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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NOS.198 AND 199 OF 2016

Vedanta Ltd. (Formerly known as Sesa Sterlite Limited/Sesa Goa Limited), Sesa Ghor, 20 EDC Complex, Patto, Panjim, Goa 403001. ... PETITIONER

Versus

1. The Assistant Commissioner of Income-tax, Circle 1 (1) having his office at Aaykar Bhavan, Panaji, Goa 403001.

2. The Commissioner of Income-tax, having his office at Patto, Aaykar Bhavan, Panaji Goa 403001.

3. The Union of India, Through the Ministry of Finance, North Block, New Delhi 110001. … RESPONDENTS

Mr Percy Pardiwala, Senior Advocate with Mr Pranav Kakodkar, Advocate for the Petitioner.
Ms Susan Linhares, Standing Counsel with Ms Epsy Fernandes, Advocate for the Respondent Nos.1 and 2.

CORAM: M. S. KARNIK &
VALMIKI MENEZES, JJ.

Reserved on : 19th SEPTEMBER 2024
Pronounced on: 3rd OCTOBER 2024

JUDGMENT : (*Per M.S. Karnik, J.*)

1. Both petitions are decided by a common judgment. Writ Petition No.198/2016 relates to a notice dated 30.09.2014 issued under Section 148 of the Income Tax Act, 1961 for the Assessment Year 2010-11 by respondent no.1. Writ Petition No.199/2016 relates to the Assessment Year 2011-12.

2. By these petitions under Article 226 of the Constitution of India, the petitioner – Vedanta Ltd. (formerly known as Sesa Sterlite Limited/Sesa Goa Limited) prays for the following reliefs:

> *"(a) this Hon'ble Court may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof quash and set aside the notice dated 30th September 2014 issued by Respondent No. 1 under section 148 of the Act to reopen the assessment for the assessment year 2010 - 2011 together with the order dated 16th December 2015 dealing with the Petitioner's objections;*

(b) this Hon'ble Court may be pleased to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and Respondent No. 1 to forthwith and cancel the notice dated 30th September 2014 issued by Respondent No. 1 under section 148 of the Act to reopen the assessment for the assessment year 2010-2011 together with the order dated 16th December 2015 dealing with the Petitioner's objections;

(c) this Hon'ble Court may be pleased to issue a Writ of Prohibition or a writ in the nature of Prohibition or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing Respondent No. 1 to permanently refrain from giving effect to and/or proceeding further by way of reassessment or otherwise in any manner in respect of the notice dated 30th September 2014 issued by Respondent No. 1 under section 148 of the Act to reopen the assessment for the assessment year 2010-2011 together with the order dated 16th December 2015 dealing with the Petitioner's objections."

3. The facts of the case in brief are as under:

The petitioner is a Company incorporated under the Companies Act, 1956 and is regularly assessed to income tax. Respondent no.1 is the Assessing Officer having jurisdiction to assess the petitioner under the Income Tax Act, 1961 ('the Act'

for short) and who has issued the impugned notice under Section 148 of the Act. Respondent no.2 is the Commissioner of Income-tax, who is required to grant approval under Section 151(1) of the Act to the issue of the impugned notice under Section 148 of the Act by respondent no.1.

4. In respect of the Assessment Year 2010-11, the petitioner filed the return of income on 14.10.2010 declaring a total income of ₹1554,29,26,836/- (Rupees One Thousand Five Hundred and Fifty Four Crores Twenty Nine Lakhs Twenty Six Thousand Eight Hundred and Thirty Six only). In the computation of income, the petitioner made it clear that it was claiming a deduction of ₹818,76,45,095/- (Rupees Eight Hundred and Eighteen Crores Seventy Six Lakhs Forty Five Thousand and Ninety Five only) under Section 10B of the Act in respect of its three units being the Codli (600 TPH) unit, the Amona unit and the Chitradurga unit. A separate computation of deduction under Section 10B of the Act in respect of each of the three units was attached to the computation. In addition, an audit report in Form 56G in respect of each of the units confirming that the deduction

under Section 10B of the Act had been correctly computed was also annexed to the return.

5. Pursuant to a query raised by respondent no.1 in respect of Assessment Year 2009-10, the petitioner addressed the letter dated 22.11.2011 by which it provided a detailed explanation why the activity carried on by it in each of the said three units constituted manufacture/production of an article or thing and why each of the said three units was eligible to claim deduction under Section 10B of the Act. The petitioner addressed another letter dated 07.12.2011 for Assessment Year 2009-10 in which it provided respondent no.1 with further details and information relating to the computation of deduction under Section 10B of the Act in respect of the said three units.

6. In relation to the petitioner's claim under Section 10B, respondent no.1 conducted a survey under Section 133A of the Act at the petitioner's premises on 23.12.2011 and 26.12.2011. The statement of its employees was recorded and several documents were impounded. Consequently, respondent no.1 addressed a letter dated 26.12.2011 in which he claimed that pursuant to a survey conducted under Section 133A of the Act it was noticed that the three units in respect of which the

petitioner had claimed deduction under Section 10B of the Act had commenced commercial production long back and no new unit had been set up at Amona and Chitradurga and that the period of 10 years had already lapsed.

7. Respondent no.1 asked the petitioner to explain why the deduction claimed under Section 10B of the Act should not be disallowed. In response, the petitioner addressed a letter dated 27.12.2011 in which it furnished a detailed reply to the query raised by respondent no.1 with regard to the date of commencement of business of each of the said three units. The petitioner pointed out by making a reference to the facts on record that the time period available for a claim of the deduction had not lapsed and that it had fulfilled all the conditions prescribed under Section 10B(2) of the Act. The petitioner accordingly requested that the deduction as claimed in the return of income may be allowed.

8. Respondent no.1 passed an assessment order dated 11.01.2013 under Section 143(3) of the Act by which it computed the petitioner's total income at ₹2484,33,78,765/- (Rupees Two Thousand Four Hundred and Eighty Four Crores Thirty Three Lakhs Seventy Eight Thousand and Seven

Hundred and Sixty Five only). In paragraph IV of the assessment order, respondent no.1 took the view that the petitioner was not eligible to claim deduction under Section 10B of the Act in respect of any of the said three units.

9. Aggrieved by the assessment order, the petitioner filed an appeal before the Commissioner of Income-Tax (Appeals) ['CIT(A)' for short]. The petitioner filed detailed written submissions vide its letter dated 07.08.2014 in which it produced voluminous material in support of its claim for deduction under Section 10B of the Act in respect of each of the said three units. Since the benefit of the order dated 08.03.2013 for the assessment year 2009-10 passed by the Income Tax Appellate Tribunal ('the Tribunal' for short) was also available during the appellate proceedings for the impugned assessment year, the petitioner relied on the conclusions arrived by the Tribunal.

10. During the pendency of the appeal before the CIT(A), the respondent no.1 wrote a letter dated 17.07.2014 informing that a survey under Section 133A was conducted on the petitioner on 20.03.2014 wherein new evidence has been found showing that the petitioner's claim

was not correct and taking into consideration the new evidence, the claim under Section 10B be disallowed. Since the survey under Section 133A was instituted by respondent no.1 after passing the impugned assessment order on 11.01.2013, the CIT(A) did not consider the submission made by respondent no.1.

11. The CIT(A) passed an order dated 11.12.2014 by which he accepted the petitioner's claim for deduction under Section 10B of the Act with regard to the said three units. The CIT(A) also held that the activity carried out at Amona, Chitradurga and Codli did amount to manufacture or production. He held that there was no reconstruction of the existing units and the claims pertained to the new units. He relied on the various decisions cited by the Income Tax Appellate Tribunal before concluding that the activity carried out by the petitioner satisfies the conditions under Section 10B of the Act.

12. The respondent no.1 filed an appeal before the Tribunal as the claim under Section 10B was accepted by the CIT(A). The Tribunal passed an order dated 10.09.2015 in which the claim under Section 10B was restored to the file of CIT(A) to

examine the same in the light of the letter dated 17.07.2014 from respondent no.1.

13. We have perused the affidavit in reply filed by the Revenue. We have also heard Mr Pardiwala, learned Senior Advocate for the petitioner and Ms Susan Linhares, learned Standing Counsel for respondent nos.1 and 2 at length.

14. Before we deal with the rival contentions in the present case, it needs to be noticed that in a collateral proceeding,

(A) Respondent no.1 filed a Miscellaneous Application before the Tribunal bearing MA No.10/PNJ/2013 dated 19.06.2013 in which he alleged that the Tribunal had committed an "apparent mistake of fact" which required rectification under Section 254 of the Act. He inter alia claimed that the finding of the Tribunal that the activities carried on by the petitioner in its three units constituted "manufacture" was contrary to the law laid down by the Hon'ble Supreme Court in the case of ***Chowgule & Co. V/s. Union of India***[1]*. There were other contentions raised by respondent no.1 as to why the petitioner is not eligible for deduction under Section 10B of the Act. The*

[1] (1981) 1 SCC 653

said Miscellaneous Application was dismissed by the Tribunal vide order dated 19.09.2013. The Tribunal opined that in its original order dated 08.03.2013, it had given a finding after considering all the case laws and appreciating the facts of the case. The Tribunal explained that the Miscellaneous Application filed by the Revenue did not relate to any mistake rectifiable on the record under Section 254(2) of the Act. The Tribunal held that the Revenue had in the garb of an application for rectification, sought to reopen and reargue the matter.

(B) Respondent no.2 filed an appeal being TXA No.25/2014 to challenge the said order dated 19.09.2013 of the Tribunal. Vide order dated 05.03.2014, this Court admitted the appeal on the following substantial question of law raised by respondent no.2:

> *"Whether the ITAT is right in holding that there is no mistake apparent on record, when the findings in the original order were contrary to the decision of the Supreme Court in the case of Chowgule & Co.P.Ltd. V/s. Union of India and Ors, 1981 AIR (SC)1014 and the decision of this Court in CIT V/s. Sesa Goa Ltd. (2004) 266 ITR 126?"*

(C) Respondent no.1 filed a second Miscellaneous Application bearing MA No.30/PNJ/2014 dated 21.08.2014 in which he alleged that there was a suppression of material facts by the petitioner which was noticed during the course of survey/post-survey enquiries in respect of setting of the EOU units.

(D) Various allegations were made by respondent no.1 on the basis of such material to demonstrate that Amona unit is an amalgamated/reconstructed unit from the existing two dry plants and one wet plant for beneficiation. New materials were also sought to be placed with respect to Chitradurga unit. The Tribunal was requested to consider the additional evidence produced by respondent no.1 to rectify its order suitably. The petitioner filed detailed written submissions before the Tribunal dealing with the allegations raised by respondent no.1.

(E) The said Miscellaneous Application was dismissed by the Tribunal vide its order dated 07.01.2015. The Tribunal held that the decision in the order dated 08.03.2013, that the units set up by the petitioner are "new" and eligible for deduction under Section 10B of the Act was based on an appreciation of the facts on record and that the department had not been able

to show that the Tribunal had not considered any contention, plea or argument raised before it.

(F) So far as alleged suppression of sales is concerned it may be stated that Justice M.B. Shah Commission of Enquiry was set up to investigate the illegal mining of iron ore and manganese in the State of Goa. The Shah Commission has given particulars of cases relating to the petitioner where according to it, there is under-invoicing. The Commission, however, made it amply clear that its findings in the report on the issue of alleged under-invoicing are tentative in nature. The issue of alleged under-invoicing of exports by the petitioner has been independently examined by the Customs Department. The Commissioner of Customs, Goa, also examined the issue in depth with respect to each shipping bill for the export of iron ore fines by the petitioner. No fault was found with the value at which the petitioner had invoiced the exports. In the assessment order passed by the Commissioner of Customs, a reference was made to a letter dated 23.09.2014 addressed by the Directorate of Revenue Intelligence to the Assistant Commissioner of Customs (SIIB) in which it is categorically stated that the investigations into the case

pertaining to the petitioner as a result of the Justice M.B. Shah Commission Report have been completed and no show cause notice has been issued to the petitioner as no evidence of under-invoicing was detected so far.

(G) So far as the alleged illegal mining activity carried on by the petitioner is concerned, in its judgment dated 21.04.2014 in ***Goa Foundation V/s. Union of India*** *(Writ Petition (Civil) No.435/2012), the Hon'ble Supreme Court held, on an interpretation of the relevant statutory provisions, that the deemed mining leases of the lessees in Goa expired on 22.11.1987 and the maximum of 20 years renewal period of the deemed mining leases in Goa also expired on 22.11.2007, consequently the mining by the lessees in Goa after 22.11.2007 was illegal. The Hon'ble Supreme Court directed that the State Government may grant mining leases of iron ore and other ores in Goa in accordance with its policy decision and in accordance with the MMDR Act and the Rules made thereunder in consonance with the constitutional provisions. Subsequent thereto some Writ Petitions are filed which may not be relevant to a decision in this case.*

(H) Respondent No.2 – The Commissioner of Income-tax after receipt of the order dated 08.03.2013 of the Tribunal for the Assessment Year 2009-10 filed an appeal under Section 260A of the Act being Tax Appeal Nos.13 and 14 of 2013 in this Court in which the finding of fact of the Tribunal that the said three units are new units was challenged. This Court admitted the appeals on 23.09.2013. Respondent no.1 also took recourse to filing Miscellaneous Applications before the Tribunal for the Assessment Year 2009-10 reiterating the submission that the petitioner is not entitled to deduction under Section 10B of the Act in respect of the profits from 100% EOUs.

15. Then the decisions of this Court which have a bearing on the issues involved in the present petition need to be noticed, which are as follows:

> *(i)* ***WP No.102/2016*** *and other connected matters dated 09.07.2019 in the case of* ***Shantadurga Transport Company Pvt. Ltd. V/s. ACIT & Anr.,***
> *(ii)* ***WP No.233/2015 and 883/2016*** *dated 19.01.2024 in the case of* ***Sociedade de Fomento Industrial Pvt. Ltd. V/s. ACIT & Anr.,***
> *(iii)* ***WP Nos.262/2016*** *and other connected matters dated 26.04.2024* in the case of ***Balaji Mines and Minerals Pvt. Ltd. V/s. ACIT & Ors.***

16. In the context of the present case, it is relevant to note that pursuant to the passing of the assessment order by respondent no.1 on 11.01.2013, appeal filed by the petitioner before the CIT(A) was allowed. The CIT(A) vide its order dated 11.12.2014 accepted the petitioner's claim for deduction under Section 10B of the Act with regard to the said three units. The CIT(A) also held that the activity held at Amona, Chitradurga and Codli did not amount to manufacture or production. It was held that there was no reconstruction of existing units and the claim pertains to the new units. It is held that the activity carried out by the petitioner satisfies the condition under Section 10B of the Act. Against the order of the CIT(A), respondent no.1 filed an appeal before the Tribunal as the claim under Section 10B was accepted by the CIT(A). The Tribunal passed an order dated 10.09.2015 in which the claim under Section 10B was restored to the file of CIT(A) to examine the same in the light of the letter dated 17.07.2014 from the respondent no.1.

17. It is pertinent to mention that the letter dated 17.07.2014 addressed by respondent no.1 to the CIT(A) was

informing that a survey under Section 133A was conducted on the petitioner on 20.03.2014 wherein new evidences have been found showing that the petitioner's claim were not new units and taking into consideration the new evidences, the claim under Section 10B be disallowed. Since the survey under Section 133A was instituted by respondent no.1 after passing the impugned assessment order on 11.01.2013, the CIT(A) did not consider the submission made by respondent no.1.

18. As indicated earlier, the Tribunal passed an order dated 10.09.2015 in which the claim under Section 10B was restored to the file of CIT(A) to examine the same in the light of the letter dated 17.07.2014 from respondent no.1.

19. Mr Pardiwala, learned Senior Advocate relied on the third proviso to Section 147 in support of his submissions. Section 147 reads thus:

> *147. If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in*

this section and in sections 148 to 153 referred to as the relevant assessment year).

Provided *that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, 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:*

Provided further *that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:*

Provided also *that the Assessing Officer "may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.*

(emphasis supplied)

20. The allegations of under-invoicing exports as well as illegality in carrying the mining activities by the petitioner came up for consideration in several Writ Petitions. We find it

relevant to refer to the observations of this Court in ***Sesa Sterlite Limited V/s. The Assistant Commissioner of Income-Tax & Ors.*** in Writ Petition No.141/2015, which was decided recently on 04.09.2024. Para 34 of the decision in *Sesa Sterlite Limited V/s. The Assistant Commissioner of Income-Tax & Ors.* (supra) reads thus:

> "*34. We find that the reasons recorded prior to the issuance of the notice, as set out herein before, proceed on the footing that the reassessment proceedings are initiated on account of three circumstances. The first two circumstances viz. the allegation of under invoicing exports as well as the allegation that the mining activities carried out by the petitioner are illegal came up for consideration in several Writ Petitions some of which were disposed of by this Court by three separate judgments. The first judgment is in the case of* ***Sesa Sterlite Limited and others V/s. ACIT*** [2]*. This Court held that the Assessing Officer could never have reason to believe that the income of the assesses therein had escaped assessment on account of the observations made in the third report of Justice M.B. Shah Commission as well as on account of the declaration by the Supreme Court in its judgment dated 21.04.2014 in the case of* ***Goa Foundation V/s. Union of India***[3] *that the mining activities that were carried out post 2007*

[2] 417 ITR 774
[3] WP No.435 of 2012

after the expiry of the mining leases were illegal. This Court reiterated this view in its subsequent judgment dated 19.01.2024 in the case of ***Sociadade de Formento Industrial Co. Ltd. V/s. ACIT***[4] *and judgment dated 26.04.2024 in the case of* ***Balaji Mining and Minerals Private Limited & Ors. V/s. ACIT Circle 1***[5] *. This aspect of the matter has been dealt with from paras 52 to 59 of the judgment. For the same reason, in the present case also, the reopening in so far as this circumstance is concerned is not sustainable in law. So far as the allegation of under invoicing of exports is concerned, we find that by an order dated 30.03.2012, the CIT(A) had passed an order under Section 263 revising the assessment originally framed and directing the Assessing Officer to consider the report filed by the SFIO and submissions of the petitioner thereon. Thereafter, the Assessing Officer has passed an order under Section 143(3) on 20.03.2013 accepting that having regard to the supplementary report furnished by SFIO there was no basis in the allegation that the petitioner was under invoicing its exports. The Assessing Officer has also found that the petitioner has not under invoiced its exports on the basis of the allegations made in the Shah Commission report. This circumstance also is not in support of the Revenue."*

[4] WP No.233 of 2015
[5] WP No.262 of 2016

21. As indicated in the earlier part of this judgment, pursuant to the passing of the assessment order by respondent no.1 on 11.01.2013, the appeal filed by the petitioner before the CIT(A) was allowed. The CIT(A) vide its order dated 11.12.2014 accepted the petitioner's claim for deduction under Section 10B of the Act with regard to the said three units. Against the order of CIT(A), respondent no.1 filed an appeal before the Tribunal as the claim under Section 10B was accepted by CIT(A). The Tribunal passed an order dated 10.09.2015 in which the claim under Section 10B was restored to the file of the CIT(A) to examine the same in the light of a letter dated 17.07.2014 from respondent no.1. This letter dated 17.07.2014 addressed by respondent no.1 to the CIT(A) informed that the survey under Section 133A was conducted on the petitioner on 20.03.2014 wherein new evidences have been found showing that the petitioner's claim was not a new unit and taking into consideration new evidences the claim under Section 10B be disallowed.

22. It may be mentioned that this very survey formed the basis of the contention raised by the petitioner in *Sesa Sterlite Limited V/s. The Assistant Commissioner of Income-Tax*

(supra) decided on 04.09.2024 and the petitions referred to hereinbefore. In this context, it is relevant to refer to the observations of this Court from paras 35 to 41, which read thus:

> *35. Let us now consider the reasons of the Assessing Officer that the petitioner's claim for deduction under Section 10B cannot be countenanced on the basis of the information found in the course of a survey conducted on 20.03.2014. The petitioner had claimed a deduction under Section 10B in the return of income that it had filed on 29.09.2009 in a sum of ₹451.28 crores in respect of the profits derived from its export oriented undertakings situated at Amona, Chitradurga and Codli. As noted earlier, on the basis of the documents found in the course of a survey conducted on 23.12.2011, respondent No.1 denied the claim of the deduction under Section 10B in its entirety. The said claim was denied on the premise that the units at Amona and Chitradurga were not new units and the setting up of the same by making some investments on plant and machinery would not justify a claim for deduction under Section 10B. The CIT(A) upheld the denial of the claim of deduction under Section 10B by respondent no.1. However, the Tribunal by an order dated 08.03.2013 upheld the claim of the petitioner for deduction under Section 10B. The Tribunal dealt with all the reasons given by the Assessing Officer. The Tribunal, from paragraph 45.11 onwards of its order, specifically dealt with the argument that the units at Amona and Chitradurga were not new units but were merely a reconstruction*

of the existing units. Thus, it is apparent that the subject matter of appeal both before the CIT(A) as well as before the Tribunal was whether the petitioner was entitled to a deduction under Section 10B as claimed.

36. The question whether the petitioner can claim deduction under Section 10B was decided by the Tribunal. The tax appeal of the Revenue was pending in this Court. The Assessing Officer as well as the CIT(A) had already taken a view that the petitioner is not entitled to deduction under Section 10B. During the pendency of the tax appeal before this Court, a fresh survey was conducted and on the basis of the materials which were found during the survey in 2014. The re-assessment is sought to be justified for the purpose of denying the claim of the petitioner for deduction under Section 10B. Thus, the reasons of the Assessing Officer in support of his finding may be several but what is relevant is the subject matter of the tax appeal. It is here that according to us the third proviso to Section 147 will spring into effect. The third proviso says that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

37. Let us examine if the third proviso comes in the way of reassessment. The reassessment proceedings are obviously initiated as the income chargeable to tax has escaped assessment. The claim of the assessee for deduction under Section 10B after

the initial survey was negatived by the Assessing Officer as well as the CIT(A). When the fresh survey was conducted during the pendency of the proceedings before this Court, the new materials found by the Assessing Officer were sought to be placed before the Tribunal and this Court. The issue under consideration before the Tribunal as well as this Court was whether the assessee is entitled to claim deduction under Section 10B. Assuming that the reassessment proceedings is allowed to continue on the basis of the new materials during the pendency of the proceedings before the Tribunal and thereafter in this Court, a situation may arise that this Court finds the petitioner is entitled to claim deduction under Section 10B; whereas in the reassessment proceedings, the Assessing Officer on the basis of the new materials may come to a conclusion that the petitioner is not entitled to claim deduction under Section 10B. In our opinion, it is obviously to get over such an anomalous situation that the third proviso to Section 147 is meant to cover.

38. It is significant to note that an application was preferred by the Revenue even in this Court during the pendency of the Tax Appeal for considering the new materials on record found during the fresh survey. In fact, Miscellaneous Application was moved before the Tribunal also for bringing these facts on record pursuant to the passing of the order by the Tribunal, which was not entertained. The Miscellaneous Application filed by the Revenue in this Court for bringing the new materials on record was directed to be heard at the time of final hearing. Despite placing

all these facts on record, this Court upheld the order of the Tribunal thereby granting the claim of the assessee under Section 10B. It may be that this Court decided the Tax Appeal on the basis of the materials on record without adverting to the new materials which the Revenue claims to have found during the course of the fresh survey conducted in 2014. This Court, though conscious of the new materials and the reassessment proceedings, upheld the order of the Tribunal. The effect of the order passed by this Court in the tax appeal filed by the Revenue is that the assessee's claim for deduction under Section 10B has been upheld. According to us, in such a situation, if the reassessment proceedings are allowed to continue, the same would virtually amount to having an effect of sitting in appeal over the orders passed by this Court as well as the Tribunal. This cannot be countenanced. Though it is the allegation that fresh evidence was unearthed during the course of fresh survey in March 2014, it indicates that the new units were in fact not new units but an amalgamation of the existing units. The exercise really is to rely on these materials in support of the findings earlier recorded by the Assessing Officer which was already subject matter of challenge before the competent forum.

39. In ***Poonam Builders V/s. ACIT***[6]*, the assessee therein had claimed a deduction under Section 81B(10) which was denied to it in the course of an assessment framed under Section 153A read with*

[6] 162 Taxmann 238

153C of the Act. This denial was challenged by the assessee therein before the CIT(A) on two grounds, viz., that such denial could not be done in the course of an assessment framed under section 153A read with section 153C of the Act in the absence of any incriminating material found in the course of the search and, in any event, all the conditions required to be complied with for being entitled to a deduction under Section 81B(10) were fulfilled. The CIT(A) passed an order accepting the first contention and, therefore, did not deal with the second contention. Thereafter, a notice under Section 148 was issued proposing to reassess the assessee's income on the ground that the deduction under Section 81B(10) was wrongly allowed in the original assessment. This Court held that the proviso is a clear bar to the exercise of jurisdiction to reopen where any income which is the subject matter of appeal is alleged to have escaped assessment. This Court held that albeit the CIT(A) has not decided the issue with regard to the entitlement of the assessee to claim a deduction under Section 81B(10), nevertheless, the entitlement of the assessee therein to the deduction was certainly a subject matter of appeal and, accordingly, the reopening could not be sustained. Similar such view has been taken by the Delhi High Court, Gujarat High Court, Kerala High Court, Madras High Court as well as this Court in the following decisions:
(i) M/s Alcatel Lucent France & Anr. V/s. Assistant Director of Income-tax[7]*;*

[7] 384 ITR 113

(ii) CIT V/s. Flothern Engineers Private Limited[8];
(iii) ICICI Bank Limited V/s. Dy. CIT Circle 3(1)[9];
(iv) Jhankit Chandulal Prajapati V/s. Dy. CIT Central Circle (1)(2)[10];
(v) Metro Auto Corporation V/s. ITO[11];
(vi) S.S.Landmarks V/s. ITO[12];
(vii) PCIT Vs. Kerala State Electricity Board[13]; and
(viii) Yogeshbhai R. Dhanak V/s. ACIT[14].

40. A brief reference to the Tax Appeal filed by the Revenue in this Court challenging the decision of the Tribunal is necessary. As indicated earlier, the Tribunal allowed the claim for deduction under Section 10B. One of the questions that was raised in the Tax Appeal was whether the deduction was rightly allowed in view of the fact that the units were not new units. This Court in its order admitting the appeal vide order dated 23.09.2013 did not formulate this question. However, this Court in its judgment dated 07.05.2021 has noted the argument of the learned counsel for the Revenue in para 7 as well as in para 17 to the effect that the Amona and Chitradurga units were not new units. The subject matter of Tax Appeal was the entitlement of the petitioner to a claim for deduction under Section 10B of the profits

[8] 45 Taxmasnn 546
[9] 16 Taxmann 250
[10] 106 Taxmann 312
[11] 286 ITR 618
[12] 117 Taxmann 825
[13] 439 ITR 323
[14] 41 Taxmann 183

that are derived from its export oriented undertakings situated at Amona, Chitradurga and Codli. It is this claim which was adjudicated by the appellate authorities in the original assessment proceedings. Respondent no.1 wants to reassess this claim by relying on certain additional evidence found in the course of the survey which according to him supports its case that the deduction under Section 10B could not be allowed. According to us, such a course of action cannot be countenanced as it would be in the teeth of the third proviso to Section 147.

41. For the reasons stated above, in our opinion, respondent no.1 has acted wholly without jurisdiction when he has sought to assume jurisdiction to reassess the petitioner's income so as to once again disallow a claim for deduction under Section 10B."

23. In the present case, we find that the claim under Section 10B was restored to the file of the CIT(A) by an order of the Tribunal dated 10.09.2015. The CIT(A) was directed to examine the same in the light of the letter dated 17.07.2014 from respondent no.1. In our opinion, as the proceedings are still pending on the file of the CIT(A), we find force in the submission of Mr Pardiwala learned Senior Advocate that the present petitions are squarely covered by the decision of this Court in *Sesa Sterlite Limited V/s. The Assistant*

Commissioner of Income Tax and Ors. (supra) decided on 04.09.2024. We, therefore, have no hesitation in allowing these petitions in view of the third proviso to Section 147 of the Act.

24. Writ Petition No.198/2016 is accordingly allowed in terms of prayer clause (a). Writ Petition No.199/2016 is also allowed in terms of prayer clause (a). No order as to costs. Needless to mention that the proceedings before the CIT(A) to proceed on its own merits and in accordance with law.

VALMIKI MENEZES, J. **M. S. KARNIK, J.**