(2014) 03 KL CK 0115

In the High Court Of Kerala

Case No : I.T.A. Nos. 179 and 180 of 2011

Commissioner of Income Tax APPELLANT

Vs

Abad Constructions P. Ltd. RESPONDENT

Date of Decision : 04-03-2014

Acts Referred:
Income Tax Act, 1961 — Section 148, 263, 80-IB, 80-IB(10)

Citation : (2014) 363 ITR 372

Hon'ble Judges : Manjula Chellur, C.J;A.M. Shaffique, J

Bench : Division Bench

Advocate : P.K.R. Menon, Senior Counsel and Jose Joseph, Standing Counsel, Advocate for the Appellant; Joseph Kodianthara, Senior Advocate, Mathews K. Uthuppachan, Binu Mathew, Terry V. James, B.J. Johan Prakash, Tom Thomas (Kakkuzhiyil) and V. Abraham Markos, Advocate for the Respondent

Judgement

Dr. Manjula Chellur, C.J.—The following substantial questions of law arise for consideration:

(a) Whether the suo motu revisional order of the Commissioner is right in law and with jurisdiction and the Tribunal is right in law in setting aside the order?

(b) Whether, on the facts and in the circumstances of the case and in the light of the finding of the Commissioner that the Assessing Officer has failed to make enquiry as regards the allowability of the claim of the assessee u/s 80-IB...'' read in the light of the principle laid down in the decisions reported in Commissioner of Income Tax Vs. Active Traders (P.) Ltd., ; Thalibai F. Jain and Others Vs. Income Tax Officer, Assessment-4, Hubli and Another, , is not the order of the Commissioner legal and with jurisdiction?

(c) Whether, on the facts and in the circumstances of the case and the order of the Commissioner being one confined to jurisdiction without touching upon the case on the merits,--

1. the Tribunal is right in law in considering the case on the merits and setting

aside the order of the Commissioner;

2. is not the order of the Tribunal on the merits uncalled for and perverse?

These two income tax appeals pertain to the assessment years 2005-06 and 2006-07. The brief facts that led to filing of the present appeals are as under:

The respondent-assessee is a company engaged in the business of constructing apartments and villas. Declaring the taxable income of Rs. 6,66,450, the company filed its return of income on October 31, 2005, so far as 2005-06. It declared a taxable income of Rs. 52,11,011 in its return of income filed on November 24, 2006, so far as 2006-07. In both the years the assessee had claimed certain amount as deductions allowable u/s 80-IB(10) of the income tax Act (hereinafter referred to as "the Act") being profits and gains from infrastructure development, i.e., developing and building of housing projects. The Assessing Officer made a preliminary enquiry and found that two projects undertaken by the assessee during the above two assessment years did not qualify for deduction u/s 80-IB of the Act. The Assessing Officer had also found that in respect of the project Marine Plaza there was some violation against the approved construction plan which would make the project ineligible for deduction u/s 80-IB(10) of the Act. So far as the first assessment year, a notice u/s 148 of the Act came to be issued on March 11, 2008, after recording reasons for reopening the assessment. By letter dated March 25, 2008, the assessee requested to treat the return filed on October 31, 2005, as one filed in response to the notice u/s 148 of the Act. However, on April 2, 2008, the assessee filed a return of income for the assessment year 2005-06 along with audit reports, financial statements and other report in the required forms. However, so far as the income is concerned, there was no change in the income in this revised return.

2. Then coming to the assessment year 2006-07, it was a regular assessment and as on the date of taking up computation of tax for the assessment year 2006-07, the assessment for the previous year was not yet over, therefore, the officer opined that both should be taken up and disposed of on the same day. So far as the stand of the assessee, for both the assessment years in a land consisting of 1.76 acres, apartments were put up, maximum built up area in respect of the "A" type flats is 1,497 sq. feet which is below 3 feet maximum area of 1,500 sq. feet to extend the benefit of deduction u/s 80-IB. They also contended that the space occupied by shops and commercial rooms works out less than 5 per cent of the aggregate built up area, hence, according to the assessee, all conditions required for claiming deduction u/s 80-IB(10) was complied with.

3. The Assessing Officer having noticed that the built up area of "A" type apartment in the project being 1,497 sq. ft. just 3 sq. ft. less than the maximum area for which deduction is allowable felt there has to be some enquiry into the matter. After perusing the list of names of purchasers to whom the flats were

sold, he learnt that some of the adjacent flats were sold to members of the same family. Therefore, he felt the need to ascertain the factual situation whether two of the apartments have been combined to form a single unit. It is also relevant to mention that the assessment though was initiated and proceeded with by another officer, by the time it came to be concluded the officer who passed annexure A order was in charge of the file. After perusal of a note in the file by the predecessor in office, the Assessing Officer in question felt some violation of the approved plan seems to exist and also the possibility of combining adjacent apartments to form a single unit opined, verification by inspection of the building was necessary.

4. As a matter of fact, Smt. Daisy Abraham and one Mr. K.T. Anil Kumar, two inspectors, were sent to have the spot study and give a report. Though such officers went to the building and saw the apartments, their information as per the records reveal that some apartments were opened and most of the apartments were locked as those apartments were already handed over to the purchasers. The assessee was also not in possession of the keys of those apartments. This would indicate that they requested the assessee to furnish the keys of those apartments which were locked. However, they were not able to make a reasonable assessment of the factual situation. This is what contained in the report dated December 23, 2008. In the report those officers also opined, the correctness of the area of the apartments could be verified only with the expert''s assistance in the field. The assessee also responded to the queries seeking some more time to inform the purchasers to make available those apartments which were closed for inspection.

5. In the above circumstances, the Assessing Officer opined, the information was not sufficient to decide or were not satisfactory to support the claim of deduction u/s 80-IB(10) claimed by the assessee. However, surprisingly the Assessing Officer opining that assessment for both years was getting time barred proceeded to complete the assessment and allowed the deductions claimed by the assessee. This became the subject matter of proceedings on the file of the Commissioner of income tax who initiated suo motu proceedings u/s 263 of the Act.

6. After issuing show-cause notice dated June 23, 2009, and considering the response of the assessee through its representative, the Commissioner, after referring to the factual situation with reference to sub-section (10) of section 80-IB, proceeded to form its opinion at paragraphs 3 and 4 which read as under:

3. I have carefully considered the submissions of the assessee and perused the records of the case. During the course of assessment proceedings, field enquires were made and it was noticed that in respect of the project ''Marine Plaza'' there was some violation made against the approved plan in the construction of the apartment and, hence, this project was not eligible for deduction u/s 80-IB. Spot inspection of the apartments in the project was made to verify the claim of the assessee. However, since most of the apartments which were already allotted to

the customers were locked up, detailed inspection could not be carried out. Since the assessee was also not in possession of the keys of those apartments, it requested for more time to make available the apartments for inspection since they had to contact the purchasers. Further, some technical assistance was also required to verify the correctness of the area of the flats. It appears that since the assessments involved were barring by limitation, the orders were passed on the basis of the materials available without making proper and detailed examination of the claim of the assessee u/s 80-IB. In its submissions dated August 4, 2009, the assessee''s own admission that ''if for any reason it is found out that some of the units have plinth area in excess of 1,500 sq.ft., the assessee cannot be denied deduction u/s 80-IB for the entire project itself shows that there has been some violation of the approved plan of the project.

4. The assessee''s contention that the Commissioner has no material to come to the conclusion that the assessment is erroneous and prejudicial to the interests of the Revenue, cannot be accepted. The provisions of section 263 empowers the Commissioner to call for and examine records of any proceedings under the Act if he considers that any order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. In this case, having called for and examined the assessment proceedings for the above assessment years, I am of the considered view that the Assessing Officer has failed to make enquiry as regards to the allowability of the claim of the assessee u/s 80-IB and, hence, the assessment order of the Assessing Officer in allowing the same, without making proper and detailed enquiry, is erroneous and prejudicial to the interests of the Revenue and, therefore, amenable to the revisional jurisdiction of the Commissioner.

7. Ultimately, at paragraph 6, he opined that the assessment orders passed by the Assessing Officer dated December 30, 2008, for both the assessment years are erroneous in so far as they are prejudicial to the interests of the Revenue and those orders were set aside for the limited purpose of verification of the deduction claimed u/s 80-IB(10) of the Act. The Assessing Officer was directed to re-compute the deduction allowable u/s 80-IB afresh.

8. This order came to be challenged before the Appellate Tribunal by the assessee. The Tribunal after considering the facts and circumstances in which notice u/s 263 of the Act came to be given, ultimately opined that there was no justification for the Commissioner to invoke its jurisdiction u/s 263 of the Act and proceeded to quash the impugned order dated August 27, 2009, passed u/s 263 of the Act. This is the subject matter in the appeals before us.

9. Learned standing counsel for the Department contended that the previous Assessing Officer, i.e., the predecessor to the officer who completed the assessment, had noted the defects or doubts so far as the measurement or area of apartment, in the light of the factual situation, that is, A type apartment 1,497 sq. ft., i.e., just 3 sq. ft. less than the maximum measurement to go out of the benefit of deduction and the possibility of removal of common wall between the

two apartments, making as single unit as the purchase was by same family members, the officer concerned referring to such doubts or suspicion felt they could be dispelled only by spot inspection. There was justification on the part of the Assessing Officer to depute the officers for inspection. However, the inspection could not be completed for the reasons stated in the orders. Therefore, the Assessing Officer instead of proceeding with computation of income, ought to have rejected the claim of deduction for want of material particulars and this is nothing but an erroneous procedure adopted by the Assessing Officer. It is nothing short of non-application of mind by the Assessing Officer which amounts to erroneous decision. He further contends that in the absence of details there could not have been such computation of tax payable, therefore, the ultimate result will be prejudicial to the interests of the Revenue. Therefore, there was justification so far as the proceedings initiated u/s 263 of the Act. He places reliance so far as section 263 of the Act in Appollo Tyres Ltd. Vs. Deputy Commissioner of Income Tax, .

10. So far as the orders of the Commissioner, he also contends that it was open remand with reference to section 80-IB(10) of the Act. In other words, every question that has to be considered u/s 80-IB(10) of the Act was kept open for consideration. Therefore, the Tribunal ought not have proceeded on other materials which were available in the assessment proceedings before the Assessing Officer. According to the learned standing counsel, the occupancy certificate and approved plan cannot be considered without any verification for the purpose of allowing deductions u/s 80-IB and the subjective satisfaction of the Assessing Officer with reference to deductions claimed by the assessee requires verification and satisfaction by the officer concerned. Therefore, having opined that the required material was not available, the Assessing Officer was not justified in passing such orders. Therefore, the Tribunal ought to have confirmed the orders of the Commissioner of income tax u/s 263 of the Act and the orders of the Tribunal deserves to be set aside.

11. As against this, learned senior counsel, Shri Abraham Markose, submits that it was very much within the competency of the Assessing Officer to disallow the deductions claimed u/s 80-IB having found that there was no sufficient material satisfying or clearing the doubts noted by the previous Assessing Officer as the inspecting officers were not able to secure the complete picture of the factual situation. Having opined the inability of the Department to get sufficient material and in the light of the fact that the assessee was unable to have key of the apartments that were locked, as much earlier to that date, possession of the buildings were handed over to the respective allottees/purchasers, nothing else was available within the power of the assessee to furnish the material therefore, there was nothing else the assessee could do. Therefore, the Assessing Officer based on the available material, that is, approved plan, etc., has proceeded with the assessment. Having proceeded with the assessment, allowing the claim of deductions, it has to be presumed that the material available as on the date of completing the assessment proceedings satisfied the Assessing Officer that the

claim was justified. Hence, initiation of proceedings u/s 263 of the Act by the Commissioner of income tax, according to the learned senior counsel, was erroneous. When it was possible for the Assessing Officer to reject the claim of deduction but on the other hand having accepted the material placed before him, i.e., approved plan and occupancy certificate along with the building tax assessment giving the details of measurement, there was no justification to conclude that the assessment was erroneous and prejudicial to the interests of the Revenue. According to him, the factual situation in which the assessment came to be completed did not warrant initiation of any proceedings u/s 263 of the Act as the Assessing Officer who had the authority to reject the claim of deduction was of the opinion, could allow the claim of the deduction, therefore, there was no non-application of mind on the part of the officer.

12. So far as the orders of the Tribunal, according to the learned senior counsel the Tribunal having regard to the situation in which the earlier officer had made a note of details to be gathered, having attempted and failed in complying with the material particulars, there was no reason why the Assessing Officer should not rely upon the available material. This persuaded the Tribunal to opine that no circumstance warranted to initiate proceedings u/s 263 of the Act. He also relies upon two decisions in Commissioner of Income Tax Vs. L.F. D''silva, and Commissioner of Income Tax Vs. Hindustan Coconut Oil Mill, .

13. We have gone though the judgments relied upon by the standing counsel as well as the senior counsel, in the above appeals, the entire controversy revolves around whether the circumstances warrant initiation of proceedings u/s 263 of the Act by the Commissioner or not. On perusal of the assessment order, though the Assessing Officer had made a mention that so far as the assessment year 2005-06 the limitation was running by December 30, 2008, we note, even in respect of 2006-07, the limitation for completion of assessment proceedings would be over by December 31, 2008. There was an attempt on the part of learned senior counsel to refer to this observation of the Assessing Officer to contend that as the limitation was running out, the Assessing Officer hurried up and proceeded with the assessment. If this argument were to be believed, it was within the competency of the Assessing Officer to reject the claim of deduction. On the other hand, the Assessing Officer had allowed the deduction giving a concession after expressing doubt that the material attempted to be collected was not collected, therefore, he proceeded to pass the orders on the available material.

14. The subjective satisfaction of the officer while proceeding with computation of tax payable, it is not the successive officer''s subjective satisfaction with which we are concerned, we are concerned with both the Assessing Officers as found in the files. If the Assessing Officer did not make an attempt to collect material in spite of a note by earlier officer, probably it would have been a different situation altogether. Having opined that there need to be further inspection to ascertain the factual situation in spite of several documents like approved plan, occupancy

certificate building tax assessment proceedings in the file, proceeded ahead with collection of material fact. This would clearly indicate the assessing authority who was passing orders factually was not satisfied with the material available, therefore, attempted to collect material but failed.

15. Having discussed the entire details with reference to incomplete material, in one sentence he proceeds to pass the orders on the available material. This very available material was incomplete, according to him. This is the subjective satisfaction of the assessing authority. Though not satisfied with the material available, he still proceeded to opine that the claim of deduction has to be allowed. This is nothing short of non-application of mind. Most of the discussion and the reasoning was in respect of a particular opinion of the officer but in the last sentence in the assessment order gives a go by to that opinion. This is nothing short of erroneous view taken by the authority. In other words, there was no subjective satisfaction but still he proceeded to pass the order. Having proceeded to pass such erroneous order with the incomplete material particulars, giving deduction as claimed by the assessee is prejudicial to the interests of the Revenue.

16. Learned senior counsel also contended that disposal of two appeals is purely an academic issue in view of assessment being completed by fresh order, in the light of orders u/s 263 of the Act. We are not concerned with the merits or demerits of the assessment orders now passed consequent to the orders of the Commissioner u/s 263 of the Act. It will take its own course of action in accordance with law. Whether there was extraneous consideration pertaining to issues which were required to be considered or not cannot be looked into and discussed in these appeals. We are only required to see whether the Commissioner of income tax was justified in initiating and proceeding with the matter by the impugned order.

17. In order to accept the approved plan, occupancy certificate and building tax assessment order, none of the provisions with reference to section 80-IB provide that production of such documents would be sufficient. If that were to be the intention of the Legislature, they would have said so in the relevant provisions. On the other hand, a reading of section 80-IB and the relevant sub-section clearly indicates it is the factual situation which would decide the allowance of the claim or not. In other words, the subjective satisfaction which, we referred to above, is with regard to material particulars. How one gets these material particulars, could be from the documents produced by the assessee and if a doubt or suspicion arises in the mind of the Assessing Officer he has to make an enquiry and secure material which dispels his doubt or suspicion. The doubt expressed is a genuine one because of two reasons, that is, "A" type flat is just 3 sq. ft. less than the maximum measurement of the apartment and the same family members had purchased the adjacent apartments. Unless this is factually verified by spot inspection, it remains a doubt. When deductions are allowed u/s 80-IB several checks and balances are indicated. In order to give concession or

benefit of deduction, the officer has to take into account whether there is any attempt to evade payment of tax. This is the primary duty of the Department. In order to discharge this duty, the subjective satisfaction of the officer is very relevant. Therefore, we are of the opinion, the Tribunal was not justified in setting aside the orders of the Commissioner and we are of the opinion, in the light of the above discussion and reasoning the Commissioner was justified in initiating the proceedings u/s 263 of the Act.

Accordingly, these two appeals are allowed.

