BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.03.2019

CORAM:

THE HONOURABLE DR. JUSTICE VINEET KOTHARI
and
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

W.A.(MD) No.1051 of 2011

Deputy Commissioner of Income-tax,
Company Circle I, Madurai,
2,V.P.Rathinasamy Road,
Madurai – 625 002. ... Appellant

-vs-

Visvas Promoters (P) Ltd.,
78, T.P.K.Road,
Madurai – 625 003. ... Respondent

PRAYER: Appeal is filed under Clause 15 of Letters Patent, to set aside the order dated 28.09.2010 in W.P.(MD) No.10866 of 2010 on the file of this Court.

For Appellant : Mrs.S.Srimathy, learned standing counsel

For Respondent : Mr.Venkatesh for Mr.A.Shivaji

JUDGMENT

[Judgment of the Court was delivered by DR.VINEET KOTHARI, J.]

The Revenue Department has filed this Intra Court Appeal against the order of the learned Single Judge allowing the writ petition filed by the Assessee vide order dated 28.09.210, by which, the learned Single Judge quashed the impugned re-assessment notice and proceedings under Sections 147/148 of the Income Tax Act, 1961, initiated against the Assessee for the **Assessment Year 2003-04** by the impugned notice dated **31.03.2010** issued after four years from the end of the relevant AY 2003-04.

2.The learned Single Judge has held that the impugned re-assessment notice was issued beyond the prescribed limitation of 4 years and the 1st proviso to Section 147 of the Income Tax Act prohibited such re-assessment proceedings to be initiated after expiry of 4 years from the end of the relevant assessment year, unless there is a failure on the part of the Assessee to fully and truly disclose all material facts necessary for assessment.

3.Mrs.S.Srimathy, the learned counsel appearing for the appellant Revenue has urged before us that the reasons, for re-opening AY 2003-04 as communicated by the assessment authority to the assessee vide his communication dated **20.04.2010**, were that the Assessee claimed excess deduction under Section 80IB(10) of the Income Tax Act, 1961 to the extent of Rs.68,52,835/- in respect of its **Building Project Vajra F Block**, which was required to be disallowed as the said building comprised of residential units over the prescribed limit of 1500 sq. ft. for each residential unit.

4.She submitted that the Assessee failed to disclose all the relevant particulars for the said project about the difference of areas of residential units either below 1500 sq. ft. or over 1500 sq. ft. Therefore, there was a failure on the part of the Assessee to disclose all the relevant facts truly and fully and therefore, the limitation of 4 years for re-opening did not apply to the present case and the Assessing Authority was justified in re-opening the said assessment and the learned Single Judge has erred in quashing the same and the present appeal filed by the Revenue, therefore, deserved to be allowed.

5.Per contra, the learned counsel appearing for the respondent/assessee, Mr.Venkatesh, supported the judgment under appeal and urged that the Assessee had truly and fully disclosed all the details in the original return and at the time of original assessment proceedings, which were completed under Section 143(3) of the Act upon scrutiny of the Returns filed by the Assessee. The Assessee had disclosed all his building projects in progress including Vajra F Block, Porkudam Phase I buildings and had claimed only the proportionate benefit under Section 80IB(10) of the Act to the extent the said building comprised of the residential units below 1500 sq. ft. as stipulated in the said proviso of Section 80IB(10) of the Act.

6.He drew our attention to the original Assessment Order dated 20.12.2005 passed under Section 143(3) of the Act by the Assessing Authority and submitted that the details about all the projects were separately given at the time of original assessment proceedings and only the proportionate claim was made by the Assessee under Section 80IB(10) of the Act, being conscious of the fact that the residential units below 1500 sq. ft. only were eligible for deduction under

Section 80IB(10) of the Act. He therefore submitted that merely on a change of opinion, the Assessing Authority could not seek to disallow such deduction in respect of Vajra F Block completed by the assessee and that for the purpose of excluding the limitation of 4 years prescribed in the 1st proviso to Section 147 of the Act, he could not have issued the impugned notice under Section 147/148 of the Act for Assessment Year 2003-04 and consequently, the learned Single Judge was absolutely justified in allowing the writ petition filed by the Assessee and the present writ appeal filed by the Union of India/Revenue Department is without any merit and the same is liable to be dismissed.

7.Having regard to the submissions made by the learned counsel for the parties, we are of the opinion that there is no merit in the present appeal filed by the Revenue and the same deserves to be dismissed.

8.The reasons assigned by the Assessing Authority in communication dated 20.04.2010 are quoted below for ready reference:

"As requested, the reason recorded for re-opening of the Assessment Year 2003-04 is reproduced as under:

"During the scrutiny proceedings for AY 2007-08, it was found that for the financial year relevant Assessment Year 2003-04, the assessee company claimed deduction u/s 80IB(10) of the Income-tax Act, 1961, for its projects Vajra E & F Block and Porkudam Phase-I. In the project, Vajra E Block and Porkudam Phase-I, the assessee company had constructed and sold flats of less than 1500 sq. ft. and had claimed relief under section 80IB(10). In the case of Vajra F Block the assessee had constructed flats both more than 1500 sq. ft. and less than 1500 sqft and ***had claimed 80IB(10) proportionately to*** *the sale of flars less than 1500 sqft. Assessee's claim of 80IB(10) in relation to the separate project approved for Vajra "F" Block is not correct on the following grounds.*

"It is evident from the plain reading of the section 80IB(10) that the benefit of deduction is for ***house project as a whole and all the residential units of the project should satisfy all the conditions*** *simultaneously to*

be eligible for deduction. Each block (or) house is not a separate project and hence deduction u/s 80IB(10) claimed to the ***tune of Rs.68,52,835/- for the project Vajra "F" Block has to be disallowed. There is clear cut failure on part of the assessee to disclose fully and truly all material facts****. Further the ITAT in the assessee's own case has relied on the Judgment of Honorable apex Court 255 ITR147(SC) and allowed the issue in favor of revenue. I have reasons to believe that income has escaped assessment."*

9.The Assessee filed his objection to the said reasons communicated vide his letter dated 21.04.2010 and contended before the Assessing Authority that he had truly and fully disclosed all material particulars with respect to all the Building projects upon the details called by the Assessing Authority at the time of original assessment under Section 143(3) of the Act. The reply to the Assessee dated 21.04.2010 are also quoted below for ready reference:

"The Original assessment was completed after

full scrutiny under Section 143(3) of the Income Tax Act, 1961. The Assessing Officer has said in the ***Assessment Order that details were called for and scrutinized.*** *In fact the Vajra "F" Block is also clearly mentioned in the assessment order. The eligible deduction under section 80-IB(1) has been worked out by the Assessing Officer and forms part of the assessment order as Annexure.* ***This shows that he has applied his mind to the claim made and completed the assessment. This also shows that all primary facts required have been furnished by us.*** *In fact in the working the Assessing Officer has clearly worked out the* ***deduction admissible proportionately for eligible flats.*** *In working out the sale value of eligible flats he has excluded the sale value of flats exceeding the 1500 sq. ft. This would show that all primary facts were available while making the original assessment. Merely adding a sentence in the reasons recorded and communicated that there is a clear cut failure on part of the assessee to disclose fully and truly all materials without disclosing the nature of failure would not be enough for initiating reassessment. The reference of Tribunal's decision and Supreme Court decision would not clothe the assessing officer with jurisdiction to reopen except failure on the part of the*

assessee to furnish primary facts. In fact the jurisdictional High Court in Fenner (India) Ltd., Vs. CIT (241 ITR 672 (Mad) has clearly held "In cases where the initiation of proceedings is beyond the period of four years from the end of the assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment but also the default of failure committed by the assessee. Failure to do so would vitiate notice and the entire proceedings". This decision has been accepted by the department.

Therefore, the facts are clear that the assessment has been reopened after a period of four years from the end of assessment year without there being any failure on the part of the assessee and such proceedings are barred by the proviso to Section 147. The present proceedings are clearly due to change of opinion and not due to any failure on the part of the assessee. Reopening due to change of opinion has been held to be invalid by the Apex Court in Kelvinator India Ltd. (320 ITR 561 (SC). It appears that the reopening has been done due to change of opinion because of the Tribunal's decision in our case which is not permissible under the proviso to Section 147.

In view of the above please pass a speaking order

as required by the Supreme Court case in GKN Drive shafts (India) Ltd. Vs. ITO (259 ITR 19 (SC) early and drop the the proceedings which are patently illegal for the reasons aforementioned. "

10.The Assessing Authority, however, overruled the objections of the Assessee vide his communication dated 05.05.2010 citing some judgments therein.

11.There is no dispute before us that the 1st Proviso to Section 147 of the Act provides for a limitation of 4 years from the end of the relevant assessment year and the assessment can be re-opened by the Assessing Authority having "reason to believe" that the income of the assessee has escaped assessment on account of failure on the part of the Assessee to disclose fully and truly all material facts necessary for assessment for that assessment year. Unless there is such a failure on the part of the assessee, the re-assessment notice issued under Sections 147/148 of the Act issued after the expiry of 4 years from the end of relevant assessment year is liable to be quashed as the Assessing Authority would lack the jurisdiction to issue any such re-assessment notice.

12.We do not find any such failure on the part of the Assessee, in the present case. He disclosed fully and truly all the relevant facts before the Assessing Authority in the Return filed by him or at the time of original assessment proceedings under Section 143(3) of the Act. The Assessee not only disclosed all the Building Projects undertaken by him, but also consciously claimed only a proportionate deduction under Section 80IB(10) of the Act, for Vajra F Building to the extent of eligible Residential Units below 1500 sq. ft. each. If the Assessee had anything to hide or make a wrong claim, then proportionate deduction under Section 80IB(10) of the Act would not have been claimed by him. The Assessing Authority, while passing the original assessment under Section 143(3) of the Act, had all the powers to call for any further details, if he chose to do so. But, on the contrary, it appears that all the details, were called for by the Assessing Authority and were so furnished by the Assessee and on a conscious application of mind only, the proportionate benefit under Section 80IB(10) was allowed by the Assessing Authority while passing the original assessment under Section 143(3) of the Act. The alleged reasons assigned by the Assessing Authority while undertaking the re-assessment proceedings beyond the limitation

under Section 147/148 of the Act and that too on the ground that the residential flats over 1500 sq.ft. were not disclosed by the Assessee has no legs to stand upon. Section 80IB(10) of the Act grants deduction to the Assessee engaged for the business of developing and building housing projects approved before 31.03.2008 subject to certain conditions and the conditions relevant for the case in hand are quoted below for ready reference:

> (c) the residential unit has a **maximum built-up area of one thousand square feet** where such residential unit is situated within the city of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and **one thousand and five hundred square feet at any other place**;

13.We are satisfied that since a proportionate claim was made by the Assessee, who disclosed all the details at the time of original assessment and an assessment order was passed by the Assessing Authority under Section 143(3) of the Act applying his mind to the relevant facts, this impugned re-assessment proceedings initiated after the end of four years in the present case were without any valid rhyme or reason and on a mere change of opinion by the Assessing

Authority. On a mere change of opinion, the re-assessment proceedings are not permitted under the Act. The Assessing Authority cannot have a mere re-appreciation of the same facts or a review of existing material on a mere change of opinion and take a different view of the matter and he is not permitted to undertake the re-assessment proceedings. The condition of 4 years provided in 1st proviso to Section 147 of the Act is a protection in favour of the Assessee against the whimsical and arbitrary re-assessment proceedings initiated by the Assessing Authorities beyond this limitation of 4 years, except where the escapement of income has resulted on account of failure on the part of Assessee to disclose the material particulars. That is why, the law has been settled by the Hon'ble Apex Court as well as various High Courts that "reason to believe" on the basis of which, such a genuine and objective opinion or reason to believe is formed by the Assessing Authority is required to be conveyed to the Assessee and to which the Assessee is entitled to raise objections and without meeting those objections, the Assessing Authority is not permitted to undertake re-assessment proceedings and it is a question of jurisdiction, which goes to the root of the matter and the said exercise cannot be lightly ignored by the

Assessing Authority.

14.In the present case, we find that the Assessee had made true and full disclosure and had consciously made only a proportionate claim under Section 80IB(10) of the Act, which was rightly allowed by the Assessing Authority at the time of original assessment proceedings under Section 143(3) of the Act and therefore after the expiry of 4 years in 2010, the impugned notice under Section 147/148 of the Act for AY 2003-04 issued on 31.03.2010 was not a valid initiation of the re-assessment proceedings. We are of the considered opinion that the learned Single Judge was justified in quashing the impugned re-assessment proceeding and there is no merit in the present appeal filed by Revenue and the writ appeal deserves to be dismissed and accordingly, the same is dismissed. No costs.

[V.K.,J.] **[T.K.,J.]**

27.03.2019

Index : Yes
Internet : Yes
Arul

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and
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