

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1009 OF 2017

Bhavya Construction Co.

... Appellant.

V/s.

Asst. Commissioner of Income Tax
Circle 21(1), Mumbai & Anr.

...Respondents.

Dr. K. Shivaram, Advocate a/w. Ms. Neelam Jadhav,
Advocate for the Appellant.
Mr. Sham Walve, Advocate a/w. Mr. Pritesh Chatterjee
for Respondents.

**CORAM : UJJAL BHUYAN AND
MILIND N. JADHAV, JJ.**

DATE : JANUARY 30, 2020.

PC :

1 Heard Dr. K. Shivaram, learned senior counsel
for the Appellant / Assessee and Mr. Sham Walve,
learned standing counsel Revenue for the Respondents.

2 This Appeal has been preferred by the
Assessee under section 260A of the Income Tax Act
1961 (briefly, "the Act" hereinafter) against the order
dated 09.12.2016 passed by the Income Tax Appellate

Tribunal, Bench "B", Mumbai ("the Tribunal" for short) in Income Tax Appeal No. 4390/Mum/2014 for the assessment year 2007-08.

3 The Appeal has been preferred by the Appellant on the following questions stated to be substantial questions of law :

(a) Whether on the facts and in the circumstances of the case and in law, the order of the Tribunal is perverse inasmuch as it holds that the projects of the Appellant were approved much before 1 April 2004 without adjudicating Ground Nos.1 and 2 as raised by the Appellant on merit ?.

(b) Whether on the facts and in the circumstances of the case and in law, the amendment to section 80-IB(10)(b) vide Finance (No.2) Act, 2004 that substituted section 80-IB(10) as it stood then and relaxed the condition imposed by section 80-IB(10)(b) by introducing the proviso to section 80-IB(10) (b) is clarificatory and retrospective in nature and has retrospective operation ?.

(c) Whether on the facts and in the circumstances of the case and in law, the order of the Tribunal is perverse inasmuch as it does not consider the ratios laid down in the case laws of the co-ordinate benches of the Income

Tax Appellate Tribunal, Mumbai against the doctrine of `stare decisis'?.

(d) Whether on the facts and in the circumstances of the case and in law, the order of the Tribunal is perverse inasmuch as it violates the principles of natural justice by referring to and relying upon numerous case laws that were not relied upon by the Revenue during the course of the hearing and hence the Appellant was given no opportunity to rebut or distinguish the same ?.

4 In the proceedings held on 15.10.2019 this Court, after noting the grievance of the Appellant, was of the prima-facie view that the manner of disposing of the Appeal by the Tribunal was not proper. Accordingly, it was observed that the matter may be remanded back to the Tribunal for a fresh hearing and disposal in accordance with law.

5 Having regard to the observations made in the order dated 15.10.2019 relevant portion of the same is extracted hereunder :

“2. The basic grievance of the Appellant is that the impugned order of the Tribunal has been passed in breach of principles of natural justice. This for two reasons, one the decisions

relied upon by the Tribunal of its own (not cited at the bar) in the impugned order were not brought to the notice of the Appellant at any time, before the passing of the impugned order. This resulted in order adverse to the Appellant without the Appellant having an opportunity to address the Tribunal on the inapplicability of the decisions to the facts of this case. Thus, in effect an order without hearing. The second reason is that the Tribunal did not deal with the decisions relied upon by the Appellant in support of its case. This even though the impugned order records the decisions of its Co-ordinate Benches relied upon by the Appellant. This not dealing with the same by pointing out how the decisions would not apply to the facts of the case, leads to the order prima facie being bad as an order without reasons.

4. Prima facie, this manner of disposing appeals by the Tribunal is not expected of it and cannot stand to the scrutiny of law and justice. Thus, if the above contentions are not shown by the Respondent as incorrect, rather than admitting the appeal it may be appropriate to set aside the impugned order and restore the appeal to the Tribunal for fresh disposal.”

6 Dr. Shivaram, learned counsel, has taken us through the impugned order and submitted that the Tribunal has referred to more than 50 judgments of

various courts; not relied upon either by the assessee or by the Revenue, to the great prejudice of the assessee.

7 Mr. Walve, learned standing counsel Revenue submitted that on similar issue this court has admitted Income Tax Appeal No. 653 of 2012 (Ramesh Gunshi Dedhia vs. Income Tax Officer) vide order dated 08.08.2014.

8 In response Dr. Shivaram, learned counsel for the Appellant submits that there is a CBDT Notification No. 2 of 2011 dated 05.01.2011 which clarifies that projects covered by section 80IB(10) of the Income Tax Act, 1961 would be eligible for deduction under the said provision from the assessment year 2005-06 on-wards. In Ramesh Gunshi Dedhia's case this notification was not available before the Tribunal as it was issued afterwards. That was the reason why the Appeal has been admitted by this court. He further submits that in later assessment years Tribunal has relied upon the said notification of the CBDT and granted relief to the Appellant.

9 Be that as it may, having heard learned counsel for the parties and having perused the

impugned order passed by the Tribunal, we are of the view that the impugned order is required to be set aside for re-hearing of the appeal in accordance with law after giving further opportunity of hearing to the parties.

10 Accordingly, impugned order dated 09.12.2016 passed by the Tribunal in ITA No. 4390/Mum/2014 for the assessment year 2007-08 is set aside and the matter is remanded back to the Tribunal for fresh hearing and decision.

11 It is made clear that we have not expressed any opinion on merit and all contentions are kept open.

12 Appeal is accordingly disposed of.

Shalikram
P. Borey

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by Shalikram P.
Borey
Date: 2020.02.04
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(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

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