Sequeira

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8045 OF 2019

M/s. S.S.Landmarks .. Petitioner
Vs
The Income Tax Officer, Ward-2(2),
Pune and another .. Respondents

Mr.Mihir Naniwadekar a/w Mr.Rohan Deshpande i/b Ms.Alisha Pinto, for the Petitioner.

Mr.Sham V. Walve a/w Mr.Pritish Chatterjee, for Respondents.

CORAM : M.S.SANKLECHA &
NITIN JAMDAR, JJ.
Date : 17 October 2019.

P.C. :

At the request of the parties the Petition is being taken up for final disposal at this stage.

2. This Petition under Article 226 of the Constitution of India seeks to challenges a notice dated 29 March 2019 issued under Section 148 of the Income Tax Act 1961 (Act). The impugned notice seeks to reopen assessment for the Assessment Year 2012-13.

3. The brief facts leading to this Petition are as under :

(a) The Petitioner is engaged in the business of building and developing housing projects. For the subject Assessment Year the Petitioner filed its return of income claiming benefit of section 80IB(10) of the Income Tax Act, 1961, (the Act). This on the ground that the housing project called "Shagun Phase 1" (said project) was completed within the stipulated period on or before 31 March 2012. This as the said project was sanctioned on 20 March 2007.

(b) During the course of the assessment proceedings the Assessing Officer made detailed inquiries by notices under section 142(1) and 143(2) of the Act with regard to the Petitioner's claim for deduction under section 80IB(10) of the Act in respect of the said project. In its reply to the above notices, the Petitioner pointed out that the project had been completed before 30 March 2012. The application for completion certificate was made to the local Authority on 20 February 2012 and 27 March 2012 as the project had already been completed. However the completion certificate was received in September 2012 and the same would be effective from the date of application for completion certificate. The Assessing Officer accepted the stand of the Respondent by placing reliance upon the decision of the Tribunal in the case of Hindustan Samuah Awas Ltd. V/s. ITO (ITA No.945/Pn/2010) wherein it has been held that completion certificate granted by the local authority would relate back to the date of the application for completion certificate relating to the project. In the above view after recording the Petitioner's claim with its supporting documentary evidence, deduction under section 80IB(10) had been considered and verified. Thus the claim of deduction under section 80IB of the Act was allowed by Assessment Order dated 23 March 2015 passed under section 143 (3) of the Act.

(c) On 29 March 2019, the impugned notice was issued. The reasons in support of the show cause notice read as under :

> ***'Reasons for forming belief to escapement of income:***
>
> *An information has been received from Asst. CIT Cir-2, Pune, Wherein as per ITR filed by assessee it is seen that the assessee has claimed deduction u/s 80IB(10) for an amount of Rs.3,38,63,518/- for A.Y. 2012-13. The assessee has claimed deduction u/s.80IB(10) in respect of its projects "Shagun Phase I". As per records number of buildings in shagun phase-I are A,B,C,D,E,F, Row houses and Bungalows G1 and G2. The first sanction for the project was received on 20.03.2007 i.e. F.Y.2006-07. After that, the assessee had received completion certificate for building A,B,E,F, Row House 1,2,3,4,17 and 18 on 25.03.2011 whereas completion certificate for building C & D, Row House 5 to 11, 11A, 12, 13, 14, 15 & 16 and Bungalows G1 and G2 was received on 25.09.2012. As per section 80IB(10), the project as a whole should be completed within 5 years after the end of F.Y. in which the first sanction was received. As the project got sanction on 20.03.2007, the project should have been completed by 31st March, 2012.*
>
> *As per the provisions of Section 147 of the I.T.Act, 1961, the undersigned has reason to believe that the income chargeable to tax amounting to Rs.3,38,63,518/- has escaped assessment as assessee*

> *has wrongly claimed deduction u/s 80IB(10) in respect of Profit earned in these buildings and filed ITR declaring Income at Rs.8,487/-. Thus there is failure on the part of the assessee to disclose truly and fully all material facts. The case is required to be re-opened u/s 147 to bring the above mentioned quantum of income to taxation.*
>
> *As the period of 4 years have lapsed from the end of the relevant Assessment Year and excaped income is more than 1 lakh, the necessary permission of the Pr.CIT-2, Pune for issue of notice u/s 148 may be accorded'.*

4. The Petitioner by letter dated 27 May 2019 objected to the reasons in support of the impugned notice on the ground that there was no failure on its part to disclose truly and fully all material necessary for assessment. Thus, the impugned notice is hit by proviso to section 147 of the Act. Besides the Assessing Officer while passing the regular assessment order under section 143(3) of the Act had considered this very claim and accepted the same. Thus, it was urged that the basis of the impugned notice is a change of opinion. Therefore, without jurisdiction. However the Assessing Officer by order dated 6 June 2019 rejected the objections to the impugned notice. This has led to the filing of the present Petition.

5. Mr.Naniwadekar, learned counsel appearing in support of the Petition points out that impugned notice is without jurisdiction for the following reasons.

(a) The impugned notice has been issued beyond the period of four years from the end of the relevant Assessment Year when the regular assessment proceedings had been completed under section 143(3) of the Act. In such cases it is submitted that unless there has been a failure on the part of the Petitioner to disclose truly and fully all material facts necessary for assessment the Assessing Officer would not acquire jurisdiction to reopen the assessment. In the present case the reasons do not indicate any failure on the part of the Petitioner to disclose all material facts necessary for assessment in respect of claim under section 80IB(10) of the Act. Thus the impugned notice is without jurisdiction; and

(b) It is further submitted that the facts which form the basis of the Assessing Officer's reason to believe that income chargeable to tax has escaped assessment were itself a subject matter on examination by the Assessing Officer while passing the order under section 143(3) of the Act. Thus, it would amount to a change of opinion and therefore on this ground also the notice would be without jurisdiction. In view of the above it is submitted that the impugned notice be quashed as being without jurisdiction.

6. On the other hand Mr.Walve, learned counsel appearing on behalf of Revenue in support of the impugned notice submits as under :

(a) The order disposing objections records the fact that the material which led to the belief of the Assessing Officer that income chargeable to tax has escaped assessment was found / noticed during the assessment for the subsequent Assessment Year 2014-15. In the Assessment Year 2014-15 it was found that the completion certificate received by the Petitioner was only of part completion. Therefore, it was a case of fresh tangible material leading to the impugned notice to *prima facie* hold that benefit under section 80IB(10) of the Act could not be granted to the Petitioner; and

(b) The Petitioner cannot take advantage of having disclosed incorrect and/or incomplete facts in the regular assessment proceedings for the subject Assessment Year. It is not open to the Petitioner to claim that having accepted the claim in regular assessment proceedings, it is not open to reopen the assessment. In support he placed reliance upon the decision of the Supreme Court in Phool Chand Bajrang Lal and another Vs Income Tax Officer and another - 203 ITR page 456.

On the basis of the above it is submitted, that the Petition be dismissed.

7. It is an undisputed fact before us that the regular assessment proceedings for Assessment Year 2012-13 were completed under section 143(3) of the Act. Further, during the regular assessment proceedings for the subject Assessment Year specific questions were raised with regard to the Petitioner's claim for deduction under section 80IB(10) of the Act. The Petitioner during that inquiry pointed out to the Assessing Officer that the completion

certificate received on 25 September 2012 from the local Authority in respect of the project which had been completed before 31 March 2012 and the application for completion certificate was made by the Petitioner on 20 February 2012 and 27 March 2012 i.e. prior to31 March 2012. These facts were considered by the Assessing Officer while granting the benefit of deduction under section 80IB(10) of the Act. The reasons in support of the impugned notice itself proceed on the above facts viz. - completion certificate was received on 25 September 2012 while the project had to be completed before 31 March 2012 and therefore, this has led to the reason to believe that the income chargeable to tax has escaped assessment. Therefore the basis of the reasons to believe that income chargeable to tax has escaped assessment was that the completion certificate was not obtained on or before 31 March 2012. This was a subject matter of consideration by the Assessing Officer while passing the Assessment Order under section 143(3) of the Act for Assessment Year 2012-13. Thus the reason in support would be a clear case of change of opinion and the reopening notice would be without jurisdiction.

8. However, Mr.Walve learned counsel for Revenue invites our attention to the order dated 6 June 2019 disposing the objections and contends that the order disposing all objections in fact records the fact that during the proceedings of Assessment Year 2014-15, the Assessing Officer received tangible material which indicated that in September 2012 only the part completion certificate was issued.

Therefore, it is the above tangible material that led to the reasonable belief that the benefit of section 80IB(10) of the Act is not available to the entire project. However, these facts which are being relied upon by Mr.Walve are only recorded in the order disposing of the Petitioner's objections and do not form a part of the reasons for the Assessing Officer to come to reason to believe that income chargeable to tax has escaped assessment. This reliance upon an order disposing of objections to the reopening notice cannot be a ground different for the reasons recorded. The validity of the impugned notice has to be tested only on the basis of the reasons recorded for issuing the notice. In fact this issue is no longer res-integra. This Court in Hindustan Lever Vs R.B.Wadkar – 208 ITR page 332 has held that the reopening notice must stand or fall only on the reasons recorded by the Assessing Officer while issuing the reopening notice. It is not permissible for the Assessing Officer to either substitute and/or delete and/or add to the reason recorded while issuing the notice of reopening. Thus this reliance by Mr.Walve on the order disposing of objections is not justified.

9. Therefore one has only to examine the reasons as recorded which led the Assessing Officer to believe that income chargeable to tax has escaped assessment. It is not open to improve upon the reasons recorded. The reasons set out in the order of disposing of objections cannot form basis of his reason to believe that income chargeable to tax has escaped assessment at the time he issued

the impugned notice. As pointed out above the reasons recorded prior to issue of the impugned notice were on facts which was a subject of consideration in proceedings under section 143(3) of the Act. Thus a clear case of change of opinion and notice without jurisdiction.

10. In the above facts and circumstances, the decision of the Apex Court in Phool Chand and another (supra) would have no application. We are concerned here with the jurisdiction of the Assessing Officer to reopen assessment. The reopening of an assessment is strictly dependent on the Assessing Officer meeting the jurisdictional requirements to issue a reopening notice i.e. reason to believe that the income has escaped assessment. This examination is only for the reason recorded at the time of issuing the impugned notice. Thus the fact that an assessee in subsequent proceedings discovered facts which were suppressed in the earlier assessment proceedings by itself could not have led to the reopening of an assessment unless the Assessing Officer forms a reasonable belief on the above facts that income chargeable to tax has escaped assessment. This satisfaction has to be recorded in his reasons before issuing of the reopening notice. It is not open to reopen an assessment on reasons for belief not being recorded. The reasons recorded in support of the impugned notice are completely silent about assessment done for the Assessment Year 2014-15. Thus the decision in the case of Phool Chand Bajrang (supra) has no application to the present facts.

11. It is also to be noted merely alleging that there is failure to disclose truly and fully all material facts necessary for assessment, would not satisfy the jurisdictional requirement unless the reasons indicate what material facts the Petitioner had failed to disclose fully and truly during the course of the regular assessment. In fact our Court in the case of Bombay Stock Exchange Ltd. Vs Deputy Director of Income-Tax (Exemption) and others – [2014] 365 ITR 181 (Bom) has observed as follows :

> *'In the present case, admittedly, there are no details given by the Assessing Officer (respondent no.1) as to which fact or material was not disclosed by the petitioner that led to its income escaping assessment. There is merely a bald assertion in the reasons that there was a failure on the part of the petitioner to disclose fully and truly all material facts without giving any details thereof. This being the case, the impugned notice is bad in law and on this ground alone the petitioner is entitled to succeed in this writ petition'.*

In the above view also the impugned notice is without jurisdiction as the proviso to section 147 of the Act will be applicable in these facts.

12. For the above reasons, the impugned notice is set aside and the Petition is allowed.

(NITIN JAMDAR, J.) ***(M.S.SANKLECHA, J.)***