IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.28580 of 2011
and
W.M.P.No.1 of 2011

M/s.Arihant Foundations and Housing Ltd,
Rep by its Director, Mr.Vimal Lunawath,
"ANKUR MANAR" First Floor,
271 (Old No.182) Poonamallee High Road,
Kilpauk, Chennai - 600 010. ...Petitioner

Vs.

Joint Commissioner of Income Tax (OSD),
Company Circle - I (1),
121, Mahatma Gandhi Road,
Nungaambakkam, Chennai - 600 034. ...Respondent

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorari, calling for the records in PA No.AAACA7402P/AX-6691/169 dated 08.12.2011 on the file of the Respondent relating to the Assessment year 2004-2005 and quash the same.

For Petitioner : M/s.S.Sriniranjani
for Mr.G.Baskar & Mr.N.Muthukumar

For Respondent : Mr.Prabhu Mukuth
Arunkumar Jr.Standing Counsel for
M/s.Hema Muralikrishnan

O R D E R

The petitioner has challenged the impugned communication/impugned order dated 08.12.2011 over ruling the objection of the petitioner against invocation of Section 148 of the Income Tax Act, 1961 vide Notice dated 25.03.2011.

2. It is the submission of the learned counsel for the petitioner that though the scrutiny assessment order dated 30.5.2006 was passed under Section 143(3) of the Income Tax Act, 1961 and does not specifically discuss the deduction claimed by the petitioner under Section 80IB(10) of the Income Tax Act,

1961, nevertheless there were adequate disclosure for the deduction claimed under the aforesaid provision before the Assessing Officer vide 2 letters dated 4.4.2006 of its Chartered Accountant. He refers to the copies of these letters.

3. It is further submitted that the assessment order dated 30.5.2009 allowing the above deduction was revised by the Commissioner of Income Tax on 24.3.2009 under Section 263 of the Income Tax Act, 1961 and the deduction claimed under Section 80 IB of the Income Tax Act, 1961 was also disallowed.

4.It is submitted that the assessing officer also gave effect to the aforesaid order dated 24.3.2009 of the Commissioner of Income Tax by an order dated 30.9.2009 pursuant to hearing held on 22.7.2009 and 3.8.2009. The issue regarding deduction under Section 80 IB(10) was thus discussed and disallowed vide order dated 30.9.2009.

5. It is further submitted that the petitioner preferred an appeal against both the order dated 24.3.2009 of the Commissioner of Income Tax passed under Section 263 of the Income Tax Act, 1951 and the consequential order dated30.9.2009 of the assessing officer giving effect to the said order of the Commissioner of Income Tax before the Income Tax Appellate Tribunal and the Commissioner of Income Tax (Appeals) respectively

6. The order dated 24.3.2009 of the Commissioner of Income Tax passed under Section 263 of the Income Tax Act, 1951 was set aside by the Income Tax Appellate Tribunal on 15.12.2010. The Commissioner of Income Tax (Appeals) also set aside the consequential order dated 30.9.2009 of the assessing officer giving effect to the said order dated 24.3.2009 of the Commissioner of Income Tax passed under Section 263 of the Income Tax Act, 1951.

7. Therefore, it cannot be stated that there was a failure on the part of the petitioner to truly and fully disclose all material required for assessment for invoking the power under section 148 of the Income Tax Act, 1961 for the purpose of Section 147 of the Income Tax Act, 1961.

8. It is further submitted that Explanation to Section 80IB (10) giving retrospective effect from 1.4.2001 vide Finance Act, 2004 does not give a right to respondent to reopen the completed

assessment as ingredients to 1st proviso to Section 147 would still be required to be satisfied.

9. The learned counsel for the petitioner also drew my attention to the decision of the Division Bench of Gujarat High Court in the case of Sadbhav Engineering Ltd, vs. Deputy Commissioner of Income Tax, (2011) 333 ITR 483 (Gujarat) wherein dealing with amendment to Section 80IA retrospectively would not entitled the Department to reopen the Assessment under Section 148 of the Act for the purpose of Section 147 of the Income Tax Act, 1961.

10. On behalf of the respondent, it is submitted that present writ petition is liable to be dismissed as the respondent has to pass appropriate order under Section 147 of the Income Tax Act, 1961. It is submitted that the Tribunal did not have an occasion to consider issue regarding eligibility of the deduction under Section 80 IB of theIncome Tax Act, 1961 from the point of view of the retrospective amendment made to Section in the year 2009 with effect from 2001 and therefore the respondent was entitled to re-open the assessment.

11. It is further submitted that this Court in its order dated in W.P.No.28457 of 2008 and W.P.No.19260 of 2009 following the decision of the Honourable Supreme Court has held that the proceedings initiated for reassessment cannot be quashed at the threshold and it is open for the petitioner to produce records to satisfy the authorities that there was no necessity for re-assessment.

12. It is further submitted that any adverse order that may be passed is appealable not only before the 1st appellate Commissioner but thereafter before the Income Tax Appellate Tribunal. It is further submitted that there is further scope for approaching this court and therefore the assessment proceedings cannot be scuttled.

13. Heard the learned counsel for the petitioner and the respondents. The impugned communication rejecting/overruling the objection of the petitioner reads as under:-

13. "(a). The reopening of assessment was made consequent to the introduction of new amendment by way of explanation to sub-section 10 of Section 80 IB by the Finance Act, 2009 with retrospective effect from 01.04.2001 which says that the benefit

of this deduction shall not be allowed to any undertaking which executes the housing project as a works contract. The reason for reopening was also communicated by this office letter dated 29.11.2011.

> 14. (b). Whether the assessed company has executed the eligible projects by way of works contract or as a developer-cum-builder needs to be examined only during the course of assessment proceedings and deciding the issue otherwise before going to the facts and circumstances of the case is premature and not correct."

14. I have considered the facts on record and have perused the impugned order.

15. While exercising powers to reopen the concluded assessment under Section 148 of the Income Tax Act 1961 for the purpose of Section 147 of the Income Tax Act, 1961, powers of the assessing officer is circumscribed by the limitation prescribed under proviso to aforesaid section. Such officer cannot reopen the assessment if there was true and full disclosure of information required for the purpose of assessment and merely because there is a subsequent amendment to the provision, the power to reopen the assessment cannot come to the rescue of the revenue. This is evident from a reading of the language of the 1st proviso to Section 147 of the Income Tax Act, 1961 as per which no action shall be taken after the expiry of 4 years from the end of the relevant assessment year, unless income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for those assessment, for that assessment year.

16. Thus, it is incumbent on the respondent to pass appropriate order terms of the 1st proviso to Section 147 of the Income Tax Act, 1961. Mere retrospective amendment to Section 80 IB of the Income Tax Act, 1961 is of relevance.

17. Since the dispute pertains to the assessment year 2004-05, the respondent is requested to pass appropriate orders within a period of three months from date of receipt of a copy of this order. While passing such order, liberty is also given

to the respondent to proceed on any other grounds, other than the ground on which the subject notice under Section 148 of the Income Tax Act, 1961 was issued in terms of Explanation 3 to Section 147 of the Income Tax Act, 1961.

18. Petitioner is given liberty to file objections, if any, within a period of thirty days from date of receipt of a copy of this order.

19. Writ petition stands disposed with the above observation. Consequently, connected miscellaneous Petition is closed. No cost.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

jas/kkd

To

Joint Commissioner of Income Tax (OSD),
Company Circle - I (1),
121, Mahatma Gandhi Road,
Nungaambakkam, Chennai - 600 034.

+1cc to M/s.N.Muthukumar, Advocate, S.R.No.14459
+1cc to M/s.Hema Muralikrishnan, Advocate, S.R.No.14287

W.P.No.28580 of 2011
and
W.M.P.No.1 of 2011

GP(CO)
KKV/14/07/2020