

In the High Court of Judicature at Madras

Dated : 03.9.2021

Coram

The Honourable Mr.Justice T.S.SIVAGNAM

and

The Honourable Mr.Justice SATHI KUMAR SUKUMARA KURUP

Writ Appeal No.2259 of 2021 & CMP.Nos.14396 & 14397 of 2021

Indus Teqsite Private Ltd. (presently known as Data Patterns India Pvt. Ltd.) rep.by its Managing Director Mr.S.Rangarajan

...Appellant

The Deputy Commissioner of Income Tax, Company Circle II(3), 5th Floor, Room No.513, Wanaparthy Block, 121, Mahatma Gandhi Road, Chennai-34.

...Respondent

APPEAL under Clause 15 of the Letters Patent against the order dated 16.6.2021 made in W.P.No.6543 of 2014

For Appellant: Mr.Nithyaesh Natraj
For Respondent: Mr.Prabhu Mukunth Arunkumar, JSC

Judgment was delivered by T.S.SIVAGNAM,J

We have heard Mr.Nithyaesh Natraj, learned counsel appearing

for the appellant and Mr.Prabhu Mukunth Arunkumar, learned Junior Standing Counsel accepting notice for the respondent.

2. This appeal filed by the appellant – assessee is directed against the order dated 16.6.2021 in W.P.No.6543 of 2014, in which, the appellant sought to quash the reassessment proceedings initiated by the respondent herein under Section 147 of the Income Tax Act, 1961 (for short, the Act) for the assessment year 2006-07.

3. It is pertinent to note that the appellant – assessee filed another writ petition in W.P.No.6542 of 2014 wherein the assessee sought for the issuance of a Writ of Certiorari to quash the order passed by the Central Board of Direct Taxes (CBDT) in Instruction No.2/2009 dated 09.3.2009 read with corrigendum to the instruction in so far as it related to 100% Export Oriented Units under the Software Technology Parks (STP) Scheme/Electronic Hardware Technology Parks (EHTP) Scheme.

4. Both the writ petitions were heard on the same day, but were dismissed by two separate orders. As against the dismissal of W.P.No. 6542 of 2014, the appellant – assessee has filed W.A.No.2261 of 2021.

5. With regard to the order impugned before us, the learned Single Judge dismissed W.P.No.6543 of 2014 on the ground that W.P.

No.6542 of 2014 filed by the appellant – assessee challenging the said Instruction of the CBDT had been dismissed. The correctness of the said order in W.P.No.6543 of 2014 has been put to challenge in this writ appeal.

6. At the very outset, we need to point out that the reasons assigned by the learned Single Judge for dismissing W.P.No.6543 of 2014 are not tenable. We support such a conclusion with the following reasons :

W.P.No.6543 of 2014 was filed challenging the reassessment proceedings under Section 147 of the Act. Though the appellant – assessee stated that they filed a separate writ petition challenging the said Instruction of the CBDT, the reopening of assessment was challenged on other grounds as well stating that the reasons assigned by the Assessing Officer in his order dated 26.8.2013 could not be a basis for reopening the assessment.

7. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of **CIT Vs. Kelvinator of India Ltd. [reported in (2010) 320 ITR 561]** wherein it was held that the concept of 'change of opinion' must be treated as an in-built test to check abuse of power by the Assessing Officer. Referring to the decision of the Delhi High Court in the case of **CIT Vs. Kelvinator of**

India Ltd. [reported in (2002) 256 ITR 1] as confirmed by the Hon'ble Supreme Court in the decision reported in **(2010) 320 ITR 561**, it was contended that if two interpretations were possible, the interpretation, which upheld the constitutionality, should be favoured.

8. It was further contended by the appellant - assessee that in any event, the Assessing Officer could not initiate reassessment proceedings on a mere change of opinion. It was also contended that the primary facts necessary for assessment were fully and truly disclosed and that in the absence of any findings recorded by the Assessing Officer that the assessee did not make full and true disclosure, the reopening of assessment would be a case of change of opinion. In support of such a contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of **CIT Vs. Bhanji Lavji [reported in (1971) 79 ITR 582]**.

9. It was contended by the appellant - assessee that where a deduction was considered and allowed, the subsequent withdrawal of the same under Section 148 of the Act amounted to change of opinion. The appellant - assessee pointed out that they had been granted approval by the Authority as early as 17.4.2008 and based on such approval, deductions were claimed by the assessee under Section 10B of the Act, which were accepted by the Assessing Officer.

All of a sudden, for the assessment year 2006-07, after the assessment was completed under Section 143(3) of the Act, the same was sought to be reopened by invoking the power under Section 147 of the Act.

10. Thus, the question, which is required to be decided in W.P. No.6543 of 2014, is as to whether the reopening of assessment was valid in law and was it a case of change of opinion and without deciding such a question, W.P.No.6543 of 2014 could not have been dismissed. This would be sufficient to set aside the order passed in W.P.No.6543 of 2014.

11. Now, we need to examine as to whether the reasons given by the Assessing Officer in the order dated 26.8.2013 would qualify as valid reasons for reopening the assessment. For better appreciation, we quote the reasons hereunder :

"On perusal, it is found that the assessee company has not produced ratification certificate given by Board of Approval (BoA) on the approval granted by the Development Commissioner as per Section 10B Explanation 2(iv) and directions issued by Board vide Instruction No.02/2009 dated 09 of March 2009. In this regard, the Instruction of the Board clearly says that 'it has been

decided that an approval granted by the Development Commissioner in the case of an 100% EOU will be considered valid, once such an approval is ratified by the BoA for EOU Scheme'. Hence, assessee company is not eligible for claiming deduction under Section 10B."

12. On perusal of the above reasons, it is seen that there was no allegation that the assessee did not fully and truly disclose all the material and primary facts required for completing the assessment. The settled legal principle is that the Assessing Officer cannot be directed to complete the assessment in a particular manner. The duty cast upon the assessee is to place all the materials before the Assessing Officer to enable him to take a decision. In the absence of any such allegation, if we examine the reasons for reopening, it is solely on the ground that the assessee has not produced the ratification certificate given by the Board of Approval on the approval granted by the Development Commissioner as per Explanation 2(iv) to Section 10B of the Act.

13. The Assessing Officer referred to Instruction No.2/2009 issued by the CBDT, which was challenged by the appellant - assessee in W.P.No.6542 of 2014. The challenge to the said Instruction of the CBDT can have no impact on the relief sought in W.P.No.6543 of 2014

because the challenge in W.P.No.6543 of 2014 was to the reopening of assessment proceedings and the first aspect to be considered is as to whether the reopening was on account of change of opinion because the appellant – assessee had relied upon the approval granted by the Development Commissioner as early as 17.4.2008 and the assessment had been completed in respect of other years as well as the subject assessment, which was sought to be reopened. Therefore, in the absence of any such allegation against the appellant – assessee for non disclosure of primary facts, the reopening cannot be justified.

14. The learned Junior Standing Counsel appearing for the respondent submits that the assessee has not followed the procedure, which has been laid down by the Hon'ble Supreme Court in the case of ***GKN Driveshafts (India) Ltd. Vs. ITO [reported in (2003) 259 ITR 19]***, as the assessee has not given their objections to the reasons recorded by the Assessing Officer for reopening the assessment as communicated to the assessee vide letter dated 26.8.2013.

15. In our considered view, such a non adherence to such a procedure would be a fait accompli in the case on hand and more so, when W.P.No.6543 of 2014 was pending from the year 2014 and the challenge was to the notice issued under Section 147 of the Act.

Therefore, at this distance of time, we are not inclined to issue a direction to the appellant – assessee to file their objections to the reopening and once over again allow the Assessing Officer to take a decision as to whether the objections are sustainable or not.

16. Furthermore, the reasons for reopening were not based on any allegation of non disclosure of the financial details of the assessee or in respect of any transaction done by them in the normal course of business. The reopening was solely on the basis that an order of ratification by the Board had not been furnished.

17. The larger question is as to whether it would be within the domain and control of the assessee to obtain a ratification. Further, merely because the ratification has not been done by a Higher Authority, will it automatically vitiate the approval, which was granted by the Competent Authority namely the Development Commissioner. These are all larger questions, which cannot be, obviously, adjudicated by the Assessing Officer and more so, in the case of the assessee because the very Instruction given by the CBDT had been put to challenge by filing W.P.No.6542 of 2014. Though W.P.No.6542 of 2014 was dismissed, the appellant – assessee filed W.A.No.2261 of 2021, which has been entertained by this Court today.

18. In addition, we find that an identical case of reopening in

the matter of **Kone Elevators (India) Private Limited Vs. ACIT** was challenged by filing **W.P.No.43662 of 2016** and the same learned Single Judge, by order dated **16.6.2021**, allowed it, the relevant portions of which read thus :

"16. In respect of the case on hand, undoubtedly, the assessee had not submitted the ratification certificate to be obtained from the CBDT for claiming exemption under Section 10B of the Act. However, there are certain confusions even within the Department Officials regarding production of such ratification certificate from the CBDT. The dispute arises in view of the fact that the assessee is of an opinion that the approval granted by the STPI under the delegated powers of the Directors of STPI by IMSC is a valid approval for the purpose of claiming exemption under Section 10B of the Act. Therefore, the presumption cannot be construed as suppression on the part of the assessee. It is not a mere presumption in the present case by the assessee. The presumption has got a valid reason because the assessee is holding a valid approval obtained from the STPI and the power to grant approval was delegated to the Directors of STPI by IMSC. It is not as if the assessee

claimed exemption under Section 10B without any such approval. It is a case where the order of approval, which was validly granted, was produced before the Assessing Officer at the time of scrutiny and the Assessing Officer also accepted the approval order and granted exemption. Thus, the reason stated in the impugned proceedings that the assessee committed a mistake cannot be accepted. The assessee was possessing a valid approval which was produced before the Assessing Officer and if a ratification is to be obtained, then the Assessing Officer, at the time of scrutiny, ought to have directed the assessee to get any such ratification certificate for the purpose of grant of exemption under Section 10B which the Department had not done. Thus, it was a mistake or omission committed by the Assessing Officer at the time of passing of the original assessment order. Even in such cases, if the reopening of assessment is made within a period of four years, then there is a ground for the Department to reopen the same. However, in the present case, the reopening of assessment is made beyond the period of four years and therefore, the statutory requirement contemplated under Section 147 is to be complied with

scrupulously. Thus, the ground taken for reopening of assessment that the assessee has not disclosed fully and truly all material facts is not established in the present case and the assessee, in fact, submitted all the particulars regarding the approval granted by the authority and further ratification, if required, must be instructed by the Department which was not done and therefore, there was no suppression or non-disclosure of material facts by the assessee. Thus, the initiation of proceedings under Section 147 of the Act, beyond the period of four years, is not sustainable and consequently, the impugned proceedings are not in consonance with the conditions stipulated in the Proviso to Section 147 of the Act.

17. Accordingly, the impugned order dated 15.11.2016, passed by the respondent - Department is quashed and the writ petition stands allowed."

19. The learned Single Judge, after noting that the said assessee (Kone Elevators (India) Private Limited), as in the case of the assessee before us, had not produced the ratification certificate from the Board, further noted that there were certain confusions even within the Department regarding production of ratification certificate

from the Board and that merely because the ratification certificate had not been produced, the presumption could not be drawn that the assessee suppressed the facts. The learned Single Judge further noted that the assessee in the said case had a valid approval from the Software Technology Parks of India (STPI) based on the delegation granted to the directors of STPI by IMSC. The learned Single Judge found that it was not as if the said assessee claimed exemption under Section 10B of the Act without any such approval. Therefore, the learned Single Judge held that the reopening of assessment could not have been made as there was no mistake attributable to the said assessee. The learned Single Judge further held that even assuming that the Assessing Officer, while completing the original assessment, failed to take note of the facts, it could not be a case for reopening the assessment.

20. We approve the findings of the learned Single Judge in the decision in the case of ***Kone Elevators (India) Private Limited*** for the reasons set out by the learned Single Judge and for the reasons assigned by us in the preceding paragraphs. In other words, the non obtaining of ratification certificate from the Board has not been attributed to the assessee as a default committed by the assessee. There may be various reasons, for which, the Board might not have

granted a ratification. Nevertheless, the approval granted by the Authority, to whom the power had been delegated was valid and hence, as long as the said approval was not withdrawn, the assessee would be entitled to rely upon the approval and claim deduction under Section 10B of the Act, which is a special provision for earning of foreign exchange. In such circumstances, the reopening of assessment is without jurisdiction and bad in law.

21. For the above reasons, the writ appeal is allowed, the impugned order is set aside, W.P.No.6543 of 2014 is allowed and the reassessment proceedings initiated under Section 147 of the Act pursuant to the notice under Section 148 of the Act dated 28.3.2013 is quashed. No costs. Consequently, the connected CMPs are closed.

03.9.2021

To
The Deputy Commissioner of Income Tax, Company Circle II(3),
5th Floor, Room No.513, Wanaparthi Block, 121, Mahatma Gandhi
Road, Chennai-34.

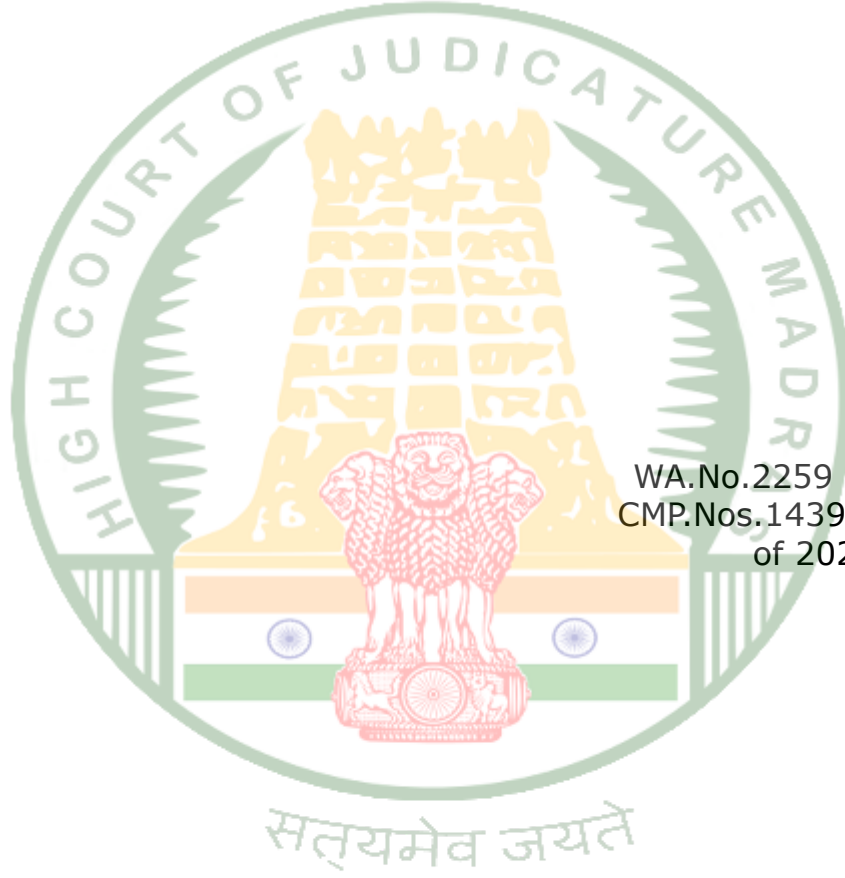
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