(2012) 12 GUJ CK 0031

In the Gujarat High Court

Case No : Tax Appeal No. 443 of 2012

Income Tax Officer APPELLANT

Vs

Keval Construction RESPONDENT

Date of Decision : 10-12-2012

Acts Referred:

Income Tax Act, 1961 — Section 40(a)(ia), 80IB(10)

Citation : (2013) 354 ITR 13

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : K.M. Parikh, for the Appellant;

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—The Revenue is in appeal against the judgment of the income tax Appellate Tribunal ("the Tribunal" for short) dated January 13, 2012 (since reported in ITO v. Keval Construction [2013] 23 ITR (Tri.) 820 (And.)). The following questions have been presented for our consideration:

(I) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in allowing the claim of deduction u/s 80-IB(10) of the Act and not appreciating the fact that the relationship between the assessee and the end user of the units was that of ''works contract''?

(IIa) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in directing to allow the disallowance as deduction u/s 80-IB(10) of the Act, which is not permissible in law since this amount is not an income derived from a housing project but a disallowance made u/s 40(a)(ia) of the income tax Act?

(IIb) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in directing to allow the disallowance as deduction u/s 80-IB(10) of the Act, since this amount is also not allowable in view of the fact that this would be allowable in this year of payment, which would lead to double deduction?

The assessee is engaged in the business of developing housing projects. The claim of the assessee u/s 80-IB(10) of the income tax Act was rejected on the ground that the assessee did not own the premises on which such project was developed. The Commissioner (Appeals) allowed the claim of the assessee upon which the Revenue approached the Tribunal. The Tribunal by the impugned order accepted the claim relying on its earlier decision in the case of Shakti Developers. It is this decision of the Tribunal which has given rise to question No. (I).

2. The decision of the Tribunal in the case of Shakti Developers came up for consideration before this court in the case of The Commissioner of Income Tax-I Vs. Radhe Developers, . We upheld the Tribunal''s order making the following observations (page 423):

We have reproduced the relevant terms of the development agreements in both the sets of cases. It can be seen from the terms and conditions that the assessee had taken full responsibilities for execution of the development projects. Under the agreements, the assessee had full authority to develop the land as per his discretion. The assessee could engage professional help for designing and architectural work. The assessee would enroll members and collect charges. The profit or loss which may result from execution of the project belonged entirely to the assessee. It can thus be seen that the assessee had developed the housing project. The fact that the assessee may not have owned the land would be of no consequence.

3. During the course of the assessment, the Assessing Officer also disallowed the expenditure of a sum of Rs. 10,93,134 u/s 40(a)(ia) of the Act on the ground that the assessee had failed to deduct tax at source on payment of transportation charges. The assessee carried the matter in appeal. The Commissioner of income tax (Appeals) confirmed the disallowance upon which the assessee approached, the Tribunal. Before the Tribunal, the assessee took two stands. He firstly, contended that this was the first year of the applicability of the provisions and, therefore, out of ignorance, the deduction was not made. He, secondly, contended that in any case such disallowance should qualify for deduction u/s 80-IB(10) of the Act. The Tribunal allowed his appeal accepting the alternative contention and directed, the Assessing Officer to grant deduction accordingly. This conclusion of the Tribunal has given rise to questions (IIa) and (IIb) noted above. Ideally since this question had arisen out of the assessee''s appeal, as contrasting the first question which had arisen out of the Revenue''s appeal against the Tribunal''s order, the Revenue should have presented two separate appeals before us. We are, however, not compelling for two separate appeals.

4. Having heard counsel on both the questions today in this appeal, we find no error in the Tribunal''s ultimate conclusion. Even if a certain expenditure which

was incurred by the assessee for the purpose of developing housing project was not allowable by virtue of section 40(a)(ia) of the Act, since the assessee had not deducted the tax at source as required under law, it cannot be denied that such disallowance would ultimately go to increase the assessee''s profit from the business of developing housing project. Whatever be the ultimate profit of the assessee as computed even after making disallowance u/s 40(a)(ia) of the Act, would qualify for deduction as provided under the law. No question of law, therefore, arises. The tax appeal is dismissed.

