

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ "ए" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

BEFORE HON'BLE S/SHRI JOGINDER SINGH (JM), AND RAJESH KUMAR,(AM)

आयकर अपील सं./I.T.A. No.1708/Mum/2015

(निर्धारण वर्ष / Assessment Year :2006-07)

Ms.Vijay Buildcom Pvt Ltd., (Now Knows as Vijay Grihanirman Pvt Ltd), 205, Marine Chambers, 43, New Marine Lines, Mumbai-400020	बनाम/ Vs.	Dy.Commissinr of Income Tax- CC-15-16, Mumbai
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAACV4036A

अपीलार्थी ओर से / Appellant by:	Ms.Bhumika Vora
प्रत्यर्थी की ओर से/Respondent by	Shri Sachchidanand Dube

सुनवाई की तारीख / Date of Hearing : 28.7.2016

घोषणा की तारीख /Date of Pronouncement :16. 08.2016

आदेश / O R D E R

Per RAJESH KUMAR, Accountant Member:

This is an appeal filed by the assessee and is directed against the order of the Ld. CIT(A)-51, Mumbai dated 8.1.2015 pertaining to A.Y.2006-07.

2. Only issue raised in the grounds of appeal is against the confirmation of penalty of Rs.4,99,520/- by the Id. CIT(A) as levied by the AO under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

3. Facts of the case are that a search and seizure action u/s 132(1) of the Income Tax Act, 1961 was carried out on 22.9.2005. The assessment

proceedings were completed u/s 143(3)(ii) of the Act determining the total income at Rs.17,272/-. Thereafter, the Commissioner of Income Tax exercising the revisionary powers under section 263 of the Act set aside the assessment being erroneous and prejudicial to the interest of interest of Revenue directed the AO to pass assessment order denovo. The assessment u/s 143(3) r.w.s.263 of the Act completed on 31.12.2009 determining the total income of Rs.14,88,910/-. The penalty proceedings under section 271(1)(c) of the Act were initiated for the disallowance of deduction claimed u/s 80IB(10) of Rs.14,84,029/-. During the course of setting aside assessment proceedings, the AO observed that the approval in respect of the housing project was obtained more than once and in that case, when the project approved was taken more than once then the housing project would be deemed to have been approved on the date on which the building plan was first approved by the local authority and thus held that the date of commencement of project was 10.1.1996 and therefore, denied deduction u/s 80IB(10) of Rule 18BBB for the reasons that the assessee has not fulfilled the condition as provided in the section 80IB(10) of the Act. The assessee was issued show cause notice which was replied by the assessee vide letter dated NIL received in the office on 25.3.2013 which was reproduced in para 4 of the penalty order in which the assessee submitted that initially the project was commenced in 1996 but due to some problems the construction was stopped and thereafter assessee acquired development rights in the project vide agreement dated 28.4.1999 and obtained a fresh

commencement certificate on 11.7.2000 and the project was completed accordingly and thus, the assessee disclosed all the facts qua the project in the return of income and thus neither furnished inaccurate particulars of income nor concealed any particulars of income in the return of income filed by the assessee. In response to query by the AO that no separate profit and loss account, balance sheet was prepared as required under the provisions of section 18BBB, the assessee submitted that since there was only one project in hand and therefore, no separate profit and loss account and balance sheet was required to be prepared. The AO not finding the reply of the assessee satisfactory and rejected the same and imposed the penalty of Rs.4,99,520/- being 100% of the tax sought to be evaded for making wrong claim of deduction on the ground that assessee has furnished inaccurate particulars of income and concealed the income. Aggrieved by the order of AO, the assessee preferred an appeal before the Id CIT(A). The Id. CIT(A) also upheld the order of AO by imposing the penalty by giving details observation in para 6 of the appeal order as observing and holding as under:

"6. I have very carefully considered the facts of the case, the findings of the AO and the submissions as made by the appellant. Needless to state, in a taxing statute penalty provisions are provided to plug leakages wherever attempts are made to contravene the provisions of the Act, so as to make taxation laws effective. It is certainly true that additions made in assessment proceedings would not automatically justify imposition of penalty. However, the conduct of the assessee has to be examined. In the instant case, the appellant claimed deduction under section 80IB (10) though it is crystal clear, from a plain reading of the provisions of the Act that it is not entitled to the claim. The AO has pointed out in the order of penalty that on verification of the return of income filed it was revealed that since the date of commencement of the project was before 1.10.1998, it was not

eligible for the claim. The provisions of the Act are crystal clear and there is no ambiguity. Despite the clear provisions of law the appellant has made the claim and therefore as stated by the AO, its submissions that it was a claim bonafide made, rings hollow, It is not as though two views were possible, in the instant case of the appellant, on facts there is only one view possible, the view that the appellant is not entitled to deduction under section 80IB(10). In the circumstances, the appellant cannot equate the claim with making a wrong claim; in fact in the appellant's case it is a false claim which has been made and but for verification on the part of the AO, the claim would have got allowed. As held by the Bombay High Court in the case of Jyoti Laxman Konkar V/s CIT (2007) 292 ITR 163 the question whether there is concealment of income or not has to be decided with reference to the facts of a given case and the fact finding authority under the Act having come to the conclusion that in the facts of the case, the assessee has concealed income with a view to avoid the payment of tax, the imposition of penalty was valid. As regards to the contention/additional ground raised that the order of penalty is void abinitio, for the reason that the order has been passed on a non existing entity, when the matter was referred to the Assessing Officer during the course of appellate proceedings the Assessing Officer as per letter No. ACIT CC 15& 16/Addl. Ground/2014-15 dated 25.9.2014, pointed out that from the verification of records it is revealed that the assessee company i.e. M/s Vijay Buildcon Pvt Ltd, e-filed its return of income in the name of M/s Vijay Buildcon Pvt Ltd for the impugned year vide acknowledgment No 90269108 on 30.11.2006 and thereafter a copy of the said return was submitted to the Assessing Officer has further reported that the records reveal that notices under s. 143(2), 142(1) and under section 271(1)(c) rws 274 were issued in the name of Vijay Buildcon Pvt Ltd and the assessee responded to the said notice from time to time. Accordingly, the assessment proceedings under section 143(3) and reassessment proceedings under section 143(3) r.w.s 263 was completed in the name of M/s Vijay Buildcon Pvt Ltd only and the assessee neither challenged these proceedings nor raised any objection during the assessment proceedings. I am in agreement with the said observations of AO. The penalty proceedings had been initiated in the course of assessment completed under section 143(3) r.w.s 263 and the said assessment proceedings have not been challenged. The assessment subsists in the name of M/s Vijay Buildcon Pvt Ltd. Moreover, the assessee has acquiesced in all the proceedings before the AO when all the notices/letters have been accepted/responded to by the assessee in the name of M/s Vijay Buildcon Pvt Ltd. Therefore, the additional ground now raised before the CIT(A) is an afterthought to escape the

rigor of penalty. The additional ground is without merits, and is dismissed."

Now, aggrieved by the order of Id.CIT(A), the assessee in appeal before this Tribunal.

4. The Id. AR submitted before us that the order passed by the Id.CIT(A) was wrong as the assessee has not concealed its income or filed inaccurate particulars of income and has fully disclosed all the details /facts qua claiming deduction u/s 80IB(10) of the Act, in the return of income, and that in the original assessment proceedings, the claim of the assessee was duly accepted by the AO. It is only in the setting aside proceedings which were framed in consequence to the order passed by the Commissioner u/s 263 of the Act, the said disallowance was made and that too by wrong appreciation of facts of the assessee's case. The Id. AR submitted that the project in question was initially started in the year 1996 for which the commencement certificate was obtained on 10.1.1996 which was before the date 1.10.1998 and this was the sole reason for rejection of claim of the assessee u/s 80IB(10) of the Act by relying on the Rule 18BBB of the Rules that the conditions were not fulfilled for claiming deduction whereas as a matter of fact, the assessee acquired the development of right of the project vide agreement dated 28.4.1999 and obtained the fresh certificate of commencement on 11.07.2000 and thereafter the project was completed accordingly. Therefore the deduction under section 80IB(10) rightly claimed by the assessee. It was also submitted before us that where approval for

housing project was obtained more once than the approval/commencement which was obtained certificate 2nd time should be taken for the purpose of deciding whether the assessee would be entitled to the claim u/s 80IB(10) i.e. whereas first date when the approval was granted for the first time was taken by the AO for the purpose of determining the eligibility of the assessee to claim deduction u/s 80IB(10) of the Act. The Id. Counsel further submitted that the assessee has made claim which was not acceptable to the revenue and mere non acceptance of claim which might be wrong would not attract penalty at all as the same would not amount to filing inaccurate particulars of income or concealment of income. The assessee also filed a copy of audit report certified by the Chartered Account which stated that the assessee was entitled to claim deduction u/s 80IB(10) of Rs.14,84,029/-. In defence of his arguments, the Id.AR relied on the decision of the Jurisdictional High Court in the case of Commissioner of Income-tax (Central) v/s Ashray Premises (P.) Ltd. [2013] 34 taxmann.com 165 (Bombay), Prakash Steelage Ltd V/s ACIT (2014) 41 CCH 0382 (Mum Trib). The Id. DR, on the other hand, relied heavily on the orders of authorities below and argued that the assessee has concealed the particulars of income by wrongly claiming deduction u/s 80IB(10) of the Act and therefore the order of Id. CIT(A) be uphold by dismissing the appeal of the assessee.

5. We have carefully considered the submissions of the parties, perused the material placed before us including the orders of authorities below and case laws relied upon by the parties. In the present case, the assessee

claimed deduction u/s 80IB(10) of the Act of Rs.14,84,029/- in respect of the housing project for which the assessee acquired development rights on 28.4.1999 and thereafter obtained first commencement certificate on 11.7.2000. In respect of the said housing project the commencement was also obtained prior to 1.10.1998 and thus, the project was approved twice by the Municipal Authority. The assessee was also searched u/s 132(1) and the assessment was framed vide order dated 4.5.2007 in which the deduction claimed by the assessee u/s 80IB(10) was accepted. However, the Commissioner cancelled the assessment by exercising the powers under section 263 of the Act. The AO in the assessment order passed under section 143(3) r.w.r.263 order dated 31.12.2009 assessed the income of the assessee at Rs.14,88,910/- by rejecting the claim of the assessee u/s 80IB(10) of the Act. Looking into the facts of the case in totality we find merit in the argument of the Id.AR that in case of certificate of commencement/approval was granted twice to the housing project then the later date or subsequent approval/commencement certificate shall be considered for the purpose of determining the claim of the assessee under section 80IB(10) of the Act. The another plea of the Id.AR that the claim was duly certified by the Chartered Account in Form No. 10CCB r.w.section 80IB(10) and rule 18BBB of the Rules. This argument of the assessee finds force from the decision rendered in the case of Ashray Premises (P.) Ltd.(supra) in which it has been held that if the approval of project is taken

two times then subsequent and second approval shall be considered for the purpose of determining the claim u/s 80IB(10).

6. In our opinion, for mere making of claim which is not acceptable to the revenue, the penalty u/s 271(1)(c) cannot be levied. In the present case, the assessee has made claim which the deduction u/s 80IB (10) of the Act for the first time was allowed by the revenue whereas in the second assessment disallowed and rejected the same and therefore, this is not a fit case for levy of penalty.

In the case of Prakash Steelage Ltd (supra), the Co-ordinate Bench of the Tribunal has held as under :

"Once the assessee had not offered any income in consequence of search, in return of income nor any such income was found as a result of search, there was no question of application of Explanation-EA, as held by CIT(A). He had decided the issue entirely on wrong footing. In any case, at the time of filing of return of income, the assessee's claim was based on auditor's report and certificate in Form no. 10CCB. Such a claim was thus, not only based on bona fide belief but also prior to decision of Liberty India, which was rendered only on 31.08.2009. Earlier there were certain decisions which were in favour of the assessee. Even the Tribunal's decision in assessee's case for the A. Y 2003-04, came after the date of filing of return of income for the A. Y 2004-05. Thus, it cannot be held that assessee had furnished any inaccurate particular of income at the time of filing of return of income. Moreover, the Allahabad High Court in the case of Arvind Footwear, on similar facts had deleted the penalty holding that mere fact that claim of deduction under section 80IB of the Act could not have been made a basis for imposing penalty, is not correct. The Apex Court in Commissioner of Income Tax versus Reliance Petro Products Pvt. Ltd. has laid down that mere making of the claim which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars. Penalty cannot be imposed u/s 271 (1)(c) merely because assessee had claimed deduction u/s 80IB on the amounts of incentives by way of duty drawback when there was difference of opinion prevalent at the relevant time. Thus,

on the present facts also, the penalty levied on claim of deduction u/s 80IB was deleted and accordingly assessee's appeal for the AY 2004-05 was allowed."

7. The perusal of the case of the assessee reveals that the case of the assessee is squarely covered by the ration laid down in the above mentioned decision. Therefore, respectfully following the same, we set aside the order of the Id.CIT(A) and direct the AO to delete the penalty of Rs.4,99,520/-.

8. In the result the appeal of the assessee is allowed.

The above order was pronounced in the open court on 16th Aug, 2016.

घोषणा खुले न्यायालय में दिनांक: 16th Aug, 2016 को की गई ।

Sd

(JOGINDER SINGH)
Judicial Member

sd

(RAJESH KUMAR)
Accountant Member

मुंबई Mumbai: 16th Aug, 2016.

व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

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आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai