

W.P.No.9241 of 2014
and
W.P.Nos.6858 & 6879 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.04.2021

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.9241 of 2014 and W.P.Nos.6858 & 6879 of 2015

and

M.P.Nos.1 & 3 of 2014 and M.P.Nos.2,2 & 3,3 of 2015

W.P.No.9241 of 2014

M/s.Aircel Cellular Limited,
Spencer Plaza 5th Floor
769, Anna Salai,
Chennai – 600 002

Represented by its Authorized Signatory
Mr.K.Raghuraman

..Petitioner

vs

Deputy Commissioner of Income Tax
Company Circle – I (1), 6th Floor,
Aayakar Bhavan – Wanaparthi Block,
121, Mahatma Gandhi Salai,
Nungambakkam,
Chennai – 600 034.

..Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records comprised in the Notice dated 30.3.2013 as also communications dated

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21.2.2014 and 14.3.2014 purportedly issued in support thereof by the respondent and all proceedings pursuant thereto, including notices issued under section 143(2) and 142(1) dated 18.3.2014 and 19.3.2014 respectively and quash the same as illegal, arbitrary and unconstitutional and consequently forbear the respondent from proceeding with re-assessment under Sections 147 and 148 of the Income Tax Act, 1961 in respect of the Assessment Year 2006-2007.

W.P.No.6858 of 2015

M/s.Aircel Cellular Limited,
Spencer Plaza 5th Floor
769, Anna Salai,
Chennai – 600 002

Represented by its Authorized Signatory
Mr.K.Raghuraman

..Petitioner

Deputy Commissioner of Income Tax
Company Circle – I (1), 6th Floor,
Aayakar Bhavan – Wanaparthi Block,
121, Mahatma Gandhi Salai,
Nungambakkam,
Chennai – 600 034.

..Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, Calling for the records comprised in the impugned notice dated 30.03.2014 bearing PAN

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AAACR5136R in respect of Assessment year 2007-08 issued by the Respondent and purported to have been issued under Section 148 of the Income Tax Act, 1961 and all proceedings pursuant or consequent thereto including the consequential communication of reasons dated 07.10.2014 bearing PAN AAACR5136R / 2014-15 notice dated 14.01.2015 bearing notice PAN AAACR5136R/2014-15 and the notice dated 14.01.2015 bearing PAN AAACR5136R / 2007-08 and quash the same as illegal, arbitrary and unconstitutional and consequently forbear the Respondent from proceeding with re-assessment under Sections 147 and 148 of the Income Tax Act, 1961 in respect of the Assessment Year 2007-2008.

W.P.No.6879 of 2015

M/s.Aircel Cellular Limited,
Spencer Plaza 5th Floor
769, Anna Salai,
Chennai – 600 002
Represented by its Authorized Signatory
Mr.K.Raghuraman

..Petitioner

vs

Deputy Commissioner of Income Tax
Company Circle – I (1), 6th Floor,
Aayakar Bhavan – Wanaparthi Block,
121, Mahatma Gandhi Salai,
Nungambakkam,
Chennai – 600 034.

..Respondent

*W.P.No.9241 of 2014
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Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, Calling for the records comprised in the impugned notice dated 26.03.2014 bearing PAN AAACR5136R in respect of Assessment year 2009-10 issued by the Respondent and purported to have been issued under Section 148 of the Income Tax Act, 1961 and all proceedings pursuant or consequent thereto including the consequential communication of reasons dated 08.10.2014 bearing PAN AAACR5136R / 2014-15 notice dated 14.01.2015 bearing notice PAN AAACR5136R/2014-15 and the notice dated 14.01.2015 bearing PAN AAACR5136R / 2009-10 and quash the same as illegal, arbitrary and unconstitutional and consequently forbear the Respondent from proceeding with re-assessment under Sections 147 and 148 of the Income Tax Act, 1961 in respect of the Assessment Year 2009-2010.

For Petitioner : Mr.Vishnumohan
For Mr.R.Parthasarathy
[in all W.Ps]

For Respondents : Mr.Prabhumukunth Arunkumar
Standing counsel
[For Income Tax]

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COMMON ORDER

The initiation of proceedings under Section 147 of the Income Tax Act[in short, 'the Act'], reopening the assessment for the Assessment Years 2006-07, 2007-08 and 2009-10 are under challenge in the present writ petitions.

Facts of the Case:

2. **W.P.No.9241 of 2014**: The petitioner is engaged in the business of providing Telecommunication Services and operates in the Chennai Circle pursuant to the License granted by the Department of Telecommunications, Government of India. Pursuant to the commencement of business operations during the Assessment Year 1996-97, the petitioner started claiming the deduction under Section 80-IA of the Act from AY 2005-06. In its return of income submitted for the Assessment Year 2006-07, as initially filed on 29.11.2006 and subsequently, revised on 31.07.2007, the petitioner /assessee claimed deduction under Section 80-IA of the Act amount to Rs.87,29,69,962/-. Subsequently, the return of income has filed for the Assessment Year 2006-07 was selected for scrutiny and notice dated

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05.10.2007 was issued under Section 143(2) of the Act. The petitioner / assessee, in response to the said notice, duly filed its written submission dated 30.10.2007, providing details regarding the claim under Section 80-IA of the Act. Relevant documents and extracts thereof were highlighted which would demonstrate that the claim for deduction in terms of Section 80-IA is claimable from any year within 15 years from the date of commencement of operations of the assessee, subject to the cap of 10 consecutive years for availment of the benefit was duly notified and communicated in the submissions made by the petitioner before the respondent. Meanwhile, the return of income was processed under Section 143(1) of the Act, determining total refund of Rs.1,41,39,871/-. During the course of assessment hearing on 13.08.2008 under Section 143(3), the assessment officer called for various details / clarifications and all such details and clarifications were provided by the petitioner / assessee to the Assessing Officer along with the documents. Having satisfied with the documents as well as the informations provided by the petitioner / assessee, the Assessing Officer passed a final assessment order under Section 143(3) of the Income

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Tax Act on 28.11.2008. The Assessing Officer accepted the contentions of the petitioner / assessee for the purpose of claiming benefit under Section 80-IA of the Act. The issues were adjudicated and concluded. Subsequently, the respondents have initiated proceedings under Section 147 of the Act for reopening of assessment. Notice under Section 148 of the Act was issued on 30.03.2013. The petitioner submitted an application on 29.04.2013 and the reasons for reopening of assessment was provided in proceedings dated 21.02.2014 and further, reasons were furnished by the Department to the assessee on 14.03.2014.

3. With this document, the learned counsel for the petitioner strenuously contended that it is a classic case of change of opinion and cannot be construed as reason to believe as contemplated under Section 147 of the Income Tax Act. It is visible from the reasons furnished by the Department that they have changed their opinion with reference to the claim made by the petitioner under Section 80-IA of the Act, which was allowed by the Assessing Officer in the original assessment order. In order to

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substantiate the said contentions, the learned counsel for the petitioner solicited the attention of this Court with reference to the reasons given for reopening of assessment in proceedings dated 21.02.2014 by the Deputy Commissioner of Income Tax. Referring the said reasons, it is contended that the company started claiming exemption under Section 80-IA for the Assessment Year 2005-06 to the extent of 100% of the profits and gains derived from the business. However, the scrutiny of the records reveals that the assessee company commenced its operations with effect from the Assessment year 1996-97. The respondents formed an opinion that from the Assessment Year 2005-06, the assessee started claiming deduction under Section 80-IA to the extent of 100% of the Profits and gains derived from the business. Therefore, the action of the assessee in claiming deduction under Section 80-IA for the Assessment Year 2006-07 to Assessment Year 2009-10 is not in order. The relevant provisions of Section 80-IA amended by the Finance Act 1999 with effect from 01.04.2000 and the amendment contemplates that “.....*any undertaking which has started or starts providing telecommunication services whether basic or cellular, including*

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radio paging, domestic satellite service or network of trunking and electronic data interchange services at any time on or after the 1st day of April 1995 but before the 31st day of March 2000.”

4. The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of 15 years beginning from the year in which the undertaking as the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops and industrial park or generates power or commences transmission or distribution of power.

5. **W.P.No.6858 of 2015:** The petitioner is engaged in the business of providing Telecommunication Services and operates in the Chennai Circle pursuant to the License granted by the Department of Telecommunications, Government of India. Pursuant to the commencement of business operations during the Assessment Year 1996-97, the petitioner started claiming the deduction under Section 80-IA of the Act from AY 2005-06. In its return of

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income submitted for the Assessment Year 2007-08, as initially filed on 31.10.2007 and subsequently, revised on 04.03.2010, the petitioner /assessee claimed deduction under Section 80-IA of the Act amount to Rs.124,60,36,702/-. Subsequently, the return of income has filed for the Assessment Year 2007-08 was selected for scrutiny. The petitioner / assessee, duly filed its written submission dated 12.08.2010, providing details regarding the claim under Section 80-IA of the Act. Relevant documents and extracts thereof were highlighted which would demonstrate that the claim for deduction in terms of Section 80-IA is claimable from any year within 15 years from the date of commencement of operations of the assessee, subject to the cap of 10 consecutive years for availment of the benefit was duly notified and communicated in the submissions made by the petitioner before the respondent. Meanwhile, the return of income was processed under Section 143(1) of the Act. The purported reasons and justifications as required and mandated under law, have been provided vide communication from the respondent dated 07.10.2014. It is further stated that the inordinate and inexplicable gap between the issuance of the notice

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and the furnishing of purported reasons for reopening of the assessment is itself fatal to the impugned re-assessment proceedings as per settled judicial precedents. Further, the reasons for re-opening is based on a change of opinion on the part of the respondent/department and it is without jurisdiction as there are no new facts / material, which have come to the notice of the respondent that led to issuance of impugned notice as all material / information relating thereto was disclosed / furnished during the course of original assessment and therefore, the impugned notices are liable to be quashed. Further, the issuance of notice under Section 143(2) of the Income Tax Act dated 14.01.2015, seeking furnishing of details and fixing date of hearing / for completing re-assessment on 09.02.2015 is against the principles of natural justice and therefore, liable to be quashed.

6. **W.P.No.6879 of 2015**: The petitioner is engaged in the business of providing Telecommunication Services and operates in the Chennai Circle pursuant to the License granted by the Department of Telecommunications, Government of India. Pursuant to the commencement of business operations

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during the Assessment Year 1996-97, the petitioner started claiming the deduction under Section 80-IA of the Act from AY 2005-06. In its return of income submitted for the Assessment Year 2009-10, as initially filed on 30.09.2009. The petitioner /assessee claimed deduction under Section 80-IA of the Act amount to Rs.85,04,61,371/- Subsequently, the return of income has filed for the Assessment Year 2009-10 was selected for scrutiny. The petitioner / assessee, duly filed its written submission dated 17.08.2010, providing details regarding the claim under Section 80-IA of the Act. Relevant documents and extracts thereof were highlighted which would demonstrate that the claim for deduction in terms of Section 80-IA is claimable from any year within 15 years from the date of commencement of operations of the assessee, subject to the cap of 10 consecutive years for availment of the benefit was duly notified and communicated in the submissions made by the petitioner before the respondent. Meanwhile, the return of income was processed under Section 143 of the Act. The purported reasons and justifications as required and mandated under law, have been provided vide communication from the respondent dated 08.10.2014. It is

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further stated that the inordinate and inexplicable gap between the issuance of the notice and the furnishing of purported reasons for reopening of the assessment is itself fatal to the impugned re-assessment proceedings as per settled judicial precedents. Further, the reasons for re-opening is based on a change of opinion on the part of the respondent/department and it is without jurisdiction as there are no new facts / material, which have come to the notice of the respondent that led to issuance of impugned notice as all material / information relating thereto was disclosed / furnished during the course of original assessment and therefore, the impugned notices are liable to be quashed. Further, the issuance of notice under Section 143(2) of the Income Tax Act dated 14.01.2015, seeking furnishing of details and fixing date of hearing / for completing re-assessment on 09.02.2015 is against the principles of natural justice and therefore, liable to be quashed.

7. The learned counsel for the petitioner relied on the Circular issued by CBDT dated 15.02.2016, wherein it is clarified as follows:

“In the above sub-section, which prescribes the manner

of determining the quantum of deduction, a reference has been made to the term 'initial assessment year'. It has been represented that some Assessing Officers are interpreting the term 'initial assessment year' as the year in which the eligible business/manufacturing activity had commenced and are considering such first year of commencement/operation etc., itself as the first year of granting deduction, ignoring the clear mandate provided under sub-section (2) which allows a choice to the assessee for deciding the year from which it desires to claim deduction out of the applicable slab of fifteen (or twenty) years.”

8. The learned counsel for the petitioner mainly contended that the commencement of operation of the petitioner company and the benefit claimed under Section 80-IA of the Act from the Assessment Years 2005-06, 2007-08 & 2009-10 as well as the contentions are admitted by the Assessing Officer and the petitioner also clarified the facts and circumstances with reference to documents and evidences, assessment order was passed under Section 143(3) of the Act. Thus, by giving different interpretation, the subject adjudicated and concluded by the Assessing Officer, cannot be reopened under Section 147 of the Act and the same would amount to

change of opinion and thus, the writ petitions are to be allowed.

9. The writ petitioner is of an opinion that there are no new facts or materials available on records for the purpose of reopening of assessment. The material facts already adjudicated by the Assessing Officer in the assessment order, sought to be reopened, which is impermissible under the provisions of Section 147 of the Act.

10. The learned counsel for the respondent objected the contentions raised on behalf of the petitioner by stating that it is not the change of opinion. There are concrete materials to arrive a conclusion that there is a reason to believe as required under Section 147 of the Act. Even an under assessment or otherwise is a ground for reopening of assessment. In the present case, any erroneous claim made resulting under assessment, would constitute a ground for reopening of assessment by the Assessing Officer by invoking Section 147 of the Act. The benefit claimed by the petitioner under Section 80-IA may be the common ground raised. However, the Intricacies

and the manner, in which, such claim was made by the petitioner, constitutes a fresh ground for the purpose of reopening of assessment and therefore, such informations or materials is to be construed as new materials, which were not adjudicated by the Assessing officer at the time of passing original assessment order.

11. With reference to the clarification issued by the CBDT in Circular dated 15.02.2016 that the petitioner has a right to claim within 15 years from the date of commencement of business operations, the learned counsel for the petitioner relied on the proceedings dated 14.03.2014 issued by the Deputy Commissioner of Income Tax to the petitioner, wherein it is categorically held as follows:

“Provisions of Section 80-IA:

The assessee contends that it has claimed the deduction under Section 80-IA as per the amended provisions of the Act. The contention is not tenable since the assessee company commenced its operation during the AY 1996-97 and as such the its eligibility to claim the deduction would fall

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under the erstwhile/pre-amended provisions of Section 80-IA. The company which started providing telecommunication services after 1st April, 2000, will only be eligible for the new provisions of Section 80-IA. As per the erstwhile provisions, the assessee company's eligibility was clearly recorded in the reasons communicated.”

12. When the objections raised by the petitioner with reference to the claim made under Section 80-IA has been dealt with by the competent authorities and a reason has been given that the Department could able to identify certain new materials and the erroneous application of Section 80-IA, there is reason to believe for reopening of assessment and therefore, the writ petitions are liable to be dismissed.

13. This Court is of the considered opinion that the scope of Section 147 of the Income Tax Act is wider enough to cover the under assessment also. Sub Clause (c)(i) to Explanation 1 to Section 147 contemplates that “income chargeable to tax has been under assessed, then also, reopening of

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assessment is permissible.” Even Explanation 1 clarifies “Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.” Thus, various circumstances are provided for the Assessing officer for reopening of assessment, in the event of identifying any new materials including new assessment or certain facts not adjudicated with reference to certain documents etc., The very purpose and object of reopening of assessment is to ensure that the assessee pay the correct tax as applicable with reference to the provisions of the Act. In the event of any escapement and the Assessing Officer found that certain materials are available for the purpose of reopening of assessment, then it is to be construed that the Assessing Officer has reason to believe and the assessee would get ample opportunity to defend the case in the manner known to law. If the assessee has got certain reasons / clarifications / defense, then all such defense or documents are to be produced before the Assessing officer at the time of assessment. Contrarily, High Court in a writ

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proceedings, cannot adjudicate all such disputed facts and circumstances raised between the parties. Disputed facts are to be adjudicated with reference to the documents, evidences and materials available on record and such an exercise is impermissible in a proceedings under Article 226 of the Constitution of India. Thus, what is required is, whether any one of the circumstances as contemplated under Section 147 of the Income Tax Act is attracted with reference to the initiation of proceedings under Section 147 and if the Court formed an opinion that there is a reason to believe for reopening of assessment, then the same would be sufficient to proceed with the case by the Assessing Officer. However, the “Sufficiency” of the reasons cannot be gone into by the High Court in a writ proceedings. Reason to believe is one aspect of the matter and sufficiency of the materials is another aspect, which is to be adjudicated by the Assessing Officer during the enquiry and certainly not by the High Court.

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14. As far as the writ petition in W.P.No.9241 of 2014 is concerned,

the reasons are provided in proceedings dated 21.02.2014, wherein it is stated as follows:

“According to Section 80-IA which stood prior to 01.04.2000, the assessee being engaged in providing telecommunication services was entitled to a deduction of 100% of the profits and gains derived from such business for the initial five assessment years and thereafter, 30% of the profits and gains for the remaining five assessment years. Section 80-IA (12), then defined the initial assessment year as the assessment year relevant to the previous year in which the undertaking starts to provide the telecommunication services. It could be seen that the assessee had no option to choose the initial assessment year in terms of provisions of Section 80-IA of the Act as existed in the AY 1996-97. Since there was no option for the assessee. It has to claim deduction in the AY 1996-97 themselves and for subsequent nine years and not from any other year. It is seen from the assessment records that in the initial assessment years, the assessee incurred substantial losses from the business and such losses were adjusted against the profits of the business upto AY 2004-05. From

AY 2005-06, the assessee started claiming deduction under Section 80-IA to the extent of 100% of the profits and gains derived from the business. Therefore, the action of the assessee in claiming deduction under Section 80-IA for the Assessment Year 2006-07 to AY 2009-10 is not in order. The relevant provisions of Section 80-IA amended by the Finance Act 1999 w.e.f.1.4.2000 reads as under:

“.....any undertaking which has started or starts providing telecommunication services whether basic or cellular, including radio paging, domestic satellite service or network of trunking and electronic data interchange services at any time on or after the 1st day of April 1995 but before the 31st day of March 2000.”

The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of 15 years beginning from the year in which the undertaking as the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops and industrial park or generates power or commences transmission or distribution of power.

The initial assessment years is to be taken as AY 1996-97 and the assessee is eligible only for 30% of the deduction claim and remaining 70% is to be taxed. Hence, deduction under Section 80-IA should be restricted to Rs.26,18,90,989/- and excess claim of Rs.61,10,78,973/- is to be disallowed.

As per the reasons recorded above and there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. There is a definite 'reason to believe' that the deduction of Rs.61,10,78,973/- is excess deduction to the tune the income chargeable to tax has escaped assessment."

15. The Deputy Commissioner of Income Tax issued proceedings, disposed of the objections raised by the petitioner / assessee wherein it is stated regarding the provisions of Section 80-IA as under:

"Provisions of Section 80-IA:

The assessee contends that it has claimed the deduction under Section 80-IA as per the amended provisions

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of the Act. The contention is not tenable since the assessee company commenced its operation during the AY 1996-97 and as such the its eligibility to claim the deduction would fall under the erstwhile/pre-amended provisions of Section 80-IA. The company which started providing telecommunication services after 1st April, 2000, will only be eligible for the new provisions of Section 80-IA. As per the erstwhile provisions, the assessee company's eligibility was clearly recorded in the reasons communicated.”

16. The respondents have arrived a conclusion that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. It is categorically stated that the initiation of assessment years is to be taken as AY 1996-97 and the assessee is eligible only for 30% pay of the deduction claim and remaining 70% is to be taxed. Thus, the deduction under Section 80-IA should be restricted to Rs.26,18,90,989/- and excess claim of Rs.61,10,78,973/- is to be disallowed. Thus, there is a definite 'reason to believe' that the deduction of Rs.61,10,78,973/- is excess deduction to the tune of income chargeable to

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tax as escaped assessment. When it is categorically stated that on account of certain informations provided by the assessee, a wrong assessment has been made and the excess deduction was made, so as to cause loss to the Revenue, then it is to be construed that the assessee has not disclosed fully and truly all material facts. It may be stated that the facts regarding the deduction claim under Section 80-IA, all would have stated by the assessee in the return of income. However, during the scrutiny and while passing that the final order of assessment by the Assessing Officer, which was done based only on the informations provided by the assessee and thereafter, if the authorities identified some materials for reopening of assessment, then they have got every reason to believe that the assessment is to be reopened. In the event of not reopening the assessment, the interest of the Revenue would be prejudiced. Therefore, this Court is of the considered opinion that the petitioner cannot merely say that he has produced all the informations. Certain informations, which were not provided fully and truly caused loss to the Revenue with reference to the deductions made under Section 80-IA of the Act and such materials identified by the Department, while reopening

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the assessment must be adjudicated with reference to the documents and evidences available and the petitioner is at liberty to defend his case by submitting his objections or by producing documents and evidences.

17. High Court cannot adjudicate the intricacies in the Accounting System made by the assessee, which was scrutinized by the Income Tax Department. When *prima facie* case made out by the respondents to arrive a conclusion that there is a reason to believe, then the Revenue must be permitted to proceed with the reopening proceedings and mere reopening would not cause any prejudice to the assessee and during adjudication, the assessee would get an opportunity to defend his case in the manner known to law. Thus, the mere initiation based on some new materials would not cause any prejudice or violate the rights of the assessee. However, if the assessee could able to establish that there is absolutely no new materials or informations made available for the purpose of reopening of assessment, then alone, the High Court may interfere and not otherwise.

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18. This being the principles to be followed, the petitioner is at liberty to defend the case by availing the opportunities to be provided by the respondents as contemplated under the provisions of the Income Tax Act.

19. The learned counsel for the petitioner made a submission that a Resolution Plan has been sanctioned under IBC Code. The petitioner is at liberty to submit all the particulars regarding the resolution plan sanctioned before the Income Tax authorities, who can consider the said documents and take appropriate decision under the provisions of law.

20. With these observations, all the writ petitions fail and stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

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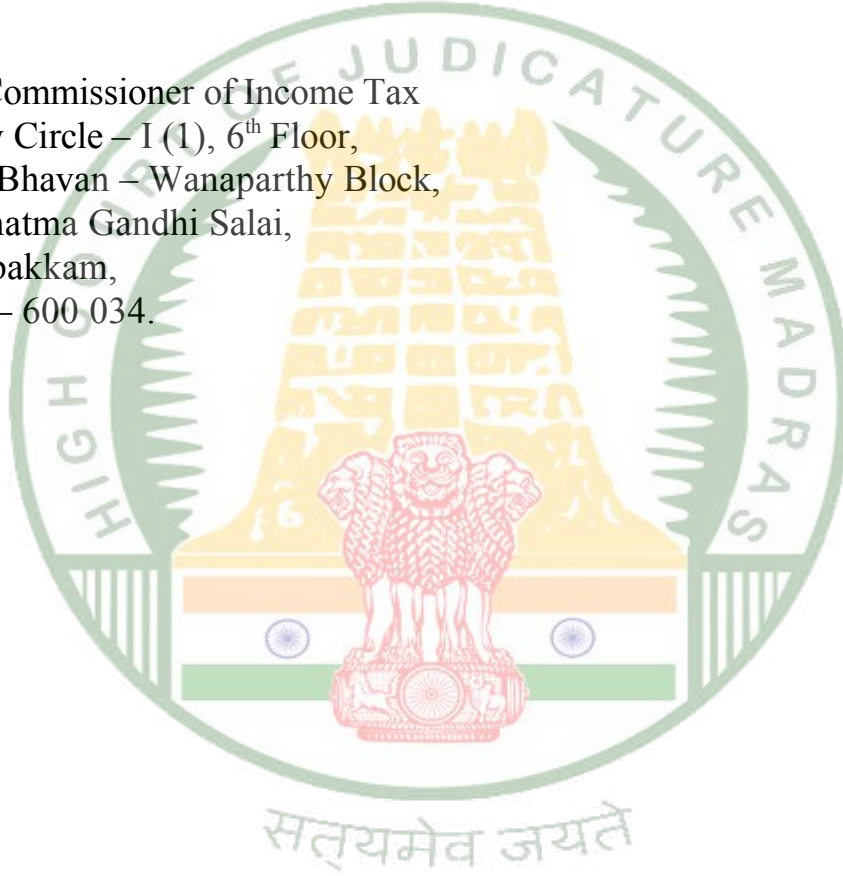
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Speaking / Non-Speaking order

To

Deputy Commissioner of Income Tax
Company Circle – I (1), 6th Floor,
Aayakar Bhavan – Wanaparthy Block,
121, Mahatma Gandhi Salai,
Nungambakkam,
Chennai – 600 034.

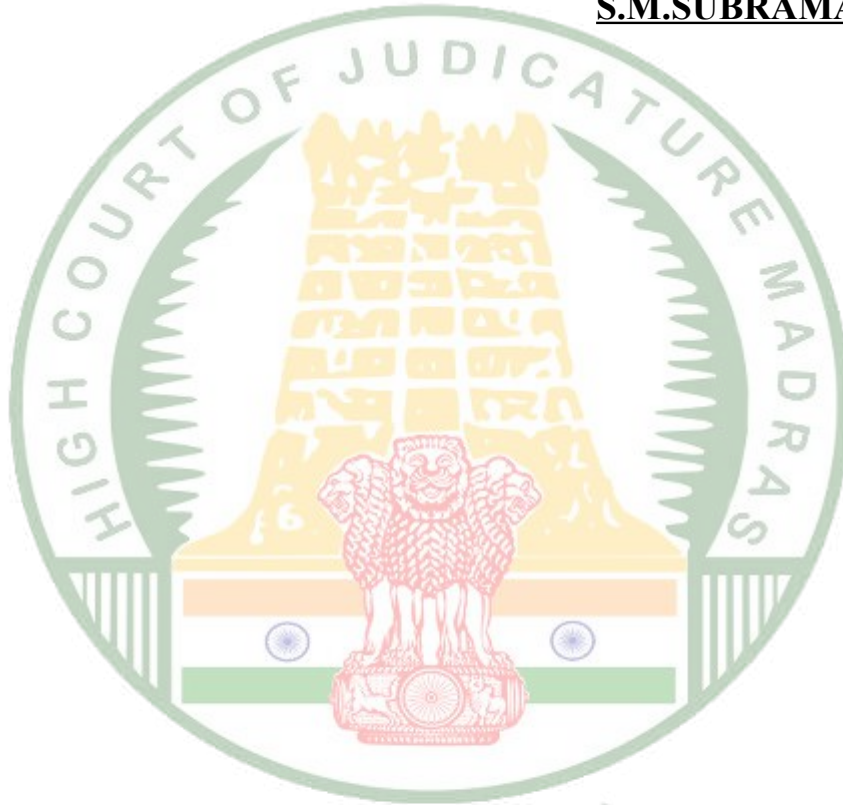


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S.M.SUBRAMANIAM, J.

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