

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 3339 OF 2018

Runwal Realty Private Limited .. Petitioner

Versus

Dy. Commissioner of Income Tax,
Central Circle 4(1) & Ors. .. Respondents

-
- Mr. Madhur Agarwal i/by Mr. Atul Jasani for the Petitioner
 - Mr. A.R. Malhotra a/w Mr. N.D. Kazi for the Respondents
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CORAM : AKIL KURESHI &
S.J. KATHAWALLA, JJ.

DATE : JUNE 3, 2019.

P.C.:

1. The petition is filed by the assessee to challenge a notice of reopening of assessment issued by the respondent – Assessing Officer on 30.3.2018.

2. Brief facts, are as under:-

2.1 Petitioner is a Private Limited Company and is engaged in the business of real estate development. The petitioner had filed return of income for the assessment year 2011-12 on 30.9.2011 declaring total income of Rs. 35.94 Crores (rounded of). This was revised by declaring total

income of Rs. 35.66 Crores (rounded off). In the return, the petitioner had claimed deduction for sum of Rs. 56.13 Crores under Section 80-IB(10) of the Income Tax Act, 1961 (“the Act” for short”). The return filed by the petitioner was taken in scrutiny by the Assessing Officer. The Assessing Officer passed an order of assessment under Section 143(3) of the Act on 8.3.2014 accepting the petitioner’s declared income. Subsequently, the petitioner was subjected to search operations. Post search also, the assessment was carried out. Thereafter, the Assessing Officer issued the impugned notice. In order to do so, he had recorded following reasons:-

“Reasons to believe that income chargeable to tax escaped assessment u/s. 147 of the Income Tax Act:-

1. In this case, the assessee filed its return of income on 30.9.2011 declaring total income of Rs. 35,94,29,403/-. A revised return of income was filed by assessee on 26.3.2013 declaring total income at Rs. 35,66,13,156/-. Subsequently, assessment u/s. 143(3) was completed on 8.3.2014 accepting the revised return filed by the assessee. A search action u/s. 132 had been carried out on the Runwal Group on 17.11.2014. Notice u/s. 153A was issued and served on the assessee. In response thereto, assessee filed return of income on 13.7.2016 declaring total income at Rs. 35,66,13,160/-. Consequently, assessment u/s. 143(3) r.w.s. 153A was completed on 30.12.2016 at an assessed income of Rs. 36,14,35,900/-.

2. On going through the record, it was observed that assessee had claimed deduction u/s 80-IB(10) of Rs. 56,13,80,172/-. It was observed that deduction u/s. 80-IB(10) had to be computed on the basis of commercial profit whereas it had been computed in accordance with provisions of Section 28 to 44 of the I.T. Act and after set off of losses in accordance with provisions of Section 70, 71, 72 and 73 of the I.T. Act. Further, it had been observed that assessee had availed deduction on sale of car parking also which cannot be construed as derived from housing projects as the car parking space cannot be sold to flat buyers and excluding car parking the eligible profit works out to Rs. 50,49,35,215/- whereas deduction had been allowed at Rs. 56,13,80,172/-. Therefore, the same resulted in excess allowance of deduction of Rs. 5,74,34,957/-.
3. Further, it was observed that assessee submitted details containing saleable area and carpet area in respect of each flat. On going through the same, it was noticed that the area of each flat was more than 1000 sq. ft. and the corresponding carpet area was less than 1000 sq. ft. and the built-up area was not given. Obviously, the deduction was allowed on the basis of carpet area which is incorrect because the provisions of the Act clearly mentions that the deduction had to be allowed to only those projects wherein built-up area of each flat should not be more than 1000 sq.ft. Therefore, the deduction has to be allowed on the basis of built-up area and not on the basis of loading on carpet area to determine saleable area which works out 45% as shown below:-

Flat No.	Saleable Area	Carpet Area	Loading (%)
203	1275	875	45.7
303	1275	875	45.7

201	1250	866	44.34
401	1250	866	44.34

Considering the above facts, the assessee had failed to fulfill the conditions laid down in section 80-IB(10) so as to be eligible for the said project.

Further, it was observed that two residential units i.e. 701 & 702 to Mr. Rajesh J. Sheth, HUF and Pranalal R. Sheth (HUF) that flat Nos. 701 and 702 were booked on 7.11.2011 and date of allotment was on 31.12.2011. Hence, the date of booking and date of agreement both were posterior to be date of amendment in the Act on 1.4.2010. Further, the event of date of allotment was not a pre-amendment event. Hence, the deduction claimed and allowed as per provisions of section 80-IB(10) is not applicable to the assessee. Hence, it can be said that assessee was not eligible for deduction u/s. 80-IB(10) of the Act.

4. Further, I have also examined the case records and after considering the same, there is enough reason to believe that the assessee prima facie has clearly failed to disclose all material facts for determination of income. In fact, in this case, the assessee seems to have fabricated evidence in order to mislead the revenue to believe the apparent as real.
5. In view of the above, it is evident that an income to the extent of Rs. 56,13,80,172/- has resulted in under assessment of income of assessee to that extent.
6. In view of the fact mentioned above, it is evident that the assessee has not fully and truly disclosed all the material facts necessary for his assessment during the assessment

proceedings which has led to the escapement of income for AY 2011-12. On the basis of the aforesaid tangible material available with me now, I have reason to believe that an amount of more than Rs. 1,00,000/- has escaped assessment for AY 2011-12 within the meaning of section 147 of the IT Act.”

2.2 The petitioner raised objections to the notice of reopening under a communication dated 4.9.2018. Such objections were, however, rejected by the Assessing Officer by order dated 17.9.2018. Hence, this petition.

3. Perusal of the reasons recorded by the Assessing Officer would show that he objects to the petitioner’s claim of deduction under Section 80-IB(10) of the Act on following three grounds:-

- i. The petitioner had sold car parking spaces and claimed it as a profit out of development under the housing project. According to the Assessing Officer, such income would not qualify for deduction under Section 80-IB(10) of the Act;
- ii. According to the Assessing Officer, the assessee had given details of saleable area and carpet area of the facts constructed were in excess of

thousand square feet. The assessee had, however, not provided the details of carpet area. According to him, therefore, the claim of deduction under Section 80-IB(10) of the Act was unsustainable;

- iii. He noticed that the assessee had sold two residential units to one Rajesh J. Sheth, HUF and Pramlal R. Sheth (HUF) which was in breach of one of the conditions contained in Section 80-IB(10) of the Act. In the reasons recorded, though he has not referred to the condition, obviously, his reference is to clause (f) of Section 80IB(10) of the Act which prohibits allotment of a flat in favour of certain person being an individual to whom the flat has already been allotted in housing project.

4. Taking us through the reasons and the material on record, the petitioner raised following contentions:-

- (i). The impugned notice has been issued beyond the period of four years from the end of relevant assessment year. There was no failure on the part of the assessee to disclose truly and fully all material facts;

- (ii). The assessee's claim of deduction under Section 80-IB(10) of the Act was examined minutely during the original assessment proceedings as well as during the post search assessment. Any attempt on the part of the Assessing Officer to dislodge the claim would be based on change of opinion since no additional material is available with the Assessing Officer;
- (iii) Even otherwise, the reasons recorded lack validity and proceeded on erroneous averments. Learned counsel pointed out that the assessee had supplied full details of carpet area. However, the clause (f) of Section 80-IB(10) would not apply in the present case since the allotments were made to two different HUF's.

5. On the other hand, learned counsel for the department opposed the petition contending that:-

- (i). There was no full and true disclosures on the part of the petitioner. Mere production of details or accounts would not satisfy the requirement of true and full disclosure. In this respect, learned counsel relied on following decisions:-

1. Rakesh Agarwal Vs. Assistant Commissioner of Income-tax¹;

2. Dr. Amin's Pathology Laboratory Vs. P.N. Prasad, Joint Commissioner of Income-tax (No. 1)²;

(ii). The petitioner had sold car parking spaces which cannot be stated to be income derived out of development under housing project. The petitioner's claim of deduction under Section 80-IB(10) to that extent was not sustainable;

(iii). The petitioner had not raised contentions with respect to the Assessing Officer's ground of unsustainability of deduction of the income derived from car parking spaces.

6. Having thus heard learned counsel for the parties and having perused the documents on record, in our opinion, the impugned notice cannot survive the test of law. Our reasons are as follows:-

7. As noted, the petitioner had filed return of income. One

1 [1996] 221 ITR 492 (Delhi)

2 [2001] 252 ITR 673 (Bombay)

of the main claim in the return was deduction under Section 80-IB(10) of the Act relating to the petitioner's income from development of housing project. The petitioner's return was taken in scrutiny. During scrutiny assessment, the Assessing Officer had raised queries which can be gathered from the fact that the petitioner had supplied several details as called for by the Assessing Officer. In one of the communications, the petitioner had made detail submissions providing materials on allowability of deduction under Section 80-IB(10) of the Act. Thus, petitioner's claim of deduction under Section 80-IB(10) of the Act was scrutinized by the Assessing Officer during the original scrutiny assessment. After such scrutiny, he passed an order of assessment in which he made no disallowance. Any attempt on his part now to disturb the claim would be based on change of opinion which is wholly impermissible as held by the Supreme Court in case of **CIT, Delhi Vs. Kelvinator of India Ltd**³. In the said decision, the Court held that even post amendment w.e.f. 1.4.1989, the concept of change of opinion would continue to apply in relation to reassessment.

3 (2010) 320 ITR 561 (SC)

8. This apart, the notice of reopening of assessment has been issued beyond the period of four years from the end of relevant assessment year. Additional requirement flowing from the provisions of Section 147 of the Act namely the income chargeable to tax had escaped assessment due to the failure on the part of the assessee to disclose truly and fully all material facts, therefore, must be satisfied.

9. In the present case, the petitioner had produced full accounts. In the profit and loss account, the petitioner had showed income of Rs. 112.58 Crores from sale of flats. A separate sum of Rs. 4,48,50,0000/- was shown by way of receipt from sale of car parking. Along with the return, the petitioner had also produced accounts dully attached in Form 3CD which also contained such details. In plain terms, there was no failure on the part of the assessee to disclose truly and fully all material facts. In fact, the Assessing Officer in his reasons recorded for issuing the impugned notice has proceeded on the basis of the material already on record clearly indicating there was no material alient to the record

on which he had placed reliance in order to form a belief that income chargeable to tax had escaped assessment. We are not oblivious to the explanation to Section 147 of the Act heavily placed reliance upon by the learned counsel for the Revenue, however, since a days of decision in case of **Calcutta Discount Co Ltd Vs. ITO**⁴, it is well settled that the duty of the assessee is to disclose primary facts. What legal inference to be drawn on the basis of such facts is within the realm of the Assessing Officer's jurisdiction.

10. Additionally, we find that the objections with respect to not providing built up area details and breach of clause (f) to Section 80-IB(10) of the Act are unsustainable factually and legally respectively. The assessee had provided full details including built up area of the flats sold contrary to what the Assessing Officer had asserted in the reasons recorded. Further, the clause (f) of Section 80-IB(10) of the Act would apply in case of allotment to an individual as the Section itself clearly provides which is not a case in the present case.

4 41 ITR 191

11. The last contention of the learned counsel for the Revenue that certain objections not having been taken by the assessee in response to the notice issued would preclude him from raising a contention that the petition is not borne out from any authority or statutory provision. If there is legal contention which goes to the root of the matter and which would render the action of the Assessing Officer of issuing notice of reassessment without jurisdiction, such a ground cannot be showed out merely because in the written objections, the petitioner had not thought of raising it. Accepting any such contention would enable the revenue to proceed further with the reassessment which at a later relatably stage when shown to be without jurisdiction, would be liable to be quashed.

12. In the result, the impugned notice dated 30.3.2018 is set aside. The petition is allowed to be disposed of accordingly.

[S.J. KATHAWALLA, J.]

[AKIL KURESHI, J]