by the Specified Authority as required as clause (iv) of Explanation 2 to s.10B. Therefore, the assessee-company is not eligible for deduction under Section 10B."**

3. Thereupon, the Company filed an objection through their letter dated 4.6.2014 as required by the Apex Court decision in ***GKN Driveshaft (India) Ltd Vs. ITO [259 IT 19 (SC)].*** However, the Assessing Officer has passed an order dated 18.02.2015 rejecting the objections of the Company and posted the case for hearing and asked for further particulars in a format, which was not received by the Company. In the above background, the present Writ Petitions have been filed.

4. The learned counsel for the petitioner submitted that in all the Writ Petitions the petitioner company is a manufacturer of ready-made garments and they are 100% Export Oriented Company. As per Section

10B of the Income Tax Act, it gives 100% exemption on total profit for Export Oriented Company. According to the respondents, the Company has not been approved by a Specified Authority as required under Explanation 2 under Section 10B. Therefore, the respondent is of the view that the petitioner company is not eligible for deduction under Section 10B. That is the reason why, the respondent had issued a notice to the Company. But the fact remains that the Company is approved by the Specified Authority. Therefore, the notice dated 27.03.2014 issued by the first respondent under Section 147 of the Income Tax Act and the consequential order of the first respondent dated 18.02.2015 is liable to be set aside.

4.1. It is the further submission of the learned counsel for the petitioner that even assuming for a moment, in case approval is granted by the second respondent for EOU at a latter point of time, it will be considered valid once such an approval is ratified by the Board of Approval for EOU Scheme. Therefore, the reason assigned by the first respondent for reopening the assessment for the years **2007-2008, 2008-2009 and 2009-2010** of the petitioner Company is not proper.

4.2. Further, the learned counsel for the petitioner submitted that the first respondent has no power to reopen the assessment orders, for the Writ Petitions in W.P.(MD).Nos.2950 and 2951 of 2015, without any tangible material. Time and again, it has been held that unless there is any tangible evidence available to come to the conclusion that there was an escape of income of assessment, the assessing authorities cannot review their own order for the sake of review. In support of his contention, he relied upon a judgment in ***Tax Case (appeal) No.217 of 2015, dated 02.06.2015.***

4.3. It is the further contention of the learned counsel for the petitioner that under Section 147 of the Act, the first respondent cannot exercise his power beyond a period of four years in the case of first two Writ Petitions since the same is hit by limitation. For this purpose, he relied upon a judgment reported in (***2000) 241 ITR 672 (Mad) Fenner (India) Ltd.*** He also drew the attention of this Court with regard to the relevant portion found in the said judgment which reads as follows:-

> "The pre-condition for the exercise of the power under Section 147 in cases where power is exercised within a period of four years from the end of the relevant assessment year is the belief reasonably entertained by the Assessing Officer that and the provision to Section 147 gets attracted. In this case, we find that the finding of the Commissioner of Income Tax (Appeals) and the Tribunal is that the Proviso to Section 147 of the Income Tax Act did not get attracted and it is a case of mere change of opinion of the Assessing Officer."

5. The first respondent has filed a vacate stay petitions in all the Writ Petitions and submitted that in all the Writ Petitions, the reassessment was done on the basis of a judgment reported in ***Regency Creations Ltd & Valiant Communications Ltd,*** wherein it is held that 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 the purpose of approval under Section 10B. Further, the petitioner during the assessment proceedings had submitted the approval from

the authority for the claim of exemption under Section 10B of the Income Tax Act, but the authority from whom the petitioner firm obtained approval is not the Specified Authority / competent authority to grant approval for the purpose of Section 10B of the Act. Therefore, the reassessment proceedings was initiated under Section 147 of the Act. The first respondent also relied upon a judgment of ***CIT Vs Novopan India Ltd (AP) 236 ITR 746*** to substantiate the contentions. In the case on hand, proper show cause notice was issued to the petitioner as to why the exemption claimed under Section 10B should not be disallowed as the petitioner's company 100% EOU was not approved by the Specified Authority as required under clause (iv) of Explanation 2 to Sec.10B and posted the hearing on 05.03.2015. After considering their explanations, it was rejected by the first respondent and posted the matter for further hearing. In the mean time, the petitioner company, without any substance, has filed the Writ Petitions. Eventually, the first respondent prayed for the dismissal of the Writ Petitions.

6. At the time of filing the Writ Petitions,

the Writ Petitioner has not impleaded the second respondent herein, who is the competent authority to consider the case of the petitioner. Therefore, this Court directed the parties to implead the second respondent. Accordingly, the second respondent was impleaded as a party in this Writ Petition, who in turn, has submitted his counter affidavit.

7. The second respondent in his counter affidavit stated that a Letter of Permission was already granted to the Company to function as a 100% Export Oriented Unit vide this office letter No.A/2001/029/EoU/TN dated 15.05.2001, issued by the second respondent herein for the purpose of manufacturing and to export ready-made garments. The Ministry of Commerce and Industry notified the Board of Approval (BOA) for EOU Schemes by Notification No. 14/2/2006-EOU dated 22nd March 2006. As far as the Board of approval is concerned, it includes the Member(Income-tax) of the Central Board of Direct taxes as one of the Members besides others. The Board of approval so constituted by the Ministry of Commerce and Industry ratified the LOP granted by the Development

Commissioners under the delegated powers and this incudes the EOU of the petitioner also, which is also listed as S.No.9 under Madurai Commissionerate. Moreover, the petitioner company has been granted with Green Card bearing No.2171, which is valid upto 13.11.2016. The Central Board of Direct Taxes which is controlling Body for the Income Tax Department has also issued an instruction No.2/2009 dated 9.3.2009 and in the Corrigendum F.No.178/19/2008-ITA-1 dated 08.05.2009 wherein, it is stated that an approval granted by the Development Commissioner in the case of a hundred percent Export Oriented Unit will be considered valid once such an approval is ratified by the BOA for the EOU Scheme. Further, the instruction was issued specifically relating to eligibility for deduction under Section 10-B of the Income Tax Act,1961. The Assessing officer of the petitioner Company has also in his letter addressed to this respondent on 05.04.2013 agrees with the said ratification and position.

8. Therefore, the reading of the counter affidavit of the second respondent would show that already approval granted by the Development

Commissioner for the petitioner unit is considered valid once such an approval is ratified by the Board of Approval for the Export Oriented Unit Scheme. Further, as per the instruction No.2/2009 dated 9.3.2009 and in the Corrigendum F.No.178/19/2008-ITA-1 dated 08.05.2009 approval granted by the Development Commissioner in the case of a hundred percent export oriented unit will be considered valid once such an approval is ratified by the BOA for the EOU Scheme. Therefore, I am of the opinion that the reason assigned by the first respondent for reopening of the assessment order is not proper. Except to state that the EOU has not been approved by the Specific Authority, the first respondent has not assigned any other reason to reopen the assessment order. Since the said reason assigned by the first respondent is not legally correct, it is not open for reopening of assessment of the Company relating to the years **2007-2008, 2008-2009 and 2009-2010.** Further, in the case on hand, as rightly pointed out by the learned counsel for the petitioner, there is no tangible evidence available against the petitioner so as to come the conclusion that there is an escapement of income of assessment and therefore, the first respondent cannot review his own order merely for the sake of reviewing. In this regard, the petitioner has relied upon a judgment reported in ***Commissioner of Income Tax Vs. Schwing Stetter India P.Ltd, (2015) 93 CCH 0112 ChenHC,*** wherein, in paragraph No.19, it has been held as follows:-

> .... After an assessment has been made, in the normal circumstances, there would be no reason for anyone to doubt that the assessment has been made on the basis of all relevant facts. If the Assessing Officer chooses to entertain the belief that the assessment has been made in the background of the assessee's failure to disclose truly and fully all material facts, it is necessary for him to record that fact, and in the absence of a record to that effect, it cannot be held that a notice issued without recording such a fact is capable of being regarded as a valid notice. As to whether the material facts disclosed by the assessee are full and true is always a question of fact and unless the facts disclosed had been examined in relation to the extent of failure if any on the part of the assess, it is not possible to from the opinion that there had been a failure on the assess's part to truly and fully disclose the material facts. A notice issued without a record of the Assessing Officer's reasonable belief that there was such failure

> on the part of the assessee would be indicative of a failure on the part of the Assessing Officer to apply his mind to material facts, and on that ground also the notice issued would be vitiated."

9. Keeping the dictum laid down in the abovesaid case, this Court does not find any tangible material warranting the Assessing Officer to reopen the assessment.

10. As far as the last ground is concerned that the first respondent has no power to reopen the assessment year after a period of four years and the same is hit by limitation, the judgment relied by the petitioner reported in ***(2000) 241 ITR 672 (Mad) Fenner (India) Ltd*** holds the field. Ofcourse, it is true that in the Writ Petition W.P.(MD).No.2953 of 2015, a notice has been issued well within the time. Therefore, the limitation may not apply for the Writ Petition in W.P.(MD).No.2953 of 2015. However, this Court inclines to consider the said Writ Petition in respect of the other grounds raised in W.P.(MD).No.2953 of 2015

11. For the foregoing discussions and reasons, the petitioner has to succeed in this Writ Petition. Accordingly, this Writ Petition is allowed. No costs, consequently, connected miscellaneous petitions are closed.

Index : Yes/No **13.10.2015**
Internet : Yes/No
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To

The Income-Tax Officer,
Corporate Ward-4,
Madurai-625 002.

R.SUBBIAH,J.

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W.P.(MD)Nos.2951 to 2953 of 2015

13.10.2015