

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

WRIT PETITION NO. 14481 OF 2018

Raviraj Devikesh Constructions

.. Petitioner

v/s.

The Income Tax Officer,
Ward 5(1), Pune & Anr.

.. Respondents

Mr. Mihir Naniwadekar a/w Ms. Alisha Pinto for the petitioner
Mr. Sham Walve for the respondents

**CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.**

DATED : 11th JANUARY, 2019

P.C.

1. At the request of the parties, the petition is being taken up for final disposal at the stage of admission.

2. This petition under Article 226 of the Constitution of India challenges a notice dated 29th March, 2018 issued under Section 148 of the Income Tax Act, 1961 (the Act). The impugned notice dated 29th March, 2018 under Section 148 of the Act seeks to reopen the assessment for Assessment Year 2011-12.

3. The petitioner is a partnership firm engaged in construction of

housing projects. For the subject assessment year, the petitioner filed its return of income claiming deduction under Section 80IB(10) of the Act in respect of its project "Sicilia" (project) in Pune. The Assessing Officer by a scrutiny assessment passed an order dated 25th March, 2014 under Section 143(3) of the Act allowing the petitioner's claim for benefit of deduction under Section 80IB(10) of the Act. This after having considered the issue of eligibility of Section 80IB(10) of the Act to the project as some of the flats appeared to be in excess of the area of 1,500 sq.ft.

4. On 29th March, 2018, the impugned reopening notice was issued. In support of the impugned notice, the Assessing Officer had recorded the following reasons :-

"1. Brief of the Assessee : The assessee is a partnership firm falling within the jurisdiction of Income-Tax Officer, Wd 5(1), Pune. The assessee firm is engaged in the business of development of properties and construction of residential buildings. It had filed return of income for the AY 2011-12 on 21.09.2011 declaring total income of Rs.3,64,47,017/-. During the previous relevant to the AY in question, the assessee firm had claimed deduction u/s 80IB(10) of the Income-tax Act, 1961 (hereinafter "the Act) amounting to Rs.8,19,29,331/- in its return of income in respect of profit and gains of its business. The return was processed u/s 143(1) of the Act. Subsequently, assessment was made u/s 143(3) of the Act on 25.03.2014 allowing the entire claim of 80IB(10) made by the assessee firm at Rs.8,19,29,331/-. Thus, the assessment resulted in acceptance of returned income of Rs.3,64,47,017/-.

2. *Brief details of information collected / received by the AO : I have gone through the relevant case records in my possession that contain Assessment Order made u/s 143(3) of the Act for the AY 2011-12. Govt. Approved Valuer, Shri. Nitin Lele's Report, dtd. 24.03.2014 and other relevant submissions. It is observed from the Valuer's Report that areas of some of the residential units constructed by the assessee firm exceed the prescribed limit i.e. 1,500 sq.ft. as elaborately discussed in the foregoing paras and, thus, the assessee violated the provisions of Sec.80IB(10)(c) of the Act.*

3. *Analysis of information collected / received :- The assessee had undertaken a project named "Sicilia" situated at S.No.70A/5/1, Ghorpadi, Pune admeasuring 26,938 Sq.Mtrs. The project consisted of 252 flats in 5 buildings A,B,C,D & E. The Valuer's Report dated 24.3.2014, vide Para Nos. 4.2 and 4.3 clearly mention (as per Area Statement enclosed therewith) that areas of 8 flats on the 1st floor and 16th flats on the 9th floor are in excess of 1,500 sq.ft. and terrace area was also a part of the flat. In accordance with the provisions of Sec. 80IB(10)(c) of the Act, the built up area of each residential unit should not be more than 1500 sq.ft. in order to be eligible to claim deduction u/s 80IB(10) of the IT Act.*

As per Sec. 80IB(a), definition of built-up area is "built-up area means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common area shared with other residential units." In this case, the terraces are not common areas because they have exclusive access from a particular flat only nobody else can access these terraces except the individual flat owner. Besides, it is seen that the authorized signatory of the firm had issued letters to the flat owners stating that as per their negotiations and rights reserved with them about grant of use of exclusive terraces towards the North and South of the said block / parking areas in the said scheme, the firm has permitted all the rights to use terraces adjoining to the units to the respective flat owners. Further, during the course of the assessment proceedings, a statement of one of the owners (flat no.A-101) Viz. Shri. Narayan Subbaiah Sava, Pune was also recorded

u/s 131 of the Act on 2.1.2014, wherein he has clearly stated that he has exclusive access for the terrace adjoining to his flat. Hence, it is crystal clear that the terrace area includes builtup area. Thus, the built up area of the above mentioned flats exceeds 1500 sq.ft. Accordingly, the assessee firm has violated the provisions of Section 80IB(10)(c) of the Act.

4. Enquiries made by the AO as sequel to information collected / received :- As stated above, it is observed that the assessee failed to fulfill the conditions stipulated in Sec.80IB(10)(c) of the Act.

5. Findings of the AO :- On the basis of the Valuer's Report, it is found that the areas of as many as 24 flats in the said project constructed by the assessee are in excess of 1,500 sq.ft. (including terrace areas). The assessee firm, therefore, did not comply with the conditions laid down u/s 80IB(10)(c) of the Act. Hence, the income of the assessee has been escaped from assessment to the extent of the deduction allowed u/s 80IB(10) i.e. Rs.8,19,29,331/-.

6. Basis of forming reason to believe and details of escapement of income :- In view of the above Para Nos. 2, 3, 4 and 5 and the information in my possession, I have reason to believe that the assessee's income chargeable to the extent of Rs.8,19,29,331/- has been escaped from assessment. I am, therefore, satisfied that it is a fit case for initiating the proceedings u/s 147 of Act to assess such escaped income and to assess any other income which may come to the notice during the assessment proceedings u/s 147 of the Act; as such the proceedings under the said Section are hereby initiated.

7. Findings of the AO on true and full disclosure of the material facts necessary for assessment under Proviso to Section 147 : The Valuer's Report dtd. 24.3.2014 highlighting the areas of 8 flats on the 1st floor and 16th flats on the 9th floor being in excess of 1,500 sq.ft. (including terrace areas) proves the fact that the assessee had not disclosed fully and truly all material facts necessary for its assessment or that the facts of the case are covered by the Explanation 1 to Section 147 of the Act.”

5. From the reasons recorded in support of the impugned notice, it

is evident that the basis for issuing the impugned notice is the report dated 24th March, 2014 of Mr. Lele, the Government approved Valuer to *prima facie* form a reasonable belief that income chargeable to tax has escaped assessment. This on the ground that in view of the above report, the petitioner is not eligible to the benefit of Section 80IB(10) of the Act.

6. The petitioners filed its objections on 7th August, 2018 to the reopening notice. However, the objections were rejected by an order dated 27th November, 2018 by the Assessing Officer.

7. Mr. Naniwadekar, learned Counsel appearing in support of the petition submits that the impugned notice is without jurisdiction and in support made the following submissions :-

(a) The impugned notice is issued in respect of an assessment completed under Section 143(3) of the Act, beyond the period of four years from the end of the relevant assessment year and in the absence of any failure to disclose fully and truly all material facts, is without jurisdiction. This particularly when the Government approved Valuer's Report dated 24th March, 2014 was a part of assessment under Section 143(3) of the Act; and

(b) The reasons recorded in support of the impugned notice clearly indicate a change of opinion on the part of the Assessing Officer as report dated 24th March, 2014 of the Government approved valuer was a subject matter of consideration by the Assessing Officer in his order dated 25th March, 2015 passed under Section 143(3) of the Act.

8. On the other hand, Mr. Walve supports the impugned notice and the order disposing of the objections and submits that the Assessing Officer would examine the issues during the re-assessment proceedings and do justice between the parties. Thus, the Court should not interfere at this stage.

9. It is a settled position in law that when an assessment is completed by scrutiny under Section 143(3) of the Act, then a reopening notice beyond a period of four years is barred, unless there is a failure to disclose fully and truly all material facts necessary for assessment. This is in fact the mandate of the first proviso to Section 147 of the Act. So also, it is settled position of law that reopening of assessment is not to review the assessment order passed under Section 143(3) of the Act. Therefore, no reopening is permissible on mere change of opinion.

10. In the present facts, we note the reopening notice is issued beyond a period of four years from the end of the assessment year 2011-12 in respect of assessment completed under Section 143(3) of the Act. The basis of the impugned notice is the Government approved Valuer's Certificate dated 24th March, 2014. We note that this very certificate was a subject of consideration while passing the assessment order dated 25th March, 2014 under Section 143(3) of the Act. The reason do not state that the above certificate dated 24th March, 2014 came to the notice of the Assessing Officer after passing the Assessment Order dated 25th March, 2014. Thus, there is no failure to disclose all material facts truly and fully on the part of the petitioner during regular assessment proceedings. Thus, on the above ground itself, the impugned notice is bad. We further find that in the assessment order dated 25th March, 2014 under Section 143(3) of the Act, the above certificate dated 24th March, 2014 was considered before passing the order. In the above circumstances, the impugned notice is an attempt to reopen an assessment completed under Section 143(3) of the Act based on the change of opinion. The Government approved valuer's report dated 24th March, 2014 was considered and a view was taken. The Assessing Officer now seeks to take a different view to form a

reasonable belief that income chargeable to tax has escaped assessment.
This also is clearly without jurisdiction.

11. Thus, the impugned notice dated 29th March, 2018 is quashed and set aside as being without jurisdiction.

12. Petition allowed.

(M.S. SANKLECHA, J.)

(AKIL KURESHI, J.)