**(2011) 11 GUJ CK 0069**

**In the Gujarat High Court**

**Case No :** Special Civil Application No. 15966 of 2011

Pravinkumar Bhogilal Shah APPELLANT

Vs

ITO and Another RESPONDENT

**Date of Decision :** 30-11-2011

**Acts Referred:**

Income Tax Act, 1961 — Section 142(1), 143(3), 147, 148, 153A

**Citation :** (2011) 11 GUJ CK 0069

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

**Bench :** Division Bench

**Advocate :** R.K. Patel, for the Appellant; Manish R. Bhatt and Ms. Mauna M. Bhatt, for the Respondent

**Final Decision :** Allowed

## Judgement

Sonia Gokani, J.—The petitioner has challenged in this petition, the notice of reassessment issued under s. 148 of the IT Act, 1961 ("Act" for short) dt. 24th March, 2011 along with notice dt. 3rd Oct., 2011 for proceeding and completing reassessment proceedings. The brief facts relevant to the case are:

1.1 The petitioner, for the Asst. yr. 2004-05, filed return of income with the relevant statement of income, audited accounts, auditors report in Form Nos. 3CB, 3CD, etc. Scrutiny assessment under s. 143(3) of the Act was framed granting deduction under s. 80-IB of the Act.

1.2 The respondent-AO has sought to reopen the assessment by issuance of the notice under s. 148 r/w s. 147 of the Act. The reason for reopening indicates that this is being reopened in view of the Explanation given below sub-s. (10) of s. 80IB which has been inserted by the Finance Act No. 2 of 2009; applicable with retrospective effect from 1st April 2001, as such the petitioner is not entitled to protection under s. 80-IB; as claimed by the petitioner. The AO noted that for the asst. yr. 2004-05, the income has escaped assessment, and therefore, he propose to reassess the income and had also further required the petitioner to deliver within thirty days, return in the prescribed form in respect of which he is assessable for the assessment year under consideration.

1.3 Reasons for reopening of assessment were furnished on 25th July, 2011 which mention that the land on which the assessee had carried out its project belonged to the land owners. The approval of the project by the local authorities was in the name of the land owners and the assessee had only entered into development agreement with them. The assessee being the works contractor, who had not undertaken any development and building of the housing project approved by the local authorities, therefore, his claim to deduction made under s. 80-IB(10) of the Act was not in accordance with law. In view of Explanation inserted by the Finance Act of 2009, w.e.f. 1st April, 2001, show-cause, notice further makes a mention that the Explanation in the amended Act clarifies that the benefit of deduction under this provision was not applicable to any undertaking which executes the housing project as a works contract awarded by any person. As it was never disclosed by the petitioner that he was merely a work contractor and not a developer in its original return of income, he had not disclosed fully and truly all material facts necessary for assessment, therefore, AO had reason to believe that the income chargeable to tax has escaped assessment and this claim for deduction of Rs. 22,06,353 under s. 80-IB(10) was an incorrect claim.

1.4 Objections to the said notice of reassessment were furnished on 28th Sept., 2011 emphasizing therein that notice of reassessment is a mere change of opinion of the AO, as in the scrutiny assessment at the time of processing original return, this issue has been pertinently gone into by the AO. Not only that but all the necessary documents pursuant to the queries were furnished justifying the claim of deduction under s. 80-IB(10) of the Act and after examining them thoroughly, the issue was concluded. It is also further contended that there were various correspondences supplied justifying the claim of deduction and after scrutiny of all these details, the assessment order had been passed by the AO. In such circumstances, this notice is depicting change of opinion merely according to the petitioner. Reliance is also placed on various judgments to substantiate the stand taken by the petitioner while objecting to the notice for reopening. Pursuant to the said objection, yet another show-cause notice was issued by the AO on 3rd Oct., 2011, calling upon the petitioner to show-cause as to why his claim should not be disallowed and add the said sum back to the total income. Petitioner was also asked to furnish relevant details in person on 14th Oct., 2011.

1.5 As averred and can be noted from the record, on 14th Oct., 2011 on account of absence of the AO, a letter was addressed to him by the present petitioner requesting him to dispose of the objections by a speaking order on the basis of the objections furnished by him on 28th Sept., 2011. As no order had been communicated to the present petitioner disposing of the objections, the present petition is filed challenging the impugned notice as mentioned hereinabove.

2. Various grounds are raised in the present petition and all centers around the contention that this notice is nothing but a mere change of opinion on the part of the AO.

3. Notice was issued to the respondents, pursuant to which affidavit-in-reply has been filed by the respondents contending therein that the assessee-company, being merely a contractor and not a developer, was not disclosed by him in his original return of income, and therefore, he had not disclosed fully and truly all the material facts necessary for his assessment, and therefore, the provision of s. 147 of the Act would be made applicable. It is also contended that the petition challenging the constitutional validity of insertion of s. 80-IB(10) is pending before this Court and as there is sufficient material to indicate that all material facts were not truly and full disclosed, the income chargeable to tax has escaped assessment on account of Explanation inserted in the statute book with retrospective effect.

3.1 Having heard learned counsel Mr. Patel for the petitioner and having considered all the materials placed before us with his assistance and also on duly considering the submissions made by Mr. Manish Bhatt, learned senior standing counsel for the Revenue, this petition deserves to be allowed for the following reasons (sic)

4. As can be noted, at the outset, the return of the petitioner filed for the relevant asst. yr. 2004-05 was finalized after scrutiny assessment. This very issue had been raised vide communication dt. 20th June, 2006, which had indicated as under:

(xi) On perusal of your return of income for asst. yr. 2004-05, it is seen that you have claimed deduction under s. 80-IB in respect of the housing schemes developed/constructed in the name of your proprietary concern. In this regard, you are requested to give complete details of the projects and furnish necessary information to substantiate your claim for eligibility for claiming deduction under s. 80-IB.

4.1 The reply to which was furnished by the petitioner vide its letter dt. 12th July, 2006, which reads as under:

The assessee is in receipt of your office notice u/s 142(1) /153A dt. 20th June, 2006, for the captioned years.

In this connection, the assessee would like to state as follows:

(i) That exactly an identical notice under s. 142(1) /153A of the Act was issued by your predecessor in office on 6th April, 2006. A photocopy of the said notice is enclosed for ready reference and placing on record.

(ii) That in compliance to the said notice, the assessee has already filed requisite written submissions dt. 12th April, 2006 with supporting documents/enclosures in respect of each of the year under consideration, separately. The then AO had duly placed them on record through order sheet entries, in respective folders of the concerned years.

(iii) However, at the cost of repetition, the assessee submits herewith copies of his earlier submissions dt. 12th April, 2006 for the above-referred years for kind perusal and placing on record.

From the record it may kindly be appreciated that the assessee has duly replied the earlier notice and there is no additional point/query yet to be replied. I hope, the above compliance meets with your requirements. If, however, you have any reason to doubt, kindly provide me reasonable time and opportunity with quantum vis-?-vis period which has specific bearing with material in your possession, so as to enable me to submit further explanation with reference to such issue(s).

4.2 Written submission dt. 12th April, 2006 reveals that the explanation regarding allowability of deduction under s. 80-IB of the Act is answered by the petitioner stating that they carried out development and building activities and claimed deduction under s. 80-IB and as all conditions are fulfilled they are therefore entitled to claim deduction under s. 80-IB(10) of the Act.

4.3 As can be seen from the assessment order, deduction under s. 80-IB(10) had been allowed in computation of income and this will indicate that when there was a specific query raised, which was replied to with specific details and supporting documents and on the basis thereof, when such an order of assessment was finalized on 29th Dec, 2006 explicitly permitting deduction in computation while determining income finally, the issue was well considered by the AO.

4.4 It is also to be noted that the assessment so finalized is sought to be reopened beyond the period of four years from the end of the relevant assessment year, on the basis of amendment that has been brought into the statute book much later. As rightly pointed out by the petitioner, there is no evidence indicating any reason much less a valid reason for assuming jurisdiction under s. 147 of the Act, except the amendment in the statute in the year 2009, particularly when there is no concealment on the part of the petitioner.

4.5 It is necessary to refer to, at this stage, the judgment of this Court rendered in case of Sadbhav Engineering Ltd. Vs. Deputy Commissioner of Income Tax (OSD), where the issue of reopening of assessment beyond the period of four years from the end of the relevant assessment year was under consideration. The Division Bench of this Court held that the assessee carried on the business which was in the nature of works contract and that the assessee being a civil contractor working for the Government, had disclosed fully and truly all material facts necessary for his assessment. There was no failure on the part of the assessee to disclose fully and truly all that was required to be done and the very initiation of the proceedings under s. 147 stood vitiated. Reliance of this authority is on yet another decision rendered by the Division Bench in the case of Aayojan Developers Vs. ITO, wherein the Division Bench has observed as under:

 

Examining the facts of the present case in the light of the above principles enunciated by the Supreme Court, a bare perusal of the reasons recorded indicates that there is not even a whisper as regards any failure on the part of the petitioner to disclose fully and truly all material facts nor is it possible to infer any such failure from the reasons recorded. Merely because of the fact that the assessee had asserted that it is a developer in the returns filed by him, it cannot be said that there is any failure on the part of the petitioner to disclose fully and truly all material facts. At best, the petitioner has made a claim along with supporting documents, namely, development agreements for construction of housing projects, etc. and based upon the said documents, the AO had formed an opinion and granted deduction under s. 80-IB(10) of the Act. As to whether in a given set of facts, the assessee is a developer or a works contractor is a matter of inference. Hence, the assertion that the petitioner is a developer, without anything more cannot be said to be an incorrect disclosure of facts, as is sought to be contended on behalf of the Revenue. In the circumstances, in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration, the assumption of jurisdiction under s. 147 of the Act after the expiry of four years from the end of the relevant assessment year is illegal and invalid. The proceedings under s. 147 of the Act which have been initiated by issuance of the impugned notice under s. 148 of the Act, therefore, cannot be sustained.

4.6 Reliance is also placed on various other judgments to avoid making this judgment bulky, they require no further dilation. Suffice to hold that they back the stand of the petitioner that any reopening beyond four years from the end of relevant assessment year is invalid in absence of any failure on the part of the petitioner to disclose fully and truly all material facts required for the assessment of the assessment year under consideration.

4.7 In the instant case, as noted hereinabove the only reason for reopening is the amendment brought on the statute book being amendment to s. 80-IB(10) of Finance Act, 2009 inserting Explanation with retrospective effect from 1st April, 2001 which denies benefit of deduction under s. 80-IB(10) to works contractors executing housing project. As notices under challenge are issued on expiry of the period of four years from the end of year of assessment under consideration, with nothing to indicate at all of the assessee not having disclosed fully and truly all material facts, the very basis for reopening is not found sustainable. And therefore, notices issued under s. 148 require to be quashed.

4.8 It needs to be also mentioned at this juncture that this Bench in Special Civil Appln. No. 15719 of 2011 (reported as (2012) 66 DTR (Guj.) 233--Ed.) also considered identical question of the petitioner who was a works contractor and who had availed deduction under s. 80-IB(10) of the Act, notice of reopening issued by the Department was quashed.

5. Thus, cumulatively when all the factual details are considered, applying them the law on the subject, it can be held that the notices for reopening having been

 

issued with no valid basis, being contrary to law, the same warrant quashment and are accordingly quashed. Petition is accordingly allowed. Rule is made absolute to the above extent with no order as to costs.

 