IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1679 OF 2014
WITH
INCOME TAX APPEAL NO. 1680 OF 2014

The Commissioner of Income Tax ..Appellant

Versus

M/s. Juhu Construction Co. ..Respondent

Mr. Tejveer Singh a/w Ms. Padma Divakar for the appellant
Mr. S.C. Tiwari a/w Ms. Rutuja Pawar for the respondent

CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 20th MARCH, 2017

P.C.

1. Both the Appeals under Section 260-A of the Income Tax Act, 1961 (the Act) challenge the common order dated 1st May, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order is in respect of Assessment Years 2002-03 and 2003-04. Thus, the two appeals.

2. The Revenue urges the following identical question of law for our consideration, in both the appeals :-

> *"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal is right in deleting the penalty levied u/s 271(1)(c) of the I.T. Act, by not considering the*

fact that, failure to offer income as per the directions given by the Tribunal before filing of return constitute, furnishing inaccurate particulars of income within the meaning of Section 271(1)(c) of the I.T. Act ?

3. The respondent assessee engaged in the business of constructing and selling flats. On 31st October, 2002, the respondent assessee filed its return of income for Assessment Year 2002-03 declaring a loss of Rs.8.26 lakhs. On 27th November, 2003, the respondent assessee filed its return of income for Assessment Year 2003-04 declaring a loss of Rs.7.44 lakhs.

4. Thereafter, the Assessing Officer reopened the assessment for both the subject assessment years. By two orders dated 14th February, 2006 one for A.Y. 2002-03 passed under Section 143(3) r/w 147 of the Act, the Assessing Officer determined the total income for Assessment Year at Rs.64.24 lakhs as against the returned loss of Rs.8.26 lakhs and for Assessment Year 2003-04 passed under Section 143(3) of the Act at Rs.68.36 lakhs as against returned loss of Rs.7.44 lakhs.

5. Being aggrieved, the respondent assessee filed appeals from both the aforesaid orders dated 14th February, 2006 to the Commissioner of

Income Tax (Appeals) [CIT(A)] but without success. Thereafter, the respondent filed an appeal to the Tribunal. However, when the appeals from the two orders dated 14th February, 2006 passed under Section 153A r/w Section 147 of the Act were pending before the Tribunal, a search action was initiated against the respondent assessee. Consequent to the search action in response to notice under Section 153A of the Act, the respondent assessee filed its return of income on 17th February, 2009 declaring a loss as declared in the regular return of Rs.8.26 lakhs and Rs. 7.44 lakhs in respect of Assessment Years 2002-03 and 2003-04 respectively. In the meantime, before the assessment consequent to the notice under Section 153A of the Act were completed for the subject assessment years, the Tribunal by an order dated 30th July, 2009 disposed of the respondent assessee's appeals from the two orders dated 14th February, 2006 passed under Section 143(3) of the Act for Assessment Years 2002-03 and 2003-04 by the Assessing Officer. The order dated 30th July, 2009 of the Tribunal directed that the profit should be estimated at 5% of recoveries in respect of the three projects which were subject matter for consideration for both the assessment years.

6. Consequent to the order dated 30th July, 2009 of the Tribunal,

the respondent assessee filed a revised computation of income in the proceedings under Section 153A of the Act, determining the profit at 5% of the recoveries for the subject assessment years accordance with the order dated 30th July, 2009 of the Tribunal. Accordingly, the respondent assessee computed income at Rs.21.75 lakhs for A.Y. 2002-03 and Rs. 48.11 lakhs for A.Y. 2003-04. The Assessing Officer accepted the same and completed the assessments for Assessment Years 2002-03 and 2003-04 under Section 143(3) r/w Sec. 153A of the Act on 9th December, 2010.

7. Thereafter, the Assessing Officer commenced penalty proceedings under Section 271(1)(c) of the Act on the ground that the respondent assessee had failed to furnish truly and correctly its income at the time of filing return of income under Section 153A of the Act. The respondent assessee pointed out to the Assessing Officer that till such time as the Tribunal decided the issue on 30th July, 2009, the respondent assessee had not accepted the estimation made by the Assessing Officer and therefore, the return of income filed consequent to the notice under Section 153A of the Act was on the same basis on which the regular return of income was filed. However, the order dated 30th July, 2009 of the Tribunal determined the percentage of

estimated income and its method of computation, the respondent assessee filed a revised computation of income with the Assessing Officer for both the subject assessment years. Thus, it was submitted that no inaccurate particulars of income was furnished by the respondent assessee which would warrant imposition of penalty. However, the Assessing Officer did not accept the same and imposed 100% penalty of the tax evaded by two orders dated 30th June, 2011 i.e. Rs.10.71 lakhs for A.Y. 2002-03 and Rs.20.41 lakhs for A.Y. 2003-04.

8. Being aggrieved, the respondent assessee filed appeals to the Commissioner of Income Tax (Appeals) [CIT(A)]. By common order dated 31st October, 2012, the CIT(A) allowed the respondent assessee's appeals for Assessment Years 2002-03 and 2003-04. This on holding that the estimated income at 5% of the recoveries made in the revised computation was only as per the order dated 30th July, 2009 of the Tribunal i.e. much after filing its return of income on 17th February, 2009.

9. Being aggrieved, the Revenue carried the issue in appeal to the Tribunal for both the assessment years. The impugned order dated 1st

April, 2014 of the Tribunal upheld the order of the CIT(A) holding that 5% of the recoveries offered as its income by the respondent assessee for the subject assessment years was in line with the order dated 30th July, 2009 of the Tribunal. The impugned order further records that the income was being determined on an estimated basis, to the knowledge of all concerned. In such circumstances, there could be no inference drawn of concealment of income or filing of inaccurate particulars, in the absence of the same being specifically pointed out by the Revenue. In the above view, the appeal of the Revenue was dismissed.

10. The grievance of the Revenue before us was that in the return of income filed consequent to the notices issued under Section 153A of the Act for both the assessment years, the respondent assessee had not declared its estimated income at 5% of the recoveries for the subject assessment years. Thus, penalty was imposable.

11. We note that the above grievance / submission on behalf of the Revenue ignores the fact that at the time when the respondent assessee filed its return of income on 17th February, 2009 for the subject assessment years consequent to notice under Section 153A of the Act,

the order dated 30th July, 2009 of the Tribunal was not available. The entire basis of the Revenue's case for penalty is the revised computation filed during proceedings under Section 153A of the Act. At the time the return of income in response to notices under Section 153A of the Act was filed, the respondent assessee continued to declare its estimated income for the subject assessment years at the same rate / quantum as shown in the return of income filed during the regular assessment proceedings in Assessment Years 2002-03 and 2003-04. It was only on the order dated 30th July, 2009 of the Tribunal, the respondent assessee filed revised computation of income during the assessment proceedings. Moreover, all concerned were aware that at all times the income offered for tax was only on estimated basis.

12. In the above view, the view taken by the impugned order of the Tribunal in the facts of this case is a reasonable view. The respondent assessee could not forecast the result of its appeal before the Tribunal and filed its return of income on the basis of determination of income by the Tribunal in the future.

13. Both the CIT(A) and the Tribunal have came to a concurrent finding of fact that there was no furnishing of inaccurate particulars

and / or concealment of income on the part of the respondent assessee.

14. Therefore, question as proposed does not give rise to any substantial question of law. Thus, not entertained.

15. Accordingly, the appeal is dismissed. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**