

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY APPELLATE JURISDICTION

WRIT PETITION NO.1005 OF 2008

Digitally
signed by
SHRADDHA
KAMLESH
TALEKAR
Date:
2022.01.11
10:02:47
+0530

1. M/s. Gemstar Construction Pvt. Ltd. ...Petitioner
vs.
1. Union of India
& 3 Ors. ...Respondents

Mr.Ajay Singh a/w. Ms.Payoja Gandhi i/b M. Archit Virmani for petitioner.

Mr.Suresh Kumar for respondents.

**CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATE : 6th JANUARY, 2022
(THROUGH VIDEO CONFERENCE)**

P.C.:

1. The petitioner is impugning a notice dated 12th December 2007 issued under section 148 of the Income Tax Act, 1961 ('the said Act') on the ground, *inter-alia*, that respondents are relying on the same material with a view to take a different view.

2. Shri Singh, learned counsel for petitioner submitted that on consideration of same set of material and information, the Assessing Officer who had passed the assessment order dated 17th March 2005, has conclusively taken one view and, therefore, it could not be open to reopen the assessment based on the very same material with a view to take another view.

3. The reasons for issuing notice under section 148 is contained in a communication dated 27th December 2007 and the same reads as under :-

“ On close scrutiny of the assessment record, it is observed that the assessee company has claimed deduction u/s. 80IB(10) as it is engaged in the development and building approved housing project. Contrary to the provisions of statute, the housing project includes shops. As a result, the company is not entitled for deduction u/s. 80IB(10).

In the light of aforesaid fact that I have reason to believe that the granting of deduction u/s. 80IB(10) of Rs.1,42,50,816/- has resulted escapement of income within the meaning of Section 147.”

4. In the assessment order itself it is recorded that a show cause notice was issued on 17th January 2005 requiring the assessee to substantiate the claim of deduction. Paragraph 6(c) and (d) of the assessment order reads as under :-

(c) The residential unit has a maximum area of 1000 sq.ft.

(d) It is also seen that the commercial units have also been constructed. Please explain as to why the project under consideration is eligible for deduction as a Housing Project.”

5. In paragraph 7.1 of the assessment order, it is recorded that petitioner has filed detailed submissions vide letter dated 10th March 2005 and has shown cause as to why it was entitled to the claim of deduction under section 80IB(10).

6. It is settled law that the Assessment Officer has no power to review an assessment which has been concluded. The Assessing Officer, before he passed the assessment order, had in his possession all primary facts necessary for assessment and then he made the original assessment. When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the very same material with a view to take another view. (*Ananta Landmark (P) Ltd. Vs. Deputy Commissioner of Income Tax*¹).

7. In our view, this is not a case where the assessment is sought to be reopened on the reasonable belief that income had escaped the assessment on account. This is a case wherein the assessment is sought to be reopened on account of change of opinion of the Assessing Officer about the manner of computation of deduction under section 80IB(10) of the Act. In a case where the notice to reopen the assessment was founded entirely on the assessment records and the entire basis for reopening the assessment was the disclosure which has been made by the assessee in the course of the assessment proceedings a Division Bench of

1 [2021] 131 taxmann.com 52 (Bombay) 14-09-2021)

this Court in *3i Infotech Limited V/s. Assistant Commissioner of Income Tax*², held that it cannot be postulated that the condition precedent to the reopening of an assessment has been fulfilled.

8. We are satisfied that not only material facts were disclosed to the petitioner truly and fully, but they were carefully scrutinized and figures of income as well as deduction were viewed carefully by the Assessing Officer. In the circumstances, the petition is allowed in terms of prayer clause (a), which reads under :-

(a) That this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the notice under section 148 of the Act, dated 12th December 2007 being Exhibit 'D' hereto and after going through the same and examining the question of legality thereof to quash, cancel and set aside the impugned notice dated 12th December, 2007 being Exh. 'D' hereto."

9. Petition disposed accordingly with no order as to costs.

(N. J. JAMADAR, J.)

(K.R. SHRIRAM, J.)

2 (2010) 192 Taxman 137 (Bombay)