

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 14302 OF 2018

Akshar Anshul Construction LLP	..	Petitioner.
v/s.		
Asst. Commissioner of Income Tax 28(1)	..	Respondent.

Ms. Ritika Agarwal, for the Petitioner.
Mr. N. C. Mohanty, for the Respondent.

**CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.**
DATE : 1st MARCH, 2019.

P.C:-

At the request of the parties, Petition is taken up for final disposal.

2 This Petition under Article 226 of the Constitution of India, challenges a notice dated 27th March, 2018 issued under Section 148 of the Income Tax Act, 1961 (the Act) by the Respondent-Assessing Officer. The impugned notice seeks to re-open the assessment for Assessment Year 2011-12.

3 Brief facts leading to this Petition are as under:-

(a) The Petitioner is a Limited Liability Partnership and is engaged in construction activity. For the Assessment Year 2011-12, the Petitioner filed its return of income on 15th September, 2011. In its

return of income, the Petitioner declared an income of Rs.29.58 lakhs from its project “Akshar Valencia” (project). However, the Petitioner claimed deduction of 100% of its income under Section 80IB of the Act. Thus, declaring its taxable income as “Nil”.

- (b) The Assessing Officer selected the return for scrutiny. During the scrutiny proceedings, the Assessing Officer called for details in respect of bookings advance/ deposit as per the format, including the date of agreement and payment received till 31st March, 2011. The Petitioner responded to the same, furnishing details as sought for by the Assessing Officer. Thereafter, the Assessing Officer verified the details as provided and passed an Assessment Order on 26th March, 2014 under Section 143(3) of the Act, allowing 100% deduction under Section 80IB (10) of the Act, as claimed.
- (c) Thereafter, in support of the impugned re-opening notice, dated 27th March, 2014, reasons as recorded were communicated to the Petitioner. The reasons read as under:-

“ The assessee firm has filed its return of income for A.Y. 2011-12 on 30.09.2011 declared total income at Rs. Nil after claiming deduction u/s. 80IB at Rs.29,58,133/-. Subsequently, assessment order u/s. 143(3) of the I.T. Act, 1961 was passed on 26.03.2014 accepted return of income declared by the assessee.

Further, the case of assessee for A.Y. 2015-16 was selected for scrutiny. During the scrutiny assessment it is observed by the AO that the assessee firm has filed its return of income for the A.Y. 2015-16 on 31.10.2015 declaring total income at Rs. Nil, after claiming deduction u/s. 80IB of the I.T. Act, 1961 at Rs.103,83,468/-.

During the course of assessment proceedings, it is evident that the project 'Valencia' is in violation of conditions stipulated in Section 80IB (10) (f) of the I.T. Act, 1961 wherein no individual or his/her spouse may own more than one residential unit in a project claiming deduction under the aforementioned section.

Since multiple flats have been registered/ allotted in the name of same individuals, it is amply clear that the assessee has been in violation of express provisions of the act right from the commencement of the project Valencia in year 2010. Attention also needs to be drawn to the fact that the violation of section 80IB is not a one time event, rather the assessee has been flouting the norms right from the commencement of the project in 2010 to the year 2015. Also, it is worth noting that as many as 25 flats have been registered and advances received from against four flats in the said project 2010 to 2016 flouting the conditions stipulated in section 80IB(10)(f).

In view of the above facts and circumstances the deduction claimed by the assessee firm under section 80IB of the I.T. Act, 1961 to the tune of Rs.1,03,83,468/- for the year under consideration was rejected and accordingly, an amount of Rs.1,03,83,468/- was considered as assessee's income from business and added to the total income of the assessee.

From the Index II of the flats registered by the assessee with sub-registrar, Uran, Panvel and on perusal of flat allotment details submitted in this office on 16.11.2017, the following have been observed with regards to Project Valencia, Plot Number 9, Sector 16E Road Pali, Kalamboli, Navi Mumbai.

Flat No.	Name of Owner	Date
1305 B Wing	1. Sandhya Iyer and Srinivasan G. Iyer	19.11.2010
1306 N Wing	2. Sandhya Iyer and Srinivasan G. Iyer	19.11.2010
1406 B Wing	3. Sandhya Iyer and Matangi Iyer	19.11.2010

The registration of the above flats was done in F. Y. 2010-11 in the name of the same person in violation of the express provisions of section 80 IB (10)(f) of the I.T. Act, 1961.

Further, it is evident from the case record for the A. Y. 2011-12 that the assessee had claimed deduction u/s. 80IB of the I.T. Act, 1961 at Rs. 29,58,133/- which was allowed by the AO during the scrutiny assessment for the A.Y. 2011-12 vide assessment order u/s. 143(3) of the I. T. Act, 1961 dated 26.03.2014.

In view of the above, I have reason to believe that income chargeable to tax which has escaped assessment to the tune of Rs.29,58,133/- (Rs. Twenty nine lakh fifty eight thousand one hundred thirty three only) chargeable to tax within the meaning of Explanation 2(c) of section 147 of the I. T. Act, 1961. As such it is a fit case for issuance of notice u/s. 148 of the Income Tax Act, 1961.

In this case, since more than four years have lapsed from the end of assessment year under consideration, hence necessary sanction to initiate proceedings u/s. 147 and to issue notice u/s. 148 of the I. T. Act may be accorded as per provisions of section 151 of the Income Tax Act.”

(d) On 4th September, 2018, the Petitioner filed its objections to the above reasons in support of the impugned notice dated 27th March, 2018. The Assessing Officer by an order dated 24th October, 2018, rejected the Petitioner's objection.

4 This Petition has been filed, challenging the rejection of its objections by order dated 24th October, 2018 that the impugned notice dated 27th March, 2017 is without jurisdiction.

5 Ms. Agarwal, learned Counsel appearing in support of the Petition, submits that the impugned notice is completely without jurisdiction as the same has been issued beyond a period of four years from the end of the relevant Assessment Year without having alleged any failure on the part of the Petitioner to disclose fully and truly all material facts necessary for assessment. It is further submitted that, in any case, the Assessing Officer had completely examined the Petitioner's case before extending the benefit of Section 80IB of the Act. The reasons in support of the impugned notice seek to deny the benefit on the ground that the Petition had not satisfied the conditions in Section 80IB (10)(f) of the Act.

This issue had been examined during the Assessment Proceedings as is evident from the queries raised. Thus, the impugned notice is completely without jurisdiction and needs to be quashed and set aside.

6 On the other hand, Mr. Mohanty, learned Counsel for the Revenue submits that the re-opening notice has been issued consequent to assessment order dated 26th December, 2017 passed for Assessment Year 2015-16. It was submitted that during the assessment proceedings for Assessment Year 2015-16, the Assessing Officer found that the commencement certificate in respect of the project was given only on 21st September, 2010. Thus, the allotment of the flat and receipt of consideration prior to 1st April, 2010 could not have been taken place. Consequently, the Petitioner could not have claimed the benefit of Section 80IB (10)(f) of the Act, as the allotment and payments would have been made subsequent to the amendment w.e.f. 1st April, 2010 by which clause (f) to Section 80 IB (10) of the Act, was introduced. In the above circumstances, it is submitted that, there is no need to interfere with the impugned notice and Petitioner be directed to respond to the notice and participate in the re-assessment proceedings.

7 It is a settled position in law that where assessment has been completed by scrutiny under Section 143(3) of the Act, an assessment cannot be reopened beyond a period of four years from the end of the relevant assessment year in the absence of any failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment. This is the mandate of the first proviso to Section 147 of the Act. In the present case, it is undisputed position that the regular assessment for Assessment Year 2010-11 was completed under Section

143(3) of the Act. The impugned notice has been issued on 27th March, 2018 i.e. admittedly, beyond a period of four years from the end of the relevant Assessment Year 2010-11. Thus, the reasons in support of the impugned notice in cases where assessments sought to be re-opened is beyond a period of four years from the end of the relevant assessment year where assessment is completed u/s. 143(3) of the Act, must spell out the exact failure on the part of the assessee which resulted in escapement of income. The reasons recorded in support of the impugned notice, alleges that the Petitioner is not entitled to the benefit of exemption under Section 80 IB (10) of the Act as from index II of the flats sold registered with the Registrar show that three flats have been sold to the same family. It is on the basis that, this sale was post insertion of section 80IB(10)(f) of the Act w.e.f. 1st April, 2010. However, we find that during regular assessment proceedings, for the subject Assessment Year 2011-12, the Petitioner had at the instance of the Assessing Officer given complete details with regard to the purchase of the flat, the date of agreement of purchase of the flats and also date of possession to the Assessing Officer. The same was examined by the Assessing Officer. At that time, the Assessing Officer was satisfied that the flats were sold prior to the amendment of 2010. It is consequent to the above that the Assessing Officer passed an order dated 26th March, 2014 under Section 143 (3) of the Act and accepted Petitioner's claim for deduction under Section 80 IB (10) of the Act. Thus, in view of the above, the full and true disclosure at the time of regular assessment, the impugned notice is without jurisdiction.

8 It may be pointed out that at the hearing, the Respondent contended that the assessment was re-opened on the basis of the

assessment order for Assessment Year 2015-16 where it was found that the commencement certificate for the project was received only on 21st September, 2010 in the name of the Petitioner. Therefore, there was a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for amendments. We find that, the reasons in support of the impugned notice, merely mentions about the Assessment for Assessment Year 2015-16. However, it does not mention of any failure to disclose the correct date of commencement being a fact which came to the knowledge of the Revenue while passing the Assessment Order for Assessment Year 2015-16. This fact, according to Mr. Mohanty is evident from the Assessment Order for Assessment Year 2015-16 and it has to be read into the reasons given in support of the impugned notice. This, submission is contrary to the decision of this Court in ***Hindustan Lever v/s. R. B. Wadkar* 268 ITR 332** – wherein this Court has held as under:-

“ The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or declaration is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusions as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons

provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safe-guard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced.”

Thus, the submission of Mr. Mohanty not being a part of the reasons recorded, cannot be read into them, in the facts of this case.

9 Therefore, in facts of this case, the reasons in support of the impugned notice not having alleged/ particularized any failure on the part of the Petitioner to disclose fully and truly all material facts necessary for the assessment, the impugned notice is without jurisdiction.

10 Accordingly impugned notice is quashed and set aside. Petition allowed in the above terms.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)