(2016) 06 GUJ CK 0064

In the Gujarat High Court

Case No : Special Civil Application No. 15717 of 2010

Jalaram Developers APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 09-06-2016

Acts Referred:

Income Tax Act, 1961 — Section 148, Section 149

Citation : (2017) 390 ITR 83

Hon'ble Judges : Mr. K.S. Jhaveri and Mr. G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : Mr. Sudhir M. Mehta, Advocate, for the Respondent Nos. 1 and 2; Mr. R.K. Patel, Advocate with Mr. Darshan R. Patel, Advocate, for the Petitioner No. 1

Final Decision : Allowed

Judgement

Mr. K.S. Jhaveri, J. (Oral) - By way of the present petition, the petitioner has challenged the notice dated 10.8.2009 issued by the respondents at Annexure - D to the petition whereby the respondents seek to reopen the assessment for assessment year 2003-04 for the reasons which are recorded as under:

"The return of income was filed on 30.9.2004 declaring total income at Rs. Nil after claiming deduction under section 80IB of Rs. 19,78,578/-. The assessment was finalized under section 143(3) at income as returned.

The assessee firm is engaged in development and construction. It is noticed that profits shown by the assessee in comparison to other builders (who are involved in the construction of similar housing projects but not availing the benefit of deduction under section 80IB) is very high. The abnormal rate of profit declared by the assessee appears to be influenced by the 100% deduction available under section 80IB of the I.T. Act, 1961. Further, the declaration of income in excess of the actual earnings from construction business also indicates to the possibility of diversion of income from undisclosed sources being brought into the books of accounts without payment of due taxes on such income. In view of these facts, I have reason to believe that income chargeable to tax has escaped assessment.

Therefore, in order to assess/re-assess the income of the firm, notice under section 148 is hereby issued for A.Y. 2004-05. The notice is being issued after obtaining the satisfaction/permission of the Addl. CIT, Vapi Range, Vapi."

2. The learned counsel for the petitioner submits that the petitioner filed its return of income along with relevant documents on 27.10.2003. After issuing notice under section 143(2) of the Income-tax Act, scrutiny assessment was framed under section 143(3) of the Act vide order dated 18.1.2005 determining total income at Nil after allowing the claim of deduction under section 80 IB of the Act. Now the respondent seeks to reopen the assessment by issuing notice under section 148 read with section 147 of the Income-tax Act.

3. The learned counsel for the petitioner has contended that the notice issued under section 148 of the Income-tax Act for reopening of the assessment by the respondent is bad in law for the reasons that reopening exercise undertaken by the authority is beyond the period of four years from the date of assessment. For assessment year 2003-04, the period will be over by 31.3.2008 and the notice issued under section 148 of the Income-tax Act after 31.3.2008 is bad in law. Even otherwise, the Assessing Officer has considered the claim under section 80IB(10) of the I.T. Act and recorded his satisfaction that since all the conditions laid down in the provisions of section 80IB(10) of the Act have been fulfilled by the assessee, it is eligible for the deduction under section 80IB at 100% of profit shown during the year i.e. Rs. 59,26,427/-. No reasons are assigned that the claim which has been allowed by the earlier Assessing Officer is bad in law. The learned counsel for the petitioner has, therefore, contended that the notice under section 148 of the I.T. Act issued by the authority is bad in law.

4. Learned counsel for the respondents Mr. Mehta has supported the case of the department and contended that the exercise of reopening the assessment under section 148 of the I.T. Act is in accordance with the provisions of the I.T. Act. The Assessing Officer has recorded reasons for reopening of the assessment. The Assessing Officer has supplied to the assessee the reasons for reopening the assessment on the basis of material collected by him. He has stated that the profits shown by the assessee in comparison to other builders is very high and the abnormal rate of profit declared by the assessee appears to be influenced by 100% deduction available under section 80IB of the Act. In that view of the matter, the learned counsel for the respondent has contended that no interference is called for with the issuance of notice under section 148 of the I.T. Act for reopening of the assessment.

5. Learned counsel for the petitioner has taken us through the rejoinder affidavit and pointed out the fact that for assessment years 2002-03, 2005-06 and 2008-09 no reopening was done by the respondents even though identical claims were made. Therefore, the notice issued by the respondent authorities for reopening of the assessment for the year under consideration is bad in law and

requires to be set aside.

6. We have heard learned counsel Mr. Patel for the petitioner and learned counsel Mr. Mehta for the respondent authorities. We have gone through the reasons recorded at page No. 36 of the petition. We have also gone through the assessment order at page 29 where the Assessing Officer has recorded that "since all the conditions laid down in the provisions of section 80IB(10) of the Income-tax Act have been fulfilled by the assessee, it is eligible for the deduction under section 80IB at 100% of profit shown during the year i.e. Rs. 59,26,427/-." The Assessing Officer has issued the notice under section 148 of the I.T. Act on 10.8.2009. Section 149 of the I.T. Act reads as under:

"Sec. 149 (1) - No notice under section 148 shall be issued for the relevant assessment year -

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c)"

7. As per the said section, for reopening of the assessment, notice should be issued within a period of four years from the end of the assessment. In the present case, we notice that the Assessing Officer has issued notice under section 148 of the I.T. Act on 10.8.2009 which is beyond the period of four years from the end of the assessment year. Even otherwise, no reasons are assigned by the respondent authority to claim that the earlier Assessing Officer has wrongly allowed the claim of the assessee. In that view of the matter, the petition deserves to be allowed and is allowed accordingly. Notice issued under section 148 of the Income-tax Act dated 10.8.2009 and the preliminary order dated 30.11.2010 for proceeding and completing the reassessment proceedings are hereby quashed and set aside. Rule is made absolute with no order as to costs.