

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "B" KOLKATA**

Before **Shri N.V.Vasusdevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.85/Kol/2012 Assessment Year :2008-09

DCIT, Circle-11, P-7, Chowringhee Square, Kolkata-700 069	V/s.	M/s Samay Construction Pvt. Ltd., C/o Model Nursury, 5/1, Tiljola Road, Park Circus, Kolkata – 700 046 [PAN No.AAHCS 8487 R]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Sital Prasad Roy, JCIT-SR-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Sanjay Bhattacharya, FCA
सुनवाई की तारीख/Date of Hearing	01-02-2016
घोषणा की तारीख/Date of Pronouncement	23-03-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is against the order of Commissioner of Income Tax (Appeals)-XII, Kolkata in appeal No.345/XII/W-11(2)/2010-11 dated 30.10.2011. Assessment was framed by ITO Ward-11(2), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 29.12.2010 for assessment year 2008-09. Grounds raised by Revenue is as under:-

"1) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) is correct in law by reducing the assessee's declared profit amounting to Rs.3,95,88,640/- to 'nil'.

2) Whether on the facts and in the circumstances of the case the Ld. CIT(A) is correct in law in holding that the profits declared by the assessee in its return for the A.Y 2008-09 be apportioned and made chargeable to tax in the AYs

2005-06, 2006-07 and 2007-08 at Rs.24,96,993/-, Rs.1,13,94,494/- and Rs.2,56,97,153/- respectively.

3) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) is correct in law in allowing the assessee to claim deduction u/s 80IB during the proceedings taken up by the AO for the AYrs 2005-06, 2006-07 and 2007-08

4) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) is correct in holding that there was no income chargeable to tax for the year under consideration with the direction of recomputation of book profit u/s. 115JB.”

2. Grounds No. 1 to 3 are common in this appeal of Revenue, hence, we club them together to pass a consolidate order. Facts of the case are that assessee in the present case is a Private Limited Company and engaged in the business of development of housing complexes at different sites under the jurisdiction of Jamshedpur since the financial year 2004-05. During the year under consideration, assessee has declared profit at NIL after claiming the deduction under section 80IB(10) of the Act for an amount of Rs. 3,95,94,294/-. However, the AO disallowed the deduction claimed by the assessee under section 80IB(10) of the Act as the assessee failed to fulfill the condition under section 80AC of the Act for filing the income tax return before the due date as specified under section 139(1) of the Act. In the instant case, the assessee filed the ITR on dated 04.02.2009 for the assessment year 2008-09 which is after the due date as specified under section 139(1) of the Act.

3. Aggrieved, assessee preferred an appeal before Ld. CIT(A). Before Ld. CIT(A) assessee submitted that assessee was following percentage completion method for the accounting of its real estate project activity in terms of Accounting Standard 7 (AS-7) till 31-3-2007. However the assessee at his own found that the AS-7 is applied to the entities engaged in the construction activity and its activities are of developing of projects. So the assessee changed its accounting policy and started following the AS-9 i.e. Revenue Recognition w.e.f. financial year 2007-08 prospectively. The assessee further

submitted that the deduction of profit claimed by the assessee for the assessment year 2008-09 for Rs. 3,95,94,294/- was actually the profit pertaining to the AYs 2005-06, 2006-07 and 2007-08. The profit declared before the deduction under section 80IB of the Act is notional profit for the year under consideration. The return filed by the assessee was belated return under section 139(4), so the assessee could not get the opportunity to rectify the mistake by filing revised return. The assessee at the time of assessment proceedings u/s 143(3) of the Act tried to explain that the income pertains to the earlier assessment years but the AO rejected the plea of the assessee.

3.1 The assessee without prejudice to above has alternatively argued that Sec. 80-IB of the Act does not contemplate a situation where profit arises on transfer of residential units before the housing project is fully completed. There is no provision in Sec. 155 or 80IB or in Chapter –VI-A of the Act dealing with the matters of deductions for amendment of assessment order if an eligible business transfers residential units and books profit in a year prior to the year in which the housing project is completed whereas at the time of passing the assessment order deduction u/s. 80IB is rightly denied due to the fact that the project is not yet fully completed and completion certificate is not available although the project is duly completed and completion certificate is obtained at a later date within the specified period of five years. Obviously the very purpose of Sec. 80IB is defeated if these profits do not qualify for deduction. Therefore, it can be said that Sec. 80IB envisages a situation where profit is considered to be arising only after the project is completed. Please note that Department Instruction No. 4/2009 has been introduced on 30.06.2009 much after the accounts were finalized and income tax return for the AY 2008-09 was submitted. As per the said departmental instruction where profit is booked on year-to-year basis on partial completion of the project, deduction is granted but to be withdrawn if found later that the project is not completed within the specified period. As per Sec. 145 of the Act, income chargeable under the

head "profits & gains of business" shall be subject to accounting standards notified by the Central Government from time to time.

RELIEF SOUGHT THROUGH THIS APPEAL

1. Profit declared in the profit & loss account be considered as notional profit or book profit subject to tax u/s 115JB of the income Tax Act 1961 in the assessment year 2008-09
2. Profit declared in the assessment year 2008-09 on presumptive sale of flats is brought to tax in the assessment year 2011-12 in which the development or consideration of the project is completed or alternatively spread out over the years period from AYs 2005-06 to 2007-08 proportionately during which construction work was carried out by the value of work done.
3. Corresponding deduction u/s 80-IB of the profit be considered in the am year 2011-12 or alternatively in AYs 2005-06, 2006-07 & 2007-08 when the profit is liable to be assessed as income.

Considering the above submissions of Ld. CIT(A) deleted the addition made by the AO by observing as under:-

"After going through the facts of the case and citation I am convinced that the income of rs.3,95,88,640/- reported in the profit & loss account as well as in the income tax return of the assessment year 2008-09 cannot be brought to tax in that assessment year. At the same time, I do not agree with the Appellant to postpone the reported profit to assessment year 2011-12 i.e. the year in which the housing project is completed. I, on the other hand, find considerable merit in the alternative argument of the Appellant for allocating the reported profit over the period of three years in which the related work has been done according to cost incurred in the respective year. Whatever be the strategy or understanding of the assessee in reporting income in the profit & loss account or in the return of income of a particular year, the assessing officer is duty bound to determine the income chargeable to tax for that year correctly. Income escaped from assessment in one year cannot be assessed in a later year. The Assessing Officer cannot take advantage of any inadvertent error or omission or commission committed by the assessee in the return. of income or in drawing the annual accounts. Accordingly I hold that although the profit & loss account and the income tax return of the assessment year 2008-09 contain a declared profit of Rs.3,95,88,640/-, the said amount is not chargeable to tax in the assessment year 2008-09. I have examined the chart showing cost of work incurred with reference to the annual accounts of the preceding years and accordingly hold that the declared profit be apportioned and made chargeable to tax in the assessment years 2005-06, 2006-07 and 2007-08 at Rs.24,96,993/-, Rs.113,94,494/- and Rs.2,56,97,153/- respectively being the prior period items as a result of errors or omissions ins preparation of financial statements of respective previous years. I, therefore, direct the Assessing Officer to re-compute the income of the assessment year 2008-09 based on the allocation stated above. Section 80AC of the Act has come into force w.e.f. assessment year 2006-07. The

Appellant has not disputed the disallowance of claim u/s. 80-IB due to application of Section 80AC for not filing the return in time and hence no claim of deduction u/s. 80-IB will be allowed in respect of the income assessable for the assessment year 2008-09. However, the AO is giving liberty to take appropriate action in assessment years 2005-06, 2006-07 and 2007-08 in accordance with IT Act, 1961 for the income of Rs.24,96,993/- Rs.1,13,94,494/- and Rs.2,56,97,153/- respectively and a similar liberty is granted to assessee to make any legal claim regarding admissibility of deduction under sec. 80IB during the proceedings taken up by the AO in AYs 2005-06, 2006-07 & 2007-08 as per law. The Appellant, however, will be liable to pay tax u/s. 115JB on the declared income of Rs.3,95,88,640/- in the assessment year 2008-09."

Being aggrieved by this order of Ld. CIT(A) Revenue came in appeal before us.

Shri Sital Prasad Roy, Ld. Departmental Representative appearing on behalf of Revenue and Shri Sanjay Bhattacharya, Ld. Authorized Representative appearing on behalf of assessee.

4. The Id. DR relied on the order of AO whereas Id AR relied on the order of Id. CIT(A). We have heard rival contentions and perused the material available on record. The Id. AR has filed a paper book which is running from page 1 to 55. From the aforesaid discussion we understand that the assessee declared the notional profit following the percentage completed construction method. The commencement of the construction for the impugn project began from the financial year 2004-05 and completed in the financial year 2006-07. From the facts of the case, we find that the assessee has incurred the entire cost on the construction for the impugn project in the financial year 2006-07 but failed to declare the profit in that year in consonance with the percentage completion method. We further find that the profit, however, was declared in the return of income for the assessment year 2008-09 and the assessee accordingly claimed the deduction of the profit under section 80IB of the Act. However, the AO disallowed the same on technical ground i.e. non-filing of ITR within the due date as specified under section 139(1) of the Act. However the Id. CIT(A) rightly held that the profit declared in the assessment year 2008-09 actually belongs to the assessment years 2005-06, 2006-07 and 2007-08

as the assessee for those years was following the percentage completion method in accordance with the accounting Standard 7 issued by the ICAI of India. The Id. AR before us submitted a chart showing the profit shown as per the wrong calculation of profit in terms of AS 7 and the correct profit that would be shown in terms of AS 7 which is part of the order as per annexure 1 of this order. We also understand that The AO cannot take the benefit with regard to the inadvertent mistake committed by the assessee in filing the return of its income. The AO should not act against the principal of natural justice. The assessee quoted and relied in the Departmental **Circular No. 14(XL-35)** dated 11-4-1955 regarding the administrative instructions issued for the guidance of the Income Tax Officers on the matters pertaining to the assessments. The assessee has relied on the following decisions in support of his claim. The law is well settled that tax authorities entrusted with the power to make assessment of tax discharge quasi judicial functions and they are bound to observe principles of natural justice in reaching their conclusions *State of Kerala v. K.T. Shaduli Yusuff* (1977) 39 STC 478, 481 (SC). The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose *S.L.Kapoor v. Jagmohan* AIR (1981) 136, 145 (SC). Principles of natural justice demand that there should be a fair determination of a question by quasi-judicial authorities. Arbitrariness will certainly not ensure fairness. If giving a mere opportunity to show cause and to explain would satisfy the principles of natural justice, the notice to show cause becomes an empty formality signifying nothing, for, after issuing the notice to show cause, the authority can decide according to his whim and fancy. The judicial process does not end by making know to the person the proposal against him and giving him a chance to explain. It extends further to a judicial consideration of his representations and the materials and a fair determination of the question involved in the case of *M.Appukutty v. STO* (1966) 17 STC 380 (Ker). In the case of *CBDT v. Smt. Kamala Bai Srikrishna Soni* (2010) 323 ITR 664 (Kar) it was held that where

the assessee had filed a belated wealth tax return including assets which were not chargeable to tax and could not file a revised return because it was either time-barred or was not permissible in the view that a belated return could not be revised, if the assessment has been taken for scrutiny, the AO is bound to pass an order so that assessee's claim was bound to be considered one way or the other with the right of appeal, if the order is adverse. The decision of the Hon'ble High Court was the subject-matter for special leave, which was declined by the Hon'ble Supreme Court in the case of *CBDT v. Kamala Bai Srikrishna Soni* (2010) 322 ITR (St) 16. Further, in the case of *CIT v. Simon Carves Ltd.* (1976) 105 ITR 212 (SC) the Hon'ble Supreme Court observed that the taxing authorities exercise quasi-judicial powers and in doing so they must act in a fair and not a partisan manner. Although it is part of their duty to ensure that no tax, which is legitimately due from the assessee should remain unrecovered, they must also at the same time not act in a manner as might indicate that scales are weighted against the assessee. It is impossible to subscribe to the view that unless those authorities exercise the power in a manner most beneficial to the revenue and consequently most adverse to the assessee, they should be deemed to have exercised it in a proper and judicious manner. In view of above, we are not inclined to interfere in the order of the Id. CIT(A), hence, ground raised by Revenue is dismissed.

5. The issue raised in this ground no. 4 of Revenue's appeal is that Id. CIT(A) erred in directing for re-computing the profit under section 115JB of the Act.

6. At the outset we observe that the provisions of the MAT are attracted to the assessee company for the year under consideration. The relevant extract of the MAT provisions as per section 115JB of the Act read as under:-

“115JB. (1) *Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax payable on the total income as computed under this Act in respect of any day of April, [2012], is less than [eighteen and one-half*

per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of [eighteen and one-half per cent]].

From the above provisions, we find that the assessee is liable to pay the tax under MAT in spite of the fact that we have given relief to the assessee under the normal provisions of Act. Accordingly we find no infirmity in the order Id. CIT(A). This ground of Revenue's appeal is dismissed.

7. In the result, Revenue's appeal stands dismissed.

Order pronounced in the open court 23/03/2016

Sd/-
(N.V.Vasudevan)
(Judicial Member)
Kolkata,

Sd/-
(Waseem Ahmed)
(Accountant Member)

*Dkp

दिनांक:- 23/03/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-DICT, Circle-11, P7 Chowringhee Square, Kolkata-69
2. प्रत्यर्थी/Respondent-M/s Samay Construction Pvt. Ltd., C/o. Model Nursury, 5/1 Tiljola Road, Park Circus, Kolkata-46
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।