IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.01.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Tax Case Appeal No.381 of 2018

Ramsingh Kumar,
No.7, 1st Floor,
Papanasan Sivan Salai,
Santhome, Mylapore,
Chennai-600 004.
PAN: AFDPR4037A ... Appellant

-vs-

The Deputy Commissioner of Income Tax,
Non-Corporate Circle – 2,
Chennai-600 034. ... Respondent

Tax Case Appeal filed under Section 260A of the Income-tax Act, 1961 against the order of the Income-tax Appellate Tribunal, 'A' Bench, Chennai in I.T.A.2194/Mds/2016, dated 06.01.2017, for the assessment year 2010-11,against the order of Commissioner of Income Tax(Appeals) 2 ITA 142(CIT(A)-2(2015-16, ITA No.143/CIT/A)2-2013-2014, ITA in 243/CIT(A)-2 2014-15 dated 17/6/2016 Pan and arising out of the assessment orders of Deputy Commissioner of Income Tax, Non Corporate Circle 2, Chennai, dated 22.06.2015 in PAN No.GIR No.AFDPR4037A, and Assistant Commissioner of Income Tax, Circle Ii, Chennai, dated 13.02.2013 in PAN/GIR No.AFDPR4037A.

For Appellant : Mr.R.Sivaraman

For Respondent : Mrs.R.Hemalatha,
Senior Standing Counsel

JUDGMENT
(Delivered by T.S.Sivagnanam, J.)

This appeal, by the assessee filed under Section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), is directed against the order of the Income-tax Appellate Tribunal, 'A' Bench, Chennai (for brevity "the Tribunal") in I.T.A.2194/Mds/2016, dated 06.01.2017, for the assessment year

2010-11.

2.The above appeal has been admitted, on 02.08.2018, on the following substantial questions of law:-

> “(i) Whether, on the facts and circumstances of the case, the Appellate Tribunal was right in law in reopening the assessment u/s 148 of the Income Tax Act, for the assessment year 2010-11 without any tangible materials on record?
>
> (ii) Whether, on the facts and circumstances of the case, the Appellate Tribunal was right in law in disallowing the benefit u/s 80-IB (10) of the Act on the condition that the Assessee had violated the provisions of clause (e) of Section 80-IB (10)?”

3.Two issues arise for consideration in this appeal.

(i) The first issue is whether the assessment, which was completed under Section 143(3) of the Act, vide order dated 13.02.2013, for the assessment year 2010-11, could have been re-opened under Section 147 of the Act.

(ii) The second issue is whether the amended Section 80IB (10)(e) inserted with effect from 01.04.2010 would be applicable to the subject assessment, viz., for the assessment year 2010-11.

4.On the first aspect, viz., whether the re-opening was valid or not, the reason for re-opening of the assessment was on the ground that as per the amended Section 80-IB(10)(e), in case there was more than one residential unit in the housing project is allotted to any person not being an individual, the deduction under Section 80-IB(10) is not allowable. The Assessing Officer alleged in the assessment order dated 01.07.2015, that the assessee has violated the conditions laid down in the amended Section 80-IB(10) and therefore, the allowance of the relief in the original assessment was not correct and liable to be withdrawn. Admittedly, there is no allegation that the assessee failed to disclose fully and truly all the materials before the Assessing Officer.

5.We have perused the assessment order dated 13.02.2013, under Section 143(3) of the Act, and we find that the Assessing Officer considered the entire facts, and verified the documents produced by the assessee, viz., plan approval, permit, completion certification and also the books of accounts, bills for major expenditure, which were checked and retained to the assessee. Thus, based upon the detailed material, evidences and clarifications, the Assessing Officer completed the assessment. Thus, in the absence of any allegation that the assessee has filed to disclose fully and truly all materials for completion of the assessment and also in the absence of no fresh tangible material, reopening of the assessment is held to be bad in law.

6.The next aspect is whether at all the amended provision of Section 80-IB(10)(e) would apply to the assessment year in question, viz., 2010-11. This issue has been clarified by the Tribunal, vide Circular No.5/2010. This has been clarified by the Board in the Explanatory Notes to the Provisions of the Finance (No.2) Act, 2009, dated 02.06.2010. So far as the applicability of the amendment in paragraph 33.8 is concerned, the following clarification has been given:-

> "33.8 Applicability - These amendments have been made applicable with effect from 1st April, 2010 and will accordingly apply in relation to assessment year 2010-11 and subsequent years. The amendments relate to restrictions on specific transactions (i.e., allotment of residential units). Therefore, they would apply to transactions after a specified date during the year. Since the Finance (No.2) Act, 2009 became law on 19th August, 2009, the restrictions regarding allotment of residential units shall not apply in respect of allotments made before 19.08.2009."

The above clearly shows that the amended provision shall not apply in respect of allotments made before 19.08.2009.

7.So far as the assessee's case is concerned, all the allotments/sale deeds have been executed on 04.06.2009, and this aspect has not been disputed by the Revenue. In fact, the documents were considered by the Assessing Officer while completing the assessment under Section 143(3) of the Act, vide order dated 13.02.2013. Therefore, the assessment could not have been reopened based upon the amendment, which could not have been applied for the subject assessment year.

8.The Hon'ble Supreme Court in the case of CIT vs. Sarkar Builders, [2015] 57 taxmann.com 313 (SC), considered the question whether Section 80-IB(10)(d) applies to housing projects approved before 31.03.2005, but completed on or after 01.04.2005. The Hon'ble Supreme Court held that in order to avail the benefit in the assessment year after 01.04.2005, if the balconies have to be removed by the assessee, it will lead to absurd results, as one cannot expect the assessee to comply with a condition that it was not a part of the statutes when the housing project was approved. Thus, it was held that clause (d) is to be treated as inextricably linked with the approval and construction of the housing project and the assessee cannot be called upon to comply with the said condition either of the assessee or even the Legislature, when the housing project was accorded approval by the local authorities. Therefore, it held that the said amendment cannot be applied to those projects, which were sanctioned and commenced prior to 01.04.2005, and completed by the stipulated date, though such stipulated date is after 01.04.2005. The above decision also strengthens the case of the assessee.

9.The learned counsel for the assessee referred to the decision of the Ahmedabad Bench of the Tribunal in the case of Patel Jashwantlal A vs. Income-tax Officer, [2015] 58 taxmann.com 135 (Ahmedabad - Trib.); and the decision of the Kolkata Bench of the Tribunal in D.C.I.T. vs. M/s.RDB Realty & Infrastructure Ltd., I.T.A.No.575/Kol/2016, dated 20.07.2018.

10.It is the submission of the learned counsel that both the decisions have been accepted by the Department. In the said decision Patel Jashwantlal (supra), the Tribunal has held that the amendment in Section 80-IB restricting allotment of more than one residential units in housing project to same person came into effect from 01.04.2010 is not applicable to allotments made prior to the said amendment.

11.In the light of the reasons assigned by us in the preceding paragraphs, we hold that the Tribunal was not right in rejecting the assessee's appeal.

12.We may point out that though the appellant has specifically raised the issue relating to the effect of the amendment, the Tribunal did not examine the said aspect and rendered no finding as regards the applicability of the amended provision. Thus, for the above reasons, the assessee is entitled to succeed.

13.Accordingly, the appeal is allowed and the substantial questions of law are answered in favour of the assessee. No costs.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

1.The Income-tax Appellate Tribunal, 'A' Bench, Chennai.

2. The Deputy Commissioner of Income Tax, Non-Corporate Circle-2 Chennai-600 034.

3. The Commissioner of Income Tax (Appeals 2), Chenai-600 034.

4. The Assistant Commissioner of Income Tax, Circle II, Chennai.

+1cc to Mr.R.Sivaraman, Advocate SR.No.4991

+1cc to Mr.R.Hemalatha, Advocate SR.No.4820

T.C.A.No.381 of 2018

VSN-II(CO)
GMY(01/03/2019)