* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA NO. 1621/2010**

% *Judgment delivered on:21.12.2010*

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Utpal Saha, Advocate.

VERSUS

PADMINI TECHNOLOGIES LTD. ….RESPONDENT

Through :Mr. Santosh Aggarwal, Advocate

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. The present appeal is filed by the Revenue against the order of the ITAT dated 4.9.2009 thereby confirming the order of the CIT(A) to the effect of deleting additions to the tune of ₹ 38,12,25,856/- made by the AO under section 68 of the Income Tax Act (hereinafter referred to as the Act).

2. To narrate the genesis of instant dispute, the facts are succinctly produced as under:

The regular assessment under section 143(3) of the Act, in respect of the assessee herein M/S Padmini Technologies Ltd, for the assessment year 1997-98, was completed on 31.03.2001. Subsequently, the Department received a report from the Directorate of Revenue Intelligence that the assessee M/S Padmini Technologies Ltd., which had obtained 25 advance licenses from Director General of Foreign Trade under DEEC scheme for duty free imports, has grossly over invoiced export of CD ROMs to show its export obligations as having been fulfilled. It was alleged in the aforesaid report that the assessee had partly sold a few of these licenses to various importers for duty free imports. This report, on the basis of enquiries conducted, concluded that the real value of exports shown by the appellant company is merely ₹ 2,35,12,236/- as against over invoiced exports values at Rs. 40,47,38,019/-. The report of the Revenue intelligence was categorical in its finding that all this has resulted in evasion of custom duties and contravention of various revenue laws of the country. In pursuance of this alarming report, the department initiated reassessment proceedings under section 147 of the Act.

3. The assessee, having received the notice dated 28.03.2002, issued by the department under section 148 of the Act filed its return dated 26.04.2002 thereby declaring its income as 'NIL'. Notices under section 143(2) and Section 142(1) along with a questionnaire were also issued, in response to which detailed submissions were filed by the assessee. Meanwhile, the assessee, feeling aggrieved with the findings of the Revenue Intelligence, filed a petition before the Custom and Central Excise Settlement Commission (C&CESC) (hereinafter referred to as the Settlement Commission) which was admitted vide its order dated 5.8.2002. Admission of this petition was taken as a defense by the assessee before the AO but this submission could not produce the desired effect as the AO was of the opinion that the order to admit the matter was not the final order. The AO calculated the unexplained amount at ₹ 38,12,25,856/- and treated it as income of the assessee under section 68 of the Act.

4. The appeal preferred by the assessee before the CIT(A) was of no consequence as the CIT(A) confirmed the additions made by the AO. Meanwhile, the Revenue went in appeal against the admission order passed by the Settlement Commission. Civil writs bearing no. 3549/2003 and 3565/2003, which pertain to this appeal, were disposed of by this court vide its order dated 20.11.2004 with the

directions to the Settlement Commission to dispose of the proceedings expeditiously after permitting the petitioner therein to produce documentary evidence on record on which the reliance was place by the revenue and thereafter examine all the issues on law and facts. The Settlement commission passed its final order no. F-287-289/CUS/05-SC (PB) on 31.05.2005. The relevant portion of the aforesaid order is as under:

> *"10.9. The Bench, therefore, observes that the applicant has succeeded in establishing that the Revenue has not substantiated their charges of over valuation of exports. Still it is debatable whether the disclosure of duty liability made by the PPL was full and true, and whether t5hey have cooperated with the proceedings to determine the correct additional duty liability, if any, when they have limited themselves to plead that the Revenue has not substantiated their charges of over invoicing of their exports. The Bench would like to recall its observations in para 10.5 above that all the indications appear to support the allegations of over valuations of exports, though the Revenue has not been able to substantiate it with evidence. Accordingly, in the subject proceedings of settlement, where immunities depends upon full and true duty disclosure and not on the applicant merely being able to prove that no case has been made out in the SSN, the Bench holds that the n applicant may not qualify for total full immunities. In any event, prosecution in this case having already been launched by the revenue, there would be no question of immunity from prosecution at this stage. The co applicants would be eligible for immunities to the extent granted to the main applicant.*

11. taking into account the above facts and circumstances, the applications are settled under Sec. 127C (7) of the Customs Act, 1962 subject to the following terms and conditions:-

(1) The applications are settled with additional duty liability of ₹ 33,37,275/- admitted by M/s Padmini Polymer Ltd., i.e. to the extent corresponding to their failure to meet the export obligation. The applicant has already deposited ₹ 2.5 crores voluntarily even as per the SCN, against which the presently settled duty of ₹ 33,37,257/- has already been ordered to be appropriated and adjusted by the Admission Order dated 5-8-02. The balance amount of duty deposit, if any, may be refunded to M/s Padmini Polymers Ltd. after adjustment of penalty and interest ordered below, on an application to be filed by them and as per the due process of law.

(2) M/s Padmini Polymers Ltd. shall pay simple interest @ 10% p.a. on the above settled duty liability under Section 28AB of the Customs Act 1962. The Revenue shall calculate and communicate to M/s Padmini Polymers Ltd the interest amount due at the above rate on the above said amount within 15 days from the receipt of this order. M/s Padmini Polymers Ltd shall pay the said amount within the next 15 days from the date of receipt of the communication from Revenue and report compliance to the Revenue and the Bench.

(3) The Bench imposes of a penalty of Rs. ₹ 10,00,000/- on M/s PPL and ₹ 5,00,000/- on Shri Vivek nagpal, its Managing Director and grant immunities in excess of the same to the above two applicants and total immunity from penalty on the other co applicants, under the provisions of Customs Act, 1962.

> *(4) Immunity is granted from confiscation and consequent fine under the provisions of Customs Act, 1962,*
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> *12.0 The above immunities are granted under sub Section (1) of Sec 127H of the Customs Act 1962. Attention of the applicants is drawn to the provisions of sub Section (2) and (3) of section 127 H, ibid. The order of the settlement shall become void if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts.*

5. On the other hand, feeling aggrieved by the order of the CIT(A), the assessee preferred an appeal before the ITAT. The ITAT set aside the order of the CIT(A) in this appeal no. 119/2003-03 and sent the matter back to the CIT(A) to frame denovo appellate order after considering the final order passed by the Settlement Commission and the letter of Directorate of Enforcement dated 2.03.2005 and also after allowing due opportunity of hearing to the parties.

6. The CIT(A), after considering the matter in accordance with the directions passed by the ITAT came to the following conclusions:

> *"That the charges of over invoicing have not been conclusively proved by the Revenue. The evidence put forth in this regard can utmost be said to be in the realm of speculation.*
> *That there is no allegation of any Hawala payment or any evidence that the proceeds received were*

> *in respect of anything other than the export of goods in question.*
> *The liability accepted by the assessee is only in respect of non-fulfillment of export obligation which in any case has nothing to do with sales already made for which addition has been made.*
> *No show cause notice was ever issued for over invoicing by the Directorate of Enforcement as there was no evidence to that effect.*
> *That the appellant has succeeded in establishing that the Revenue has not substantiated their charge of over valuation."*

7. On the basis of the conclusions, as mentioned above, the CIT(A) vide its order dated 26.03.2009 extirpated the addition of Rs. 38,12,25,856/- made by the AO in the assessment order passed under section 147. The operative portion of the CIT(A)`s order is as under:

> *"In view of the aforesaid categorical findings of C&CESC in its order dated 31.05.2005, it is evident that there is no justification to draw any adverse inference against the assessee regarding the export sale proceeds of Rs. 40,47,38,019/-. The Assessing Officer has drawn the adverse inference solely on the basis of show cause notice and in my considered opinion the conclusions drawn by the Assessing Officer cannot be now sustained in view of the categorical findings of the Settlement Commission. On these facts and circumstances, the addition of ₹ 38,12,25,857/- as made by the Assessing Officer cannot be sustained and is, therefore, deleted."*

8. The ITAT, vide its order dated 4.09.2009, refused to interfere with aforesaid order of the CIT(A) as it could not found any infirmity

in the same. Though the Revenue took a plea before the ITAT that the Custom Department has not accepted the order of the C&CESC and has filed an appeal before the High Court but the ITAT was of the view that this could not be a reason to interfere with the order of the CIT(A). Another contention of the Revenue that the CIT(A) has completely relied upon the order of the C&CESC and failed to appreciate the overwhelming evidence against the assessee brought by the AO could not bear any fruit as the Tribunal was categorical in its finding that it is clearly mentioned in the letter dated 2.03.2005 of the Directorate of Enforcement that the assessee and its directors have not been issued with any SCN for over invoicing, as there was no evidence to that effect.

9. Hence comes this appeal to us. This court, in the instant appeal, vide order dated 2.11.2010, had directed Mr. Sabharwal, Ld. Counsel for the Revenue, to verify as to whether the department has accepted the order of the Settlement Commission or not as this question has substantial bearing on this appeal. On the last date of hearing on 7.12.2010 the Ld. Counsel for the appellant-Revenue could not verify the same as he had not received any instruction from the Department. In view of this, one week time was further granted with the condition that if the instructions are not received even on the next date, this court shall presume that the Department has accepted the order of the Settlement Commission. A substantial

time has passed since the passing of that order but no reply has been filed by the Revenue on this issue. We construe this silence on the part of the Revenue as confirmation of the acceptance of the order of the Settlement Commission as it seems that the Department is unwilling to proceed with the matter.

10. In view of the above, we are of the opinion that there is no infirmity in the approach adopted by the ITAT in upholding the order of the CIT(A) dated 26.03.2009, which was passed in accordance with the final order of the Settlement Commission as the same has been impliedly accepted by the Revenue.

11. No question of law arises. This appeal is dismissed accordingly.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

December 21, 2010
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