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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.03.2022

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

Writ Appeal Nos. 216, 217 & 232 of 2013
and
M.P.No.1 of 2013

W.A.Nos. 216 & 217 of 2013

Assistant Commissioner of Income Tax
Company Circle - I (4)
121, M.G. Road, Nungambakkam
Chennai - 600 034

.. Appellant in both
the appeals

Versus

M/s.Doshi Housing Limited
Represented by Managing Director
Mr.Harshad V Doshi
Doshi Towers, 9th Floor
156 Poonamallee High Road
Kilpauk, Chennai - 600 034

.. Respondent in both
the appeals

W.A.No.232 of 2013

Deputy Commissioner of Income Tax
Company Circle - I (1)
121, M.G. Road, Nungambakkam
Chennai - 600 034

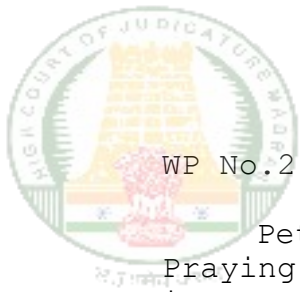
.. Appellant

Versus

M/s.Arun Excello Foundations P Ltd
Represented by Managing Director
Mr.Suresh
Battad Towers
18 West Cott Road
Royapettah, Chennai - 600 014

.. Respondent

Appeals filed under Clause 15 of Letters Patent against the orders dated 27.04.2012 passed by the learned Judge in W.P. Nos. 29069, 29070 & 23899 of 2011 respectively.



WP No.29069 of 2011:-

Petition filed under Article 226 of Constitution of India, Praying for the issuance a Writ of Certiorari to quash the impugned notice issued under section 148 of the Act in Pan No.AAACD1187G dated 01.03.2011 and consequentially quash the proceedings in AAACD1187G dated 25.11.2011.

WP No.29070 of 2011:-

Petition filed under Article 226 of Constitution of India, Praying for the issuance a Writ of Certiorari to quash the impugned notice issued under section 148 of the Act in Pan No. AAACD1187G dated 16.03.2011 and consequentially quash the proceedings in AAACD1187G dated 25.11.2011.

WP No.29070 of 2011:-

Petition filed under Article 226 of Constitution of India, Praying for the issuance a Writ of Certiorari to to call for the records on the file of the respondent and issue and quash the impugned notice issued under section 148 of the Act in Pan No. AABCA8168K dated 25.3.2011 and consequentially quash the proceedings in AABCA8168K/AX-6091/168 dated 28.9.2011.

For Appellants : Mrs. Hema Muralikrishnan
Senior Panel Counsel
in all the Writ Appeals

For Respondent : Mr. R. Sivaraman
in all the Writ Appeals

COMMON JUDGMENT

(Judgment of the Court was delivered by R. MAHADEVAN, J.)

These intra-court appeals are filed by the appellants questioning the correctness of the orders dated 27.04.2012 passed by the learned Judge in W.P. Nos. 29069, 29070 & 23899 of 2011, filed by the respondents herein.

2. The respondents herein have filed the aforesaid writ petitions questioning the notices dated 01.03.2011, 16.03.2011 and 25.03.2011 respectively and the consequential orders dated 25.11.2011 passed by the appellants herein, rejecting the objections raised by them against the proceedings initiated under Section 147 of the Income Tax Act (in short, the Act) for re-opening the concluded assessment.

3. The respondents are registered companies engaged in the



business of construction and development of housing project. For the assessment years 2006-2007, 2004-2005 and 2004-2005 respectively, they filed their returns of income declaring total loss. One of the major claims raised by the respondents in their returns was deduction under Section 80-IB(10). Such returns were taken up for scrutiny and the assessing officer passed orders of assessment under Section 143(3) granting deduction under Section 80IB(10) as claimed by the respondents herein. However, after a period of four years, the assessing officer sought to reopen the assessments on the ground that the respondents company are not eligible to claim deduction under Section 80-IB(10) in the light of the explanation inserted below section 80-IB(10) of the Act by Finance Act, 2 of 2009 with retrospective effect from 1-4-2000 whereunder, it was stated that deduction under section 80-IB(10) of the Act shall not be admissible to a contractor in respect of works contract awarded by any person. On receipt of the notices for re-assessment, the respondents have submitted their objections, but they were rejected.

4. Assailing the orders of rejection, the respondents herein have filed the writ petitions contending that the Assessing Officer was not justified in re-opening the assessment after expiry of four years. Further, there was no failure on the part of the respondents to disclose truly and fully all facts. The Assessing Officer has no new material evidence to show that certain income earned by the respondents has escaped from the purview of assessment and therefore, the re-assessment is not warranted. The respondents also placed reliance on the decision in the case of Commissioner of Income Tax, Delhi vs. Kelvinator of India Limited reported in (2010) 320 ITR 561 (SC) and contended that the re-assessment proceedings initiated against them after lapse of four years is liable to be set aside. They have also placed reliance on the decision of this Court in the case of Fenner (India) Limited vs. Deputy Commissioner of Income Tax reported in (2000) 241 ITR (Madras) 672 wherein it was held that issuing re-assessment notice after expiry of four years on the ground that there is escapement of income is not sufficient. It must be shown that the escapement must be by reason of the failure on the part of the assessee, either to file a return or to disclose, truly and fully, the material particulars necessary for concluding the assessment. Accordingly, the respondents herein prayed for setting aside the orders, which were impugned in the writ petitions.

5. The writ petitions were opposed by the appellants-revenue contending that in the orders of assessment, deduction was allowed in favour of the respondents. However, Section 80IB (10) of the Act was amended which excludes commercial areas exceeding 2000 square feet in extent from the purview of deduction under Section 80IB (10) of the Act. Such amendments



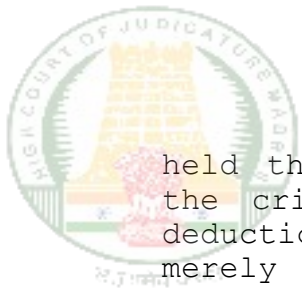
were brought with retrospective effect from 01.04.2001. Therefore, it was contended on behalf of the appellants that the amendment will have a bearing on the concluded assessment and it warranted initiation of re-assessment.

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6. The learned Judge, on considering the rival submissions, allowed the writ petitions by separate orders dated 27.04.2012 on the ground that the respondents herein have placed all the material records at the time of original assessment and it cannot be said that they have suppressed any material particulars. It was also held that the initiation of re-assessment after expiry of four years from the date of original assessment is illegal and invalid. The said orders of the learned Judge are impugned in these appeals.

7. The learned Senior Standing Counsel appearing for the appellants would contend that the re-assessment proceedings were sought to be initiated not only due to the amendments brought by way of explanation to Section 801B (10) of the Act, with retrospective effect from 01.04.2001 but due to the fact that after concluding assessment, it unfolded that the respondents herein undertook and constructed the building as a contractor and not as a developer and therefore, they are not entitled to the deduction under Section 801B (10) of the Act. The learned Judge, without appreciating the above aspect has erroneously set aside the orders of rejection passed by the appellants under Section 147 of the Act. It is also contended that if the respondents are aggrieved against the order dated 25.11.2011 passed by the respective appellants, rejecting their objections to the re-assessment proceedings, they ought to have filed statutory appeals before the appellate authority and the learned Judge ought not to have entertained the writ petitions filed under Article 226 of The Constitution of India. Therefore, the learned Senior Standing Counsel prayed for allowing the writ appeals by setting aside the orders of the learned Judge.

8. Per contra, the learned counsel for the respondents contended that in the absence of any tangible material evidence, the initiation of re-assessment proceedings itself is bad. It is not the case of the appellants that the respondents, at the time of original assessment, have withheld any documentary evidence or suppressed material particulars. In the absence of the same, the re-assessment proceedings cannot be initiated against the respondents and it was rightly considered by the learned Judge while allowing the writ petitions filed by them. In support of his contention, the learned counsel for the respondents relied on the decision of the Division Bench of this Court rendered on 18.10.2012 in Tax Case (Appeal) Nos. 1348 and 1349 of 2007 in the case of Commissioner of Income Tax, Chennai vs. M/s. Arun Excello Foundations Private Limited wherein it was



held that when the project undertaken by the assessee fulfils the criteria for being approved as a housing project, then, deductions cannot be denied under Section 80IB (10) of the Act merely because the project is approved as residential plus commercial project. It was further held that when the conditions specified under Section 80IB of the Act are satisfied, then deduction is allowable on the entire project and there is no question of allowing deduction to a part of the project alone.

9. The learned counsel for the respondents also placed heavy reliance on the decision of the Division Bench of the Gujarat High Court in the case of Ganesh Housing Corporation Limited vs. Deputy Commissioner of Income Tax, Circle 4 & 1 reported in (2016) 74 Taxmann.com 172 (Gujarat) wherein it was held that when there is no failure on the part of the assessee to truly and fully disclose all facts and the assessing officer has no new material establishing that there was escapement of income, the re-opening of the assessment by placing reliance on the explanation added to the statute with retrospective effect could not be a ground. Thus, the learned counsel for the respondents prayed for dismissal of the writ appeals.

10. We have heard the learned counsel for both sides and perused the materials placed on record.

11. Admittedly, for the assessment years 2006-2007, 2004-2005 and 2004-2005 respectively, the respondents herein have filed their returns of income and the assessments were also concluded. However, after expiry of four years, notices under Section 148 of the Act were issued to the respondents herein on 01.03.2011, 16.03.2011 and 25.03.2011 respectively. On receipt of such notices, the respondents have submitted their objections by stating that they have not suppressed any material particulars at the time of original assessment and therefore, the re-assessment proceedings is not warranted. However, such objections were rejected by the respective appellant on 25.11.2011. Therefore, challenging the show cause notices issued under Section 148 of the Act as well as the orders of rejection dated 25.11.2011, the writ petitions were filed. The writ petitions were allowed by the learned Judge on the ground that there is no proof to show that there was escapement of income warranting initiation of re-assessment proceedings.

12. In the decision of the Division Bench of the Gujarat High Court in the case of Ganesh Housing Corporation Limited vs. Deputy Commissioner of Income Tax, Circle 4 & 1 reported in (2016) 74 Taxmann.com 172 (Gujarat) it was held that re-assessment proceedings are not warranted if the assessee did not suppress any material particulars at the time of assessment or



the assessing officer had not collected any new materials to show that there was escapement of assessment. In Para Nos.10 and 11 of the decision, it was held as follows:-

"10. Thus, the entire claim of deduction came up for consideration at the hands of the Assessing Officer in the original assessment. The claim was minutely examined and only thereafter accepted. It would therefore not be permissible to the Assessing Officer to disturb such claim in exercise of powers under Section 147 of the Act by issuing the notice beyond the period of four years and beyond the period of relevant assessment year. Here again, the Assessing Officer had not recorded, in what manner, the assessee failed in its duty to disclose truly and fully all material facts. In fact, the thrust of the contention of the Assessing Officer appears to be that the assessee had not developed housing projects, but was acting as a contractor. In this respect, the Assessing Officer has placed reliance on the retrospective explanation added to section 80IB (10) of the Act. It is well settled by the series of judgments of this Court that retrospective amendment in statute would not enable the Assessing Officer to reopen an assessment beyond a period of four years.

11. The stand of the Assessing Officer that in one of the projects in the development permission, the name of the assessee was not mentioned as a developer. The petitioner has explained this in the objections raised to the reasons recorded by pointing out that after development of phase-1 of the project, when permission was granted for phase-II, the same was done in computerized format, which did not contain an entry for showing of the name of the developer. Quite apart from this explanation, on this ground, it would not be open for the Assessing Officer to re-examine the claim, which was originally accepted after scrutiny. If there was an error in view of the Assessing Officer in granting the claim, the option of the Revenue lay elsewhere. Likewise, the contention that the societies had deducted tax at source, indicating that the relationship between the petitioner and the assessee was one of the contractor and the employer of a contract, also would not permit the Assessing Officer to reopen the assessment. Firstly, in a claim, which is scrutinized, the objections of this nature would be an additional element, which if at all ought to



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have been examined by the Assessing Officer originally and surely cannot provide a ground for re-opening the assessment beyond a period of four years. Secondly, the deduction of tax at source principally is in the hands of the payer of an account. For whatever reason if the tax is deducted at a higher rate or deducted when no such deduction was warranted, it would be for the payee for taking up the issue before the department and claim adjustment or refund, as the case may be. Mere factum of deduction of tax at source or the rate at which it was deducted would not be conclusive proof of the relationship between the parties."

13. The said decision of the Division Bench of the Gujarat High Court squarely applies to the facts of this case. The contention of the learned Senior Standing Counsel for the appellants that the re-assessment is not solely based on the amendments brought to the statute, but due to the fact that the respondents herein undertook and constructed the building as a contractor and not as a developer, also cannot be sustained in the light of the decision of the Division Bench of the Gujarat High Court mentioned supra. The learned Judge also categorically held that the Assessing Officer is not in possession of tangible material evidence to initiate re-assessment proceedings against the respondents herein. Such a finding rendered by the learned Judge, in our opinion, is proper and therefore, we are not inclined to interfere with the orders, which are impugned in these writ appeals.

14. In the result, the orders dated 27.04.2012 passed by the learned Judge in W.P. Nos. 29069, 29070 & 23899 of 2011, filed by the respondents herein are confirmed. All the writ appeals are dismissed. No costs.

Sd/-

Assistant Registrar(Digit)

//True Copy//

Sub Assistant Registrar

av/rsh



To

1. The Assistant Commissioner of Income Tax
Company Circle - I (4)
121, M.G. Road, Nungambakkam
Chennai - 600 034

2. The Deputy Commissioner of Income Tax
Company Circle - I (1)
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Chennai - 600 034

+2cc to Mrs. Hema Muralikrishnan , Advocate, S.R.No.16503,16505

WA Nos. 216, 217 & 232/2013

GSM(CO)
CT 05/04/2022