

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	10.02.2020
Pronounced On	19.05.2020

CORAM

THE HON'BLE **MR.JUSTICE C.SARAVANAN**

W.P.Nos.309 & 44102 of 2016

and

W.M.P.Nos.205 & 37910 of 2016

and 31025 & 31026 of 2019

M/s. International Flavours and Fragrances
India Private Limited,
1-5, Seven Wells Street,
St. Thomas Mount, Chennai – 600 016.

... Petitioner
in both W.Ps.

Vs.

The Deputy Commissioner of Income-tax,
Large Taxpayer Unit – II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai – 600 101.

...Respondent
in both W.Ps.

Writ Petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the respondent and quash the impugned notices under Section 148 of the Act, 1961 in AAACB1376K dated 30.03.2015 & 30.03.2016 and the consequential impugned orders of the respondent in

AAACB1376K/DCIT, LTU-II/15-16 and AAACB1376K/147/16-17 dated 14.12.2015 & 28.11.2016 for the Assessment Years 2010-11 & 2009-10 respectively.

For Petitioner : Mr.Sandeep Bagmar R
in both W.Ps.

For Respondent : M/s. Hema Muralikrishnan,
Standing Counsel, in both W.Ps.

COMMON ORDER

By this common order both the Writ Petitions are being disposed.

2. In these Writ Petitions, the petitioner has challenged the impugned notices dated 30.03.2015 & 30.03.2016 issued by the respondent under Section 148 of the Income Tax Act, 1961, to re-open the completed assessments for the Assessment Years 2009-10 and 2010-11 and consequential impugned communications dated 14.12.2015 and 28.11.2016 for the respective Assessment Years.

3. By the impugned notices/communications, the respondent has rejected the objections of the petitioner as not tenable to re-open the

assessments and held that the proceedings have been validly initiated under Section 148 of the Income Tax Act, 1961.

4. The brief facts of the cases are that petitioner is engaged in manufacture of flavour essences, mixed seasoning powders (dry mix) and formulated perfumery compounds etc. The petitioner started a new manufacturing unit in State of Jammu & Kashmir in the year 2007 after obtaining all the necessary registrations and approvals with an installed capacity of 5000 MT per annum. The petitioner has claimed deduction under Section 80IB of the Income Tax Act, 1961. In this regard, the respondent had specifically asked for the details of the new undertaking vide separate notices dated 30.11.2012 and 06.12.2012 for the Assessment Year 2009-2010. The petitioner replied to the same vide separate letters dated 19.02.2013.

5. By another notice dated 23.01.2014, the respondent further sought few more details regarding the new undertaking from the petitioner for the Assessment Year 2010-2011. The petitioner also replied to the same. Subsequently, respective assessment orders dated

26.02.2013 & 28.02.2014 were passed.

W.P.No.309 of 2016 – Assessment Year 2010-2011

6. The respondent has however issued the impugned notice dated 30.03.2016 under Section 148 of the Income Tax Act, 1961 to the petitioner, to re-open the Assessment Year 2010-11. The petitioner replied to the same and asked the respondent for reasons to reopen the assessment vide letter dated 28.04.2015. By a communication dated 07.05.2015, the respondent has given the reasons for re-opening the assessment. The petitioner submitted its objections against the reasons of the re-opening the assessment vide letter dated 21.07.2015. The respondent has thereafter issued the impugned communication dated 14.12.2015. In the impugned communication, the respondent has observed that the Assessing Officer has not examined the issue or formed an opinion and since no opinion was formed, change of opinion cannot be said to exist or arise.

7. Aggrieved by the same, W.P.No.309 of 2016 was filed by the petitioner. The petitioner obtained an interim stay in this Writ Petition on 08.01.2016.

W.P.No.44102 of 2016 – Assessment Year 2009-2010

8. During the pendency of the proceedings in W.P.No.309 of 2016, the respondent issued impugned notice dated 30.03.2015 under Section 148 of the Income Tax Act, 1961, to re-open the assessment for the Assessment Year 2009-2010. In this connection also communications were exchanged. The reasons for re-opening the assessment were communicated vide communication dated 26.08.2016. The petitioner filed its objections dated 09.09.2016 which has culminated in impugned communication dated 28.11.2016 of the respondent. The respondent has overruled the objection of the petitioner with similar reasons.

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9. Aggrieved by the same, the petitioner has been filed W.P.No.44102 of 2016.

10. Heard the learned counsel for the petitioner and the learned standing counsel for the respondent.

11. The reasons for re-opening the assessment for the respective Assessment Years are similar. Communication dated 26.08.2016 of the respondent issued for Assessment Year 2009-2010 is succinct. It reads as under:-

As per the return of income filed by the assessee for the AY 2009-10, the assessee has claimed deduction u/s. 80IB(4) for a sum of Rs.8,70,83,000. From the details submitted by the assessee, it was ascertained that, the assessee company has claimed deduction in respect of profit from an undertaking at Jammu and Kashmir. The assessee is in the business of preparing Mixed Seasoning powders (dry mix). Liquid flavours and formulated perfumery compounds, commission u/s. 131(1)(d) was issued to ACIT, Circle I, Jammu to examine the facts as applicable to the claim made u/s 80IB(4). The report was received on 12.03.2015 as per which it was ascertained that the assessee is carrying out the process of blending and mixing various natural ingredients to prepare dry mix powders and liquid flavours. Since the activity carried out by the assessee do not amount to manufacture, hence the claim made by the assessee u/s 80IB(4) should be disallowed and brought to tax.

12. The reasons given in communication dated 07.05.2015 for re-opening the assessment for Assessment Year 2010-2011 is little more elaborate. It would suffice to re-produce the following paragraph from the communication dated 07.05.2015:-

As per the definition of manufacture u/s. 2(29BA), the transformation in the article should result in different name, character and use. In the present case, mixing of these raw materials does not change the character and the use of the product. Since, even the raw material being various powders (flavours) are commercially saleable and consumable, the utilization and character do not change.

13. A conjoint reading of the two extracted portions give the reason for the exercise undertaken by the respondent.

14. I have heard the learned counsel for the petitioner and the learned standing counsel for the respondent. I have also perused the records and the documents produced before me.

15. The impugned communications dated 28.11.2016 and 14.12.2015 for the respective Assessment Years issued in the light of the

decision of the Hon'ble Supreme Court in **GKN Drive Shafts (India) Ltd Vs. ITO**, (2003) 259 ITR 19 are neither an order nor a Show Cause Notice and therefore has given rise to the present Writ Petitions.

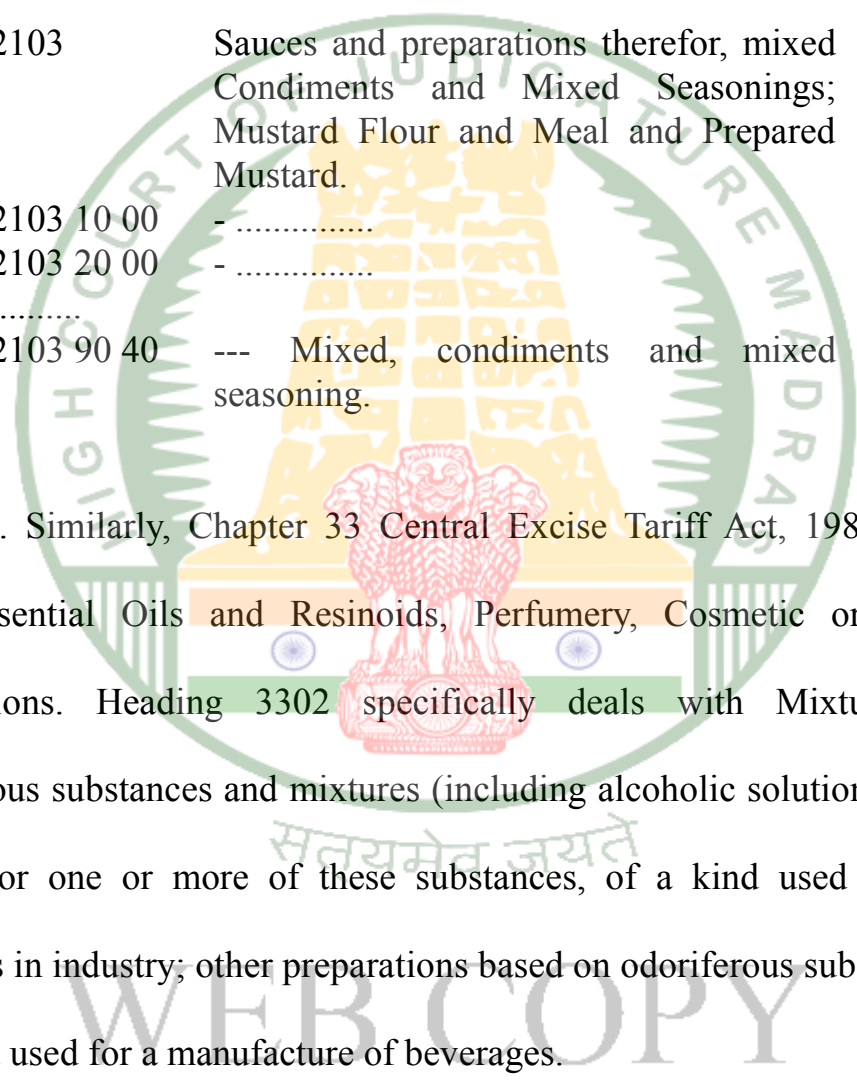
16. The petitioner has set up its manufacturing unit in the erstwhile State of Jammu and Kashmir in the year 2007. The petitioner had availed the benefit of Exemption Notification No.56/2002-CE dated 14.11.2002 as amended by Notification No.34 of 2008-CE dated 10.06.2008.

17. Chapter 21 of the Central Excise Tariff Act, 1985 deals with Miscellaneous Edible Preparations. In relation to products following under the aforesaid tariff labeling or relabeling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, also amounts to "Manufacture".

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18. Heading 2103 of Central Excise Tariff Act, 1985 specifically deals with sauces and preparations therefor, mixed Condiments and Mixed Seasonings; Mustard Flour and Meal and Prepared Mustard. Sub-

heading 2103 90 40 --- deals with Mixed, condiments and mixed Seasoning. The relevant Heading and Sub- heading are reproduced below.



2103	Sauces and preparations therefor, mixed Condiments and Mixed Seasonings; Mustard Flour and Meal and Prepared Mustard.
2103 10 00	-
2103 20 00	-
.....	
2103 90 40	--- Mixed, condiments and mixed seasoning.

19. Similarly, Chapter 33 Central Excise Tariff Act, 1985 deals with Essential Oils and Resinoids, Perfumery, Cosmetic or Toilet Preparations. Heading 3302 specifically deals with Mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis or one or more of these substances, of a kind used as raw materials in industry; other preparations based on odoriferous substances, of a kind used for a manufacture of beverages.

20. Sub-heading 3302 10 10 deals with Synthetic flavouring

essences. Relevant Heading and Sub-heading are reproduced below:-

- 3302 Mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis or one or more of these substances, of a kind used as raw materials in industry; other preparations based on odoriferous substances, of a kind used for a manufacture of beverages.
- 3302 10 -
- 3302 10 10 --- Synthetic flavouring essences.

Thus, the activity undertaken by the petitioner amounts to manufacture.

21. The above notification exempts a “manufacturer” engaged in manufacture of goods specified in the 1st and the 2nd schedule to the Central Excise Tariff Act, 1985 other than the goods specified in Annexure I appended to the said notification and cleared from such unit located in the Industrial Growth Centre, Industrial Infrastructure Development Centre, or Export Promotion Industrial Park or Industrial Estate or Industrial Area or Commercial Estate or Scheme Area as specified in Annexure II from excise duty and additional duty of Excise

as is equivalent to the amount of duty paid by the manufacturer of the goods, other than the amount of duty paid by utilisation of CENVAT credit under the CENVAT Credit Rules 2002.

22. The above notification contemplates payment of Excise duty on the manufactured goods and refund of such duties other than the amount of duty paid by utilisation of CENVAT credit under the provisions of the CENVAT Credit Rules, 2002.

23. The respondent has reopened the assessment based on a Commission issued under Section 131 of the Income Tax Act, 1961 and that the Asst. Commissioner of Income Tax, Circle 1, Jammu has reported that the petitioner has only blenders and vessels in the premises which are used for mixing the raw materials to prepare the end product. According to the respondent the activity does not amount to manufacture within the meaning of Section 2(29BA) as the transformation in the article should result in a different name, character and use. According to the respondent the activity undertaken namely mixing of raw materials does not change the character and the use of the product and that raw materials being various powders (2 flavours) are commercially saleable

and consumable and that there is no change in the utilisation character.

24. It is the case of the petitioner that the respondent's counterpart under the Central Excise Act, 1944 sitting in the same building as that of the respondent who are really concerned with the manufacturing activity have accepted the activity undertaken by the petitioner amounted to manufacture and has also refunded the amounts payable by the petitioner for the respective financial years. He has enclosed sample of order dated 21.8.2008, 15.05.2009, 29.07.2009 and 21.5.2010 as detailed below:-.

April 2008 - Rs.34,11,688/-

March 2009 - Rs.19,06,746/-

April 2009 - Rs.14,14,097/-

March 2010 - Rs.30,14,351/-

25. The definition of 'Manufacture' in Section 2(29BA) of the Income Tax Act, 1961, is broader than the definition of 'Manufacture' in Section 2(f) of the Central Excise Act, 1944. Section 2(29BA) of the Income Tax Act reads as under:-

(29BA) "manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing,—

(a) resulting in transformation of the object or article

or thing into a new and distinct object or article or thing having a different name, character and use; or
(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure;

26. Whether the activity undertaken by the petitioner amounted to manufacture or not, was deliberated upon before the respective assessment orders were passed. In this connection reference may be made to communication of the respondent dated 26.12.2013. In the said letter, the petitioner was specifically asked to explain the process of manufacture in specific and in detail with regard to the flavours produced, essences produced, flavouring essences formulated perfumery compounds and synthetic food colours preparation for claiming the benefit of deduction under Section 80IB of the Income Tax Act, 1961. Details of the plant and machinery installed in Jammu plant along with bills. The Petitioner has furnished all the details.

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27. It is only thereafter the assessments were completed for the respective Assessment Years. Therefore, a mere change in opinion of the Assessing Officer subsequent to passing of the assessment orders would

be contrary to the law laid down by the Hon'ble Supreme Court in **CIT Vs. Kelvinator of India Ltd**, (2010) 320 ITR 561 and in **Income Tax Officer Vs. Techspan India Private Limited**, (2018) 6 SCC 685 and in **Jeans Knit Private Limited Vs. Deputy Commissioner of Income Tax**, (2018) 12 SCC 36.

28. A mere change in opinion of an Assessing Officer does not clothe an Assessing Officer with the jurisdiction or power to reopen the assessment under Section 148 of the Income Tax Act, 1961 for the purpose of proviso to Section 147 of the Income Tax Act, 1961.

29. In the impugned communications dated 14.12.2015 and 28.11.2016, the respondent has not denied that the petitioner had truly and fully disclosed all the materials that were required for completing the assessments.

30. The respondent has merely stated that while passing the respective assessment orders, the Assessing Officer did not examine the

issue or has formed any opinion and since no opinion was formed in the 1st place question of change of opinion does not arise.

31. To invoke Section 148 of the Income Tax Act, 1961 for the purpose of proviso to Section 147 of the Income Tax Act, 1961, there should be a case of failure to truly and fully disclose material facts required for the assessment. In this case, I find that there were deliberations on the very issue as to whether the activity undertaken by the petitioner amounted to manufacture or not before the respective assessment orders were passed for the respective Assessment Years by the respondent's predecessor.

32. I am unable to countenance this stand of the respondent. In any event it would not clothe the Assessing Officer with the power to reopen the completed assessment under Section 148 of the Income Tax Act, 1961 for the purpose of proviso to Section 147 of the Income Tax Act, 1961 if there was truly and fully disclosure for assessment.

33. Further, the Central Excise Department has also accepted the

fact that the petitioner was engaged in the manufacture of excisable goods which were eligible for exemption under Notification No.56 of 2002-CE dated 14.11.2002 as amended by Notification No.34 of 2008-CE dated 10.06.2008. Therefore, a change of opinion based on report of Asst. Commissioner of Income Tax, Circle 1, Jammu under Section 131 of the Income Tax Act, 1961 cannot amount to failure on the part of an assessee to truly and fully disclose information/documents required for the purpose of completing the assessments.

34. Reopening of the assessment to deny the deduction under Section 80IB of the Act, is therefore without jurisdiction. Therefore, the proviso to Section 147 of the Income Tax Act, 1961 puts an embargo on the respondent from proceeding further as no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for

that assessment year.

35. At the same time, if in the course of such proceedings the respondent comes to a conclusion that there were other grounds on which assessment can be reopened, the respondent can assess or reassess such income in the light of Explanation 3 to Section 147 of the Income Tax Act, 1961.

36. In the light of the above discussion, I direct the petitioner to participate in the proceedings before the respondent. The respondent is however precluded from disturbing the deductions allowed to the petitioner in the respective assessment orders under Section 80IB of the Income Tax Act, 1961.

37. The respondent may however look for such other aspects which may come within the purview of Explanation 3 to Section 147 of the Income Tax Act, 1961 to demand tax while passing orders.

38. Since the dispute pertains to the Assessment Years 2009-10 and

2010-2011, the respondent is directed to bring a closure to the proceedings within a period of three months from the date of receipt of a copy of this order in the light of the above observations.

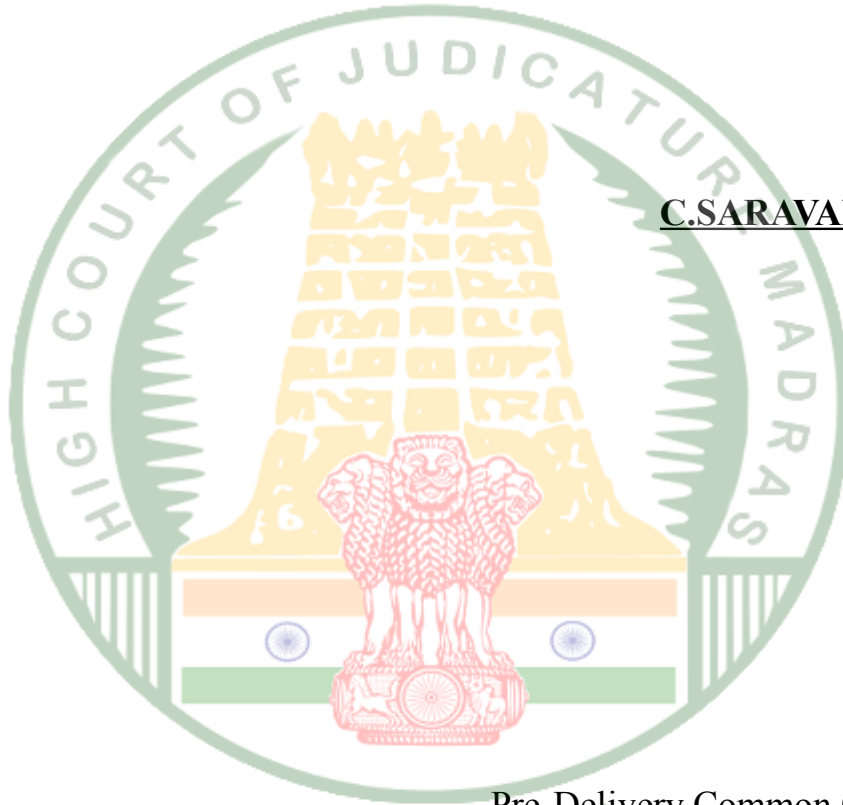
39. The present Writ Petitions stand disposed with the above observations. No cost. Consequently, connected Miscellaneous Petitions are closed.

19.05.2020

Index : Yes/No
Internet : Yes/No
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To
The Deputy Commissioner of Income-tax,
Large Taxpayer Unit – II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai – 600 101.

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C.SARAVANAN, J.

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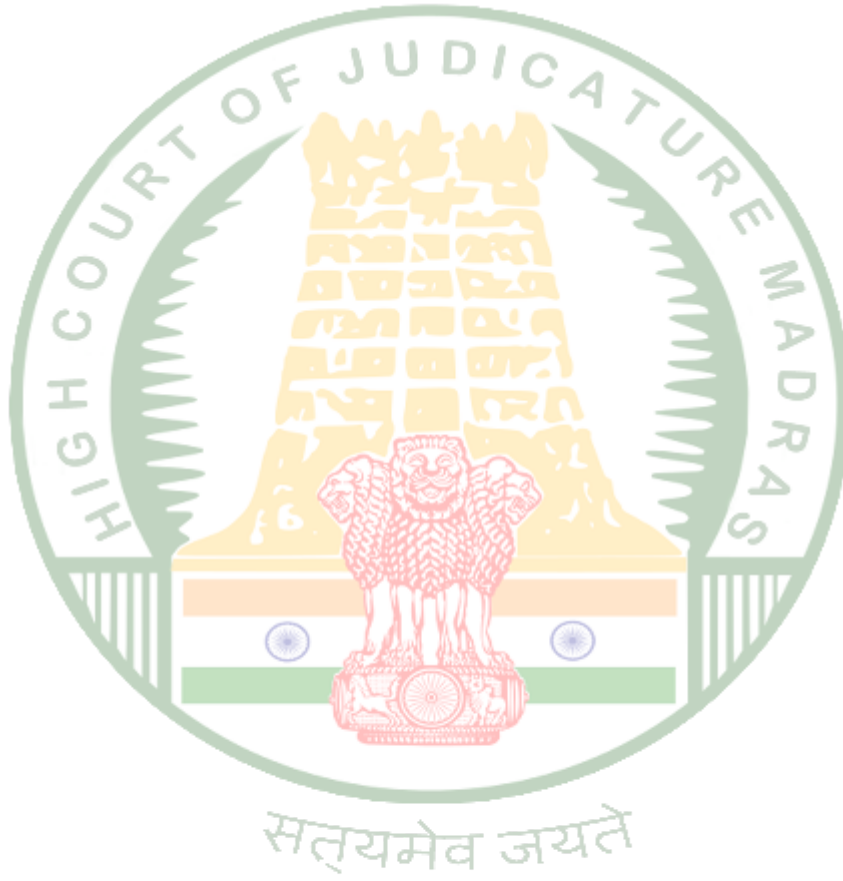
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