IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.268 OF 2010

AND

WRIT PETITION NO.269 OF 2010

Purity Techtextile Private Limited,
2, Laxmi Tower, 8th Floor, B Wing,
Behind ICICI Bank, Bandra Kurla
Complex, Bandra (East), Mumbai - 51 ..Petitioner.

Versus

1. The Assistant Commissioner of
Income Tax 10(1), 455,
Aaykar Bhavan, M.K. Road,
Churchgate, Mumbai
2. Union of India,
Aaykar Bhavan, M.K. Road,
Churchgate, Mumbai – 400 020 ..Respondents.

Mr.S.E. Dastoor, senior Advocate with Mr.Nishant Thakkar and Mr.Rajesh Poojari i/by Mint & Confreres for the petitioner.

Mr.J.S. Saluja for the respondents.

CORAM : Dr.D.Y. Chandrachud &
J.P. Devadhar, JJ.

DATE : 8th Ferbuary, 2010.

ORAL JUDGMENT (Per Dr.D.Y. Chandrachud, J.)

1. Rule, returnable forthwith. By consent of the learned counsel for the parties, the Petition is taken up for hearing and final disposal.

2. The challenge in these proceedings under Article 226 of the Constitution of India is to the re-opening of assessments for Assessment Years 2003-2004 and 2004-2005 by notices dated 24th March 2009 and 31st March 2009 in purported exercise of powers under Section 148 of the Income Tax Act, 1961.

3. The assessee claimed a deduction under Section 80IB of the Act commencing from A.Y. 2001-2002. The assessee claims to have set up an industrial undertaking in an industrially backward area at Nani Daman. Briefly stated, from the record of the Court it appears that the Maharashtra State Financial Corporation (`MSFC') had granted loan facilities to a company by the name of Innovative Plastics Private Limited. The company was in default of the payment of its dues, following which MSFC exercised its powers under Section 29 of the State Financial Corporations Act and sold the land and building to Khosla Filters Private Limited under a Deed of Conveyance dated 24th December 1999 for consideration. The purchaser granted a lease of the property on 29th December 1999 to the Petitioner for a period of ten years. The Petitioner sought registration as a Small Scale Unit for manufacturing filter bags, filter panels, made ups of cotton and man-made fabrics. Provisional registration was granted to the Petitioner by the Director of Industries on 3rd March 2000. The Petitioner made an investment of Rs.7,19,447/- for the purchase of plant and machinery and set up an industrial undertaking on the property. Industrial production commenced from 6th April 2000 and a permanent license was received on 19th February 2001.

4. The Petitioner made its claim for the first time in respect of the profits

derived from the industrial undertaking under Section 80IB of the Act for A.Y. 2001-02. The case of the Petitioner for A.Y. 2001-2002 was selected for scrutiny and during the course of the assessment proceedings, queries were raised with respect to the entitlement of the Petitioner to claim a deduction under Section 80IB. By its letter dated 3rd December 2002, the Petitioner submitted details as regards the setting up of the industrial undertaking. An order of assessment was passed under Section 143(3) of the Act on 31st October 2002 for A.Y. 2001-2002. A deduction under Section 80IB was allowed. The return for A.Y. 2002-2003 claiming a deduction under Section 80IB was processed under Section 143(1)(a). For A.Y. 2002-2004, an order of assessment was passed under Section 143(3). During the course of the assessment proceedings, the Petitioner inter alia submitted its Certificate of Registration as an SSI Unit and an Audit Report in Form 10 CCB. Among the details disclosed included the circumstance that a license to work had been issued by the local Authority. A copy of the license to work the factory issued on 14th August 2000 by the Chief Inspector of Factories, Daman was annexed to the Form 10CCB. The license contains a specific endorsement to the effect that the plans had been approved by the Sarpanch on 12th September 1988. Further details were filed by the Petitioner by a letter dated 25th January 2005 during the course of assessment proceedings for A.Y. 2003-2004, including the Certificate of Registration as an SSI Unit and the power connection release order. On 28th February 2005, an assessment order was passed under Section 143(3) of the Act for A.Y. 2003-2004. The assessment order duly notes that the assessee had claimed a deduction under Section 80IB of the Act for the unit which was set up in an industrially backward area and that Form 10CCB was available on record.

5. The Petitioner was allowed the benefit of a deduction under Section 80IB of the Act for A.Ys. 2004-2005, 2005-2006 and 2006-2007. On 24th March 2009 and 31st March 2009 the assessment for A.Ys. 2003-2004 and 2004-2005 was sought to be reopened in exercise of powers under Section 148 of the Act. The reasons which have been recorded by the Assessing Officer note that the assessee had taken an industrial unit at Daman on rent from an associate concern and that a deduction had been allowed under Section 80IB for A.Ys. 2003-2004 and 2004-2005. However during the course of the assessment proceedings for a subsequent year, it was observed that the factory had been purchased by Khosla Investment Private Limited and was given on license to the assessee. The notices record that the plan of the factory premises was approved by the Sarpanch on 12th September 1988, which would show that the industrial unit was already in existence and in the use of some other person for the purpose of availing benefits provided under the Act. In the case of the assessee, it has been stated that the factory plan having been approved twelve years prior to the commencement of the business of the assessee, that would lead to an inference that the business / industrial unit of the assessee had come into existence at the place where the business of someone else was already in existence and that the other party had availed of the benefit provided in the Act. A reference has been made to the provisions of Section 80IB of the Act to suggest that one of the conditions for claiming a deduction is that the business should not be formed either by splitting up or by reconstruction of a business already in existence.

6. The assessee filed objections to the reasons recorded by the Assessing Officer. While disputing that there was reason to believe that income had escaped

assessment within the meaning of Section 147, the assessee submitted that : (i) The sale by MSFC was only of the land and building and that it was the assessee which had installed the plant and machinery; (ii) There was absolutely no basis in the statement of the Revenue that the business of the assessee had been formed by splitting up or reconstruction of a business already in existence; (iii) The reassessment notice appeared to have been issued pursuant to an Audit Report and the Assessing Officer had no reason to believe that income had escaped assessment.

7. The objections were dealt with by the Assessing Officer and disposed of by an order dated 13th November 2009. The Assessing Officer has once again reiterated that during the course of subsequent proceedings, a copy of the license was filed by the assessee, which states that the plan for the factory was approved by the Sarpanch on 12th September 1988. According to the Assessing Officer, this document was not produced or submitted by the assessee during the course of the assessment proceedings for earlier years. Consequently, according to the Assessing Officer, there was valid reason to believe that income had escaped assessment inasmuch as the information showed that the industrial undertaking was in existence prior to the date of the lodging of the claim for deduction under Section 80IB of the Act by the assessee for A.Y. 2001-2002.

8. Two Petitions under Article 226 of the Constitution have been instituted by the assessee to challenge the re-opening of the assessment for A.Ys. 2003-2004 and 2004-2005. The assessment for A.Y. 2003-2004 has been re-opened beyond a period of four years after the expiry of the relevant assessment year. The re-opening of assessment for A.Y. 2004-2005 is within a period of four years from

the expiry of relevant assessment year. The case for A.Y. 2004-2005 will be considered separately in the later part of the judgment.

9. On behalf of the Petitioner, it was urged before the Court by learned counsel that : (i) There was no failure on the part of the assessee to disclose all material facts relevant to the assessment. The license was filed when assessment proceedings took place for A.Y. 2003-2004. A full enquiry was made and all relevant details were disclosed. The license contains a disclosure of the circumstance that plans had been approved on 12th September 1988; (ii) In any event, there was no connection between the alleged non-disclosure and the conclusion formed by the Assessing Officer. Even if it were to be assumed that a factory had been worked at the site by the person who was subjected to proceedings under State Financial Corporations Act, 1961 by MSFC, that would not dis-entitle the Petitioner to the benefit of a deduction under Section 80IB of the Act. The Petitioner who has set up a new industrial undertaking by purchasing plant and machinery would still be entitled to a deduction under Section 80IB of the Act; (iii) The reasons for re-opening an assessment must indicate both a failure to disclose all material facts and what circumstance constitutes the failure to disclose. In the present case, that requirement has not been fulfilled; (iv) In the present case, the Assessing Officer had not formed the belief that income had escaped assessment. The information which has been obtained under the Right to Information Act would reveal that the action had been instituted merely on the basis of an Audit Report; (v) The benefit of a deduction under Section 80IB was granted for A.Ys. 2001-2002 and 2002-2003, where the assessment orders have attained finality. Unless the deduction for the first year was withdrawn in accordance with law, the relief for the

subsequent years cannot be withheld.

10. In so far as the companion writ petition is concerned, as noted earlier, the assessment has been re-opened within a period of four years of the expiry of the relevant assessment year. In that case, it has been urged that the re-opening of the assessment amounts to a case of a change of opinion. No material was available before the Assessing Officer to come to the conclusion that the income had escaped assessment, having regard to the fact that for the earlier assessment years, the assessment had been completed after the assessee had placed on record all the circumstances including the fact that the plans had been approved on 12th September 1988. It was urged that there was no reason to believe that income had escaped assessment since it is only on the basis of an audit objection that the assessment was sought to be re-opened. Finally it was urged that the Revenue was not entitled to re-open the assessment for A.Y. 2004-2005, once the assessment for the earlier years had attained finality.

11. On behalf of the Revenue, it has been submitted, based on the reply, that during the course of the subsequent proceedings a copy of the license was filed by the Petitioner which state that the plan for the factory had been approved by the Sarpanch on 12th September 1988. This information, according to the Revenue, was not produced during the course of the assessment proceedings for the earlier years. The information showed that the industrial undertaking was in existence much before the date of the lodging of the claim under Section 80IB of the Act for A.Y. 2001-2002. According to the Revenue, the industrial unit was already in existence and was in use of some other person for the purposes of availing the benefit under

Section 80IB of the Act.

12. Section 147 provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 163 assess or re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the Section. Under the first proviso, where an assessment has been made under Section (3) of Section 143 or Section 147 for the relevant assessment year, no action can be initiated under Section 147 after the expiry of four years from the end of the relevant assessment year unless the income chargeable to tax has escaped assessment by reason of the failure of the assessee inter alia to disclose fully and truly all material facts necessary for his assessment, for that assessment year. The jurisdictional condition under Section 147 is the formation of belief by the Assessing Officer that income chargeable to tax has escaped assessment for any assessment year. The reasons which are recorded by the Assessing Officer are crucial and it is on the basis of those reasons alone that the validity of the order reopening an assessment has to be decided. Where an assessment has been made under Section 143(3), action can be initiated after the expiry of four years from the end of the relevant assessment year if the income chargeable to tax has escaped assessment because of the failure of the assessee to make fully and truly a disclosure of the material facts. The provisions of Section 147 have been interpreted in a recent judgment of the Supreme Court in ***Commissioner of Income Tax V/s. Kelvinator of India Limited.***[1] The Supreme Court noted that after 1st April 1989 the power to

1 (2001) 320 ITR 561 (S.C.)

reopen is much wider than earlier since the substantive part of Section 147 only imposes one condition namely that the Assessing Officer must have reason to believe that income has escaped assessment. The Supreme Court held that nonetheless, a mere change of opinion would not justify the exercise of the power to re-open an assessment and there must be tangible material before the Assessing Officer to come to the conclusion that income has escaped assessment. The Supreme Court held thus :

> "..... , one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

13. The assessee made a claim for deduction under Section 80IB of the Act, initially for A.Y. 2001-2002, which was allowed. The benefit of a deduction under Section 80IB was also granted for A.Y. 2002-2003. The assessment order for A.Y. 2001-2002 was passed under Section 143(3) of the Act, upon scrutiny. During the course of assessment proceedings for A.Y. 2003-2004, the assessee filed an Audit Report in Form 10CCB in which relevant particulars of the license to work that was granted to the unit of the assessee was disclosed. The license to work dated 14th August 2000, copy of which was filed before the Assessing Officer, contains a

disclosure of the fact that the plans have been approved by the Sarpanch by his letter dated 12th September 1988. The basis on which the assessment for A.Ys 2003-2004 and 2004-2005 has been sought to be re-opened is that it was during the course of assessment proceedings for subsequent years that the Revenue had obtained a copy of the license which showed that the plans have been approved as far back as on 12th September 1988. This statement which is contained in the reasons, on the basis of which the assessment is sought to be re-opened, is belied by the record which shows that the Revenue was in possession of the material produced by the assessee during the course of the assessment proceedings for A.Y. 2003-2004 which showed that the plans had been approved in the year 1988. Therefore, the basis on which the assessment has been sought to be re-opened is factually incorrect. The Assessing Officer granted the assessee a deduction under Section 80IB after being appraised of all the relevant details, including those in Form 10CCB which showed that plans had been approved in 1988.

14. Moreover, the fact that plans for the building were approved in the year 1988 would make no difference to the claim of the assessee to a deduction under Section 80IB of the Act. Both in the notice re-opening the assessment and in the order disposing of the objections of the assessee, reliance has been sought to be placed on the provisions of sub-clause (i) of Clause (1) of sub-section (2) of Section 80IB. Sub-clause (i) postulates that the industrial undertaking ought not to have been formed either by splitting up or reconstruction of a business already in existence. On the basis of the facts and circumstances and as recorded by the Assessing Officer, it cannot possibly be postulated that the industrial undertaking of the assessee was formed either by the splitting up or by the reconstruction of a

business already in existence. As already noted, it is an admitted position that the land and building was sold by MSFC in exercise of its statutory powers and the purchaser in turn has leased out the land and building to the assessee. It is not the case of the Revenue in the reasons for re-opening the assessment that the plant and machinery installed by the assessee has been previously used. Section 80IB(2)(ii) provides that the industrial undertaking should not be formed by transfer to a new business of plant and machinery or a plant previously used for any other purpose. It is not the case of the Revenue in the reasons for re-opening the assessment that the industrial undertaking of the assessee has been formed by transfer of plant and machinery which has been previously used for any other purpose. The assessee has annexed to the petition before the Court a copy of the Deed of Conveyance under which MSFC transferred the right of the defaulter only in respect of the land and building. The plant and machinery was not the subject matter of the sale. The Deed of Conveyance contains a specific recital that the machinery was not being sold. In these circumstances, it is apparent from the record before the Court that there was no failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment so as to justify the invocation of the powers under Section 148 of the Act beyond the expiry of a period of four years from the end of the relevant assessment year.

15. We may also note in addition that the assessee has filed together with its affidavit in rejoinder, a copy of the information received during the course of a query under the Right to Information Act. The information includes a letter by the Assessing Officer to the Commissioner of Income Tax dated 24th March 2009 seeking permission to the proposal for re-opening the assessment under Section 151(1) of

the Act. The Assessing Officer has noted, while seeking approval of the Commissioner of Income Tax, that during the course of Revenue audit proceedings, an audit objection has been raised on the ground that the assessee was not eligible to a deduction under Section 80IB from A.Y. 2002-2003. The Assessing Officer notes that the audit objection was not accepted but that as a precautionary measure the assessment was re-opened under Section 147. There is merit in the submission urged on the part of the assessee that the Assessing Officer had no reason to believe that income had escaped assessment. We clarify that we have not regarded this circumstance namely, the information which was divulged during the course of a query and the Right to Information Act as the only and exclusive circumstance for coming to a conclusion that the power has not been validly exercised. Basically, the validity of the exercise of the powers to re-open an assessment has to be decided with reference to the reasons recorded while re-opening the assessment. The reasons recorded while re-opening the assessment do not justify the exercise of the power in the facts of this case.

16. In so far as the companion writ petition is concerned (Writ Petition No.268 of 2010), the re-opening of the assessment has taken place within a period of four years from the expiry of the relevant assessment year. However, so far as this case is concerned, it is apparent that the Assessing Officer did not have before him any additional material at all to form a belief that income had escaped assessment. The assessee had admittedly placed on record before the Assessing Officer for A.Y. 2003-2004 the circumstance that the plans have been approved for the building on 12th September 1988. There was no material before the Assessing Officer, that would lead to a formation of belief that the income had escaped

assessment. We may also note that in the present case as well the Assessing Officer appears to have relied exclusively on an audit objection, which has already been dealt with while considering the facts of Writ Petition no.269 of 2010. There was hence a total absence of "tangible material", as explained in the judgment of the Supreme Court in Kelvinator (supra) to justify the conclusion that income had escaped assessment. Finally, it would be necessary to note, as we have observed earlier, that mere existence of the land and building since 1988 is not a circumstance which would dis-entitle the assessee to the benefit of a deduction under Section 80IB of the Act, once other requirements of the provisions are fulfilled.

17. For all these reasons, we quash and set aside the notices dated 24th March 2009 and 31st March 2009. Rule is made absolute accordingly. In the circumstances of the case, there shall be no order as to costs.

(J.P. Devadhar, J.) (Dr.D.Y. Chandrachud, J.)