R/13/4/2017

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IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER

ITA No.	Asst. Year	Appellant	Respondent
1428/Hyd/2015	2006-07	Mehta & Modi Homes, SECUNDERABAD **[PAN: AAJFM0647C]**	Income Tax Officer, Ward-10(4), HYDERABAD
1429/Hyd/2015	2007-08		

For Assessee : Shri S. Rama Rao, AR
For Revenue : Shri K.J. Rao, DR

Date of Hearing : 01-03-2017
Date of Pronouncement : 22-03-2017

O R D E R

PER B. RAMAKOTAIAH, A.M. :

These two appeals are by assessee against the separate but similar orders of the Commissioner of Income Tax (Appeals)-6, Hyderabad dated 06-11-2015. Assessee is aggrieved on reopening of assessment as well as on merits of disallowance made by the Assessing Officer (AO) u/s. 80IB of the Income Tax Act [Act].

2. Briefly stated, assessee is a real estate developer and has carried the project at Cherlapally Village in the name of *Silver Oak Bungalows*. It envisaged development of 76 residential units on a land admeasuring over six acres and assessee has claimed deduction u/s. 80IB(10) on the income of the said project. For the A.Y. 2006-07, assessee filed its return of income on a total income

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of Rs. 2,13,281/- after claiming deduction u/s. 80IB(10) on an amount of Rs.87,60,134/-. The assessment u/s. 143(3) was completed on 31-12-2008. In the said assessment, the ITO deputed his Inspector to verify the site and eligibility of assessee in claiming the deduction u/s. 80IB. The ITI after due inspection have stated that he has randomly selected and measured similar type of duplex houses. The built up area as measured is found to be correct as per the specifications provided by the firm. On the above basis, AO accepted the claim of assessee for deduction u/s. 80IB(10) and has completed the assessment u/s. 143(3). Similarly, for AY. 2007-08, assessee filed the return of income declaring total income of Rs. 1,20,31,006/- claiming deduction u/s. 80IB(10) on an amount of Rs. 96,33,962/-. In this year also, the assessment was completed on 31-12-2009 and the AO reproduced the Inspector's report as in earlier year and has allowed Section 80IB deduction to the extent of assessee's claim.

2.1. Subsequently, AO has come to an opinion that the deduction allowed to assessee u/s. 80IB is not correct, as assessee has excluded the area of terrace, portico from the computation of built-up area which resulted in wrongly allowing the deduction u/s. 80IB. Accordingly, after recording the satisfaction AO has issued notices u/s. 148 on 21-03-2013 for the impugned assessment years. Assessee asked for reasons for reopening and AO vide letter dt. 30-07-2013 has communicated the reasons which was objected to by assessee vide letter dt. 27-08-2013. AO rejected the objections and after including the terrace and portico areas within the built up area, came to the conclusion that the

building exceeds 1500 Sq. Ft., prescribed and accordingly, he denied the deduction u/s. 80IB in both the years.

3. Before the Ld.CIT(A), assessee took objection that :

a. Reopening after four years from the end of the assessment year without establishing any failure on the part of assessee in furnishing necessary details is bad in law;
b. Re-assessment was completed without issuing the notice u/s. 143(2);
c. That the issue of built-up area has been examined by the ITO in the course of scrutiny assessment as stated in the assessment order and so any other opinion is change of opinion not permitted in the re-assessment proceedings and;
d. Even on merits, the terrace and balconies are not part of structure as terrace is a projection of the building for the purpose of car parking and balcony also has to be excluded being not part of the building. Accordingly, on facts also, assessee is eligible for deduction u/s. 80IB.

Ld.CIT(A) however, rejected all the contentions and dismissed the appeals. Hence present appeals. Grounds raised are on the above two issues

4. Ld. Counsel mainly objected to the re-assessment proceedings stating that the notices were issued after four years and all the relevant details were furnished at the time of original assessment and in fact the Inspector has physically inspected the premises and gave a finding that assessee satisfies the conditions

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and further that a notice u/s. 143(2) was not issued but the CIT(A) rejected the contention on the reason that assessee has not filed return of income in response to notice u/s. 148. It was submitted that assessee did file a letter requesting the AO to treat the original return filed as return in response to notice u/s. 148 and accordingly, it is a deemed return. Further, the AO himself has communicated the reasons for reopening, after assessee's filing of the deemed return. Therefore, the argument of CIT(A) that assessee has not filed the return is not correct. Further, it was submitted that AO has got inspection done and allowed the deduction u/s. 80IB(10). Therefore, the successor officer differing from that opinion is a change of opinion not permitted under law. Apart from relying on the Hon'ble Supreme Court decision in the case of CIT Vs. Kelvinator of India Ltd., [320 ITR 561], assessee also relied on the jurisdictional High Court decision in the case of Kohinoor Hatcheries Pvt. Ltd., Vs. DICT and another [389 ITR 493] (T&AP).

4.1. Ld. Counsel also submitted that the objection was raised by the audit and AO has reported that objection is not valid but still on the directions of the audit, the assessment was reopened after four years. He relied on the documents placed in the Paper Book for the above submission.

4.2. Coming to the merits, it was the submission that Hon'ble Gujarat High Court in the case of CIT-IV Vs. Amaltas Associates [75 Taxmann.com 180 (GJ)] has considered that open terrace space would not be included in built up area for Section 80IB relief. Ld. Counsel also relied on the decision of the CIT Vs.

Radhe Developers [341 ITR 403] which in turn relied on by the Hon'ble Gujarat High Court in the earlier case of CIT-IV Vs. Amaltas Associates [75 Taxmann.com 180 (GJ)] (supra). It was submitted that both on facts and on law, re-assessment and denial of 80IB is not correct.

5. Ld.DR however, in reply submitted that audit objection is only an incidental to the proceedings but when audit point out, certain legal propositions, reopening can be done and relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. P.V.S. Beedies (P) Ltd., [237 ITR 13] and it was further submitted that ITAT in the group case of M/s. Modi Builders & Realtors Pvt. Ltd., in ITA No. 1541/Hyd/2010 dt. 31-03-2011 has considered similar issue and gave in favour of the AO wherein built up area was counted after including the portico and balcony areas and therefore, the denial of Section 80IB(10) in assessee's case, as relied on by the ITO in the order, is proper. Further, he has shown the satisfaction recorded to state that the ITAT order in group case was relied by the AO for reopening the assessment, but in the communication to assessee, the same was not communicated properly. Ld.DR relied on the decision of Kartikeya Interntional Vs. CIT & another [329 ITR 539] for the proposition that the notice issued is valid.

6. In reply, Ld. Counsel submitted that there is no external information and whatever assessee has submitted in the course of assessment is the basis for audit objection which indicates that assessee has duly furnished all the relevant information so that the reopening after four years will be hit by the

proviso to Section 147. In fact, he pointed out that the same AO who recorded the satisfaction for reopening the assessment has indeed replied to the audit not accepting the objection in justifying the claim u/s. 80IB. It was further submitted that case law relied on by the Ld.DR pertains to the facts involving of reopening within four years, whereas law pertaining to reopening after four years from the end of the assessment year is entirely different. Not only that there is no issuance of notice u/s. 143(2) as required by the IT Act. Therefore, on that reason also, the proceedings are invalid. He relied on the case of ACIT & anr. Vs. Hotel Blue Moon [321 ITR 362](SC).

7. We have considered the rival contentions and perused the documents placed on record. There is no dispute to the fact that the assessments were reopened after the end of four years from the relevant assessment year. There is also no dispute that the order u/s. 143(3) was passed after duly examining the claim of 80IB(10) as can be seen from the report of the ITI, extracted by the ITO in the assessment orders. Thus, there is no dispute that assessee had placed all the information relevant for completion of assessment before the AO. Provisions of Section 147 do allow the AO to reopen the assessment, if he has reason to believe that income has escaped assessment, but that power is limited by various other provisos. The Hon'ble Jurisdictional High Court in the case of Kohinoor Hatcheries Pvt. Ltd., Vs. DCIT and another [389 ITR 493] (T&AP) has considered similar issue wherein a notice was issued after expiry of limitation period of four years, the Hon'ble High Court has held as under:

"Held, allowing the petition, (i) that the assessee had challenged the very initiation of proceedings for reopening of assessment as being without jurisdiction and also in complete defiance of the statutory prescriptions. Therefore, it was not a case which could be thrown out on the ground of availability of alternative remedy.

(ii) That the Department could not deny the fact that there was a full and true disclosure by the assessee of all material facts necessary for assessment. The case of the assessee fell under the category of true and full disclosure upon which the assessment order was passed on the opinion that the lands sold by the assessee were agricultural lands and did not fall under the category of mere production of books of account and other records. The replies submitted by the assessee to the questionnaire indicated that the claim of the assessee was examined by the Assessing Officer before he passed the original assessment order under section 143(3). Therefore to say after four years that the lands were sold to a real estate company for the purpose of forming a special economic zone amounted to a change of opinion which was not permitted by law.

(iii) That by virtue of proviso to section 147, no action could have been taken, after the expiry of four years from the end of the relevant assessment year, unless any income had escaped assessment, by reason of anyone of the three contingencies on the part of the assessee, namely, (a) failure to file return under section 139, (b) failure to file return in response to a notice under section 142(2) or section 148 or (c) to disclose fully and truly all material facts necessary for assessment. The reassessment proceedings were to be set aside".

8. Since the facts are similar and law is also being clear, respectfully following the jurisdictional High Court, we are of the opinion that reopening of the assessments after the end of limitation period, without establishing that there is failure on the part of assessee in making full and complete disclosure of relevant information is bad in law.

8.1. Not only that, as can be seen from the assessment orders originally completed by the officer, he has deputed his inspector who has randomly inspected the premises and gave a certificate that assessee satisfies the conditions prescribed.

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Therefore, any different opinion on the same facts- that assessee does not satisfy the conditions- will come within the purview of change of opinion. An assessment cannot be reopened by mere change of opinion on the same set of facts as held by the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd., [320 ITR 561] (supra). Not only the above two issues, but as rightly contended by assessee before the CIT(A), there seems to be no issuance of notices u/s. 143(2). Assessee after receipt of notice u/s 148 did inform the AO by way of letter in writing that the return originally filed earlier should be treated as a return in response to notice u/s. 148. Generally, this is the procedure followed by most of the assessees instead of filing a fresh return form and the Revenue is accepting such letters as deemed filing of return. In fact, the AO after such deemed filing of return did communicate the reasons for reopening. Had assessee not filed the return/deemed return in response to notice u/s. 148, question of communicating the reasons does not arise, as per the direction of the Hon'ble Supreme Court in the case of GKN Drive Shafts (India) Ltd., Vs. ITO [259 ITR 19] (SC). Thus, the contention of CIT(A) that assessee has not filed return of income, therefore, there is no need for issuance of notice u/s. 143(2) has no legal basis. Since there is failure on the part of the AO in issuance of notices u/s. 143(2) within the time limits prescribed, subsequent proceedings of assessment becomes bad in law.

9. Coming to the merits, it is true that ITAT in another sister-concern case has accepted Revenue's contention that portico and terrace are to be included. This issue is pending for adjudication before the Hon'ble jurisdictional High Court. Be that

as it may, the fact is that whether portico and terrace can be included or excluded depends on the facts of each case and the law on the issue. As rightly pointed out by the Ld. Counsel, the Hon'ble High Court of Gujarat has excluded the portico area from computation of built up area. Here, assessee's contention is that the terrace also is to be excluded, as it was not part of the building, either at the time of approval of project or subsequently. Therefore, the issue becomes one of disputed issues, on which there can be two opinions. Since AO has taken one opinion at the time of assessment after duly examining the contentions by deputing Inspector to the premises, a successor officer of the same rank cannot differ from the earlier opinion unless there is an intervention by a superior authority. Had CIT has undertaken the proceedings u/s. 263 to disturb the findings of the AO, then, the matter would stand in a different footing. However, the AO was directed to reopen the assessment after the end of four years, when the law does not permit the same. In view of that, we are of the opinion that on both reopening of the assessment without there being any failure on the part of assessee in furnishing the particulars and subsequent completion of assessment without issuance of notices u/s. 143(2), the assessments completed are bad in law. Since the very basis for re-assessment is not valid, there is no need to adjudicate whether assessee is eligible for deduction u/s. 80IB(10) in the re-assessment proceedings, which becomes academic in nature. Since, AO has already allowed after due examination in the order u/s. 143(3), that issue is to be concluded as settled as far as these two assessment years are concerned. We are not expressing any opinion on the claim of assessee since it requires examination of facts and also law on the

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issue. Suffice to say that the reopening itself is bad in law, therefore, assessee's grounds on this are to be allowed.

10. In the result, both the appeals of assessee are allowed.

Order pronounced in the open court on 22nd March, 2017.

Sd/-
(D. MANMOHAN)
VICE PRESIDENT

Sd/-
(B. RAMAKOTAIAH)
ACCOUNTANT MEMBER

Hyderabad, Dated 22nd March, 2017.

TNMM

Copy to :

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2. The Income Tax Officer, Ward-10(4), Hyderabad.

3. CIT (Appeals)-6, Hyderabad.

4. The Pr.CIT-6, Hyderabad.

5. D.R. ITAT, Hyderabad.

6. Guard File.

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