

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI

Before Shri Joginder Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.4266/Mum/2015
(Assessment year: 2007-08)

ACIT-31(1), Mumbai	vs	M/s Gundecha Builders, 141, Gundecha House, Jawahar Nagar, Goregaon (W),Mumbai-400 062 PAN : AAAFG0848E
APPELLANT		RESPONDENT

C.O. 74/Mum/2017
(Arising out of I.T.A No.4266/Mum/2015)
(Assessment year: 2007-08)

M/s Gundecha Builders, 141, Gundecha House, Jawahar Nagar, Goregaon (W),Mumbai-400 062	vs	ACIT-31(1), Mumbai
CROSS OBJECTOR		RESPONDENT

Assessee by	Shri Vimal Punmiya
Revenue by	Shri Abhijit Patankar

Date of hearing	02-05-2018
Date of pronouncement	18-07-2018

ORDER

Per G Manjunatha, AM :

This appeal filed by the revenue, and cross objection filed by the assessee are directed against the order of the CIT(A)-42, Mumbai dated 29-04-2015 and it pertains to AY 2007-08. Since, facts are identical and

issues are common, this appeal and the cross objection were heard together and are disposed of by this common order, for the sake of convenience.

2. The assessee has taken a legal plea, challenging the validity of reopening of assessment u/s 147 in its cross objection. Therefore, we are of the view that we may first deal with the cross objection filed by the assessee since it goes to challenge the jurisdiction of the AO to pass re-assessment order u/s 147 of the Income-tax Act, 1961.

3. The assessee has raised following grounds in the cross objection:-

“1) On the facts and circumstances of the law, the Ld. CIT(A) has erred in confirming initiating of reassessment proceeding u/s 147 of the I.T. Act, 1961.

2) On the facts and circumstances of the law, the *Ld.* CIT(A) has failed to consider that:

a) Reassessment proceeding cannot be initiate after four years when assessee has disclosed all the particulars fully and truly and order is passed by AO u/s 143(3) of the I.T. Act, 1961.

b) Reassessment proceeding can be initiate only when income escaping assessment but in present case survey was conducted and after detail investigation deduction u/s 80IB(10) was partly allowed to assessee. Hence, No income escape assessment. Therefore, proceeding initiate u/s 147 is bad in law.”

4. The brief facts of the case are that the assessee is a partnership firm engaged in the business of development and construction of housing projects, filed its return of income for AY 2007-08 declaring total income of Rs.20,85,90,920. The assessment has been completed u/s 143(3) of the Act, on 29-12-2009, determining the total income at Rs.22,22,00,290 by re-working deduction claimed u/s 80IB(10) of the Income-tax Act, 1961 in respect of profits derived from housing

projects and made addition of Rs.46,26,650. Subsequently, the case has been reopened u/s 147 of the Income-tax Act, 1961 after recording reasons for reopening of assessment for the reason that income chargeable to tax had been escaped assessment within the meaning of section 147 of the Act in respect of deduction claimed u/s 80IB(10) towards housing projects and accordingly, notice u/s 148 dated 28-03-2014 was issued. In response to notices, the assessee, vide letter dated 31-03-2014 submitted that the return of income originally filed on 27-10-2007 may be treated as return of income filed in response to notice u/s 148 of the Act. Thereafter, a copy of the reasons recorded for reopening of the case was provided to the assessee, as required. The case has been selected for scrutiny and notices u/s 143(2) and 142(1) of the Act, alongwith a detailed questionnaire were issued. In response to notices, the authorized representative of the assessee appeared from time to time and filed various details, as called for.

5. During the course of assessment proceedings, AO observed that the assessee has claimed deduction u/s 80IB(10) of the Act, in respect of profit derived from a housing project which was otherwise not eligible and accordingly, called upon the assessee to explain as to why deduction claimed shall not be disallowed. In response to notice, the assessee has filed various details as called for by the AO and also filed

necessary audit report alongwith copies of approvals, etc. to prove the claim of deduction u/s 80IB(10). The AO, after considering relevant submissions of the assessee held that the assessee was not eligible for deduction u/s 80IB(10) as the land on which the project has been developed is not in the name of the assessee, therefore, he opined that the assessee is not eligible for deduction u/s 80IB(10). The AO further observed that there is numerous mistakes in audit report filed in form 10CCB dated 23-10-2006 wherein the date of commencement of the project and date of completion are not matching each other. Accordingly he opined that the claim of the assessee u/s 80IB(10) is not allowable and hence, disallowed deduction claimed u/s u/s 80IB(10) of Rs.11,06,73,239.

6. Aggrieved by the assessment order, the assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has challenged reopening of assessment on the ground that the AO has reopened the assessment merely on 'change of opinion' without there being any materials which suggest escapement of income which is evident from the fact that the AO has recorded reasons for reopening of assessment on the basis of same set of financial statements, which are part of original assessment proceedings u/s 143(3), where the AO has examined the claim of deduction u/s 80IB(10) and after fully satisfied with the claim of

the assessee worked out deduction claim by excluding certain amounts in respect of car parking & other areas. The assessee further submitted that the AO has reopened the assessment after 4 years from the end of the assessment year and as per the Proviso provided to section 147 of the Act where the assessment has been originally completed u/s 143(3) of the Act, no action shall be taken under this section after expiry of 4 years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. In this case, the assessee has disclosed all facts necessary for completion of assessment at the time of original assessment and the AO has examined the claim of deduction claimed u/s 80IB(10) with all relevant materials, therefore, it is a classic case of change of opinion, which is not permissible under law. The assessee also filed elaborate written submissions on the issue of deduction claimed u/s 80IB(10) and negated all observations made by the AO with regard to the ownership of land, discrepancies in its audit report and argued that there is no need to own the land to claim the benefit of deduction u/s 80IB(10) and what is required to be seen is whether the project undertaken by the assessee fulfilled all the conditions prescribed under the said provision or not. The assessee also

clarified the observations of the AO with regard to discrepancies in audit report in form 10CCB and submitted that these are only clerical mistakes, but fact remains that the assessee's claim of deduction u/s 80IB(10) has been accepted by the AO in the original assessment. The assessee also filed written submissions on the issue of assessment of rental income derived from properties held as stock in trade and argued that any income in the nature of rent is assessable under the head 'Income from house property' irrespective of the fact that whether said property has been held as investment or stock in trade.

7. The Ld.CIT(A), after considering relevant submissions of the assessee and also on analysis of provisions of section 147 of the IT Act, rejected legal ground taken by the assessee challenging validity of reopening of assessment on the ground that disclosure of facts to the AO is must for applicability of Proviso to section 147. Information prepared, but kept in vault does not mean that assessee disclosed facts truly before the AO. Further, the re-assessment proceedings were initiated on the basis of finding given for AY 2006-07 where also the issue of reopening u/s 147 was decided against the assessee and accordingly there is no merit in the arguments of the assessee that reopening is bad in law and liable to be quashed. Accordingly rejected legal ground raised by the assessee. Insofar as merits of the issue is concerned, the

Ld.CIT(A) observed that the assessee is eligible for deduction u/s 80IB(10) in respect of profit derived from housing project as the assessee has fulfilled all conditions including ownership of land which is evident from the fact that the assessee became the owner of the land in view of the decision of Hon'ble Bombay High Court wherein the parties have filed compromise petition as per which the assessee derived ownership on the land on which the housing project was developed. The CIT(A) further observed that the AO was erred in holding that the land should be in the name of the developer ignoring the fact that the Hon'ble Gujarat High Court in the case of CIT vs Radhe Developers (2012) 17 taxman.com 156 made it clear that the land need not be in the name of the assessee for seeking deduction u/s 80IB(10) of the Act. Insofar as other observations of the AO on contents of audit report, the Ld.CIT(A) observed that AO, on technical requirement cannot deny deduction claimed u/s 80IB(10), when all the conditions are fulfilled by the assessee. Accordingly, deleted addition made by the AO towards disallowance of deduction claimed u/s 80IB(10) of the Act. Similarly, held as stock in trade, the Ld.CIT(A), by following the decision Hon'ble Supreme Court in the case of M/s Shambu Investments (P) Ltd vs CIT 263 ITR 143 (SC) and also by following the decision of ITAT, Mumbai in assessee's own case for AY 2008-09 directed the AO to assess rent

derived from properties held as stock in trade under the head 'Income from house property'. Aggrieved by the order of CIT(A), the revenue is in appeal before us and the assessee has filed cross objection.

8. The Ld.AR for the assessee, referring to the copies of reasons recorded for reopening of assessment submitted that the sole basis for reopening of assessment was reopening of assessment for the assessment year 2006-07 on the basis of audit objection memo as per which the audit party has noticed that the assessee is not the owner of the land to claim deduction u/s 80IB(10) which requires to be deleted, but not on any new materials which suggests escapement of income within the meaning of section 147 of the Act. Therefore, he submitted that it is a classic case of mere change of opinion without there being any fresh material which suggests escapement of income to form a reasonable belief for escapement of income. The Ld.AR further submitted that the assessment for the impugned assessment year was originally completed u/s 143(3) and AO, during assessment proceedings has cast necessary enquiries with regard to the claim of deduction u/s 80IB(10) and after fully satisfying with the conditions prescribed under the law, in the light of the facts of assessee's case has allowed claim with certain disallowances which is evident from order passed by the AO u/s 143(3), where he has elaborately discussed the issue of deduction claimed by

the assessee. The Ld.AR further referring to the provisions of section 147, submitted that the assessment has been reopened after 4 years and as per the Proviso to section 147, where an assessment has been made u/s 143(3) of the Act, no action shall be taken under this section after expiry of 4 years from the end of the relevant assessment year, unless any income chargeable to tax had escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. When, we go through the reasons recorded by the AO, it is abundantly clear that the AO never alleged that the assessee has failed to disclose fully and truly all material facts necessary for assessment. Therefore, there is no reason for the AO to reopen the assessment after the end of 4 years without any new material and also without any allegation on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In this regard, relied upon plethora of judgements including the decision of Hon'ble Supreme Court in the case of CIT vs Kelvinator of India Ltd (2010) 320 ITR 561 (SC). The assessee also relied upon the decision of Hon'ble Bombay High Court in the case of Jashan Textile Mills (P) Ltd vs DCIT vs DCIT (2006) 284 ITR 542 and also in the case of Mistry Lalji Narsi Development Corporation vs ACIT (2010) 229 CTR 359. The assessee also relied upon the following judgements:-

- a) *Bhagwati Shankari Karkhana (2004) 269 ITR 186 (Bom)*
- b) *Western Outdoor Interactive (2006) 286 ITR 620 (Bom)*
- c) *Hindustan Lever Ltd. (2004) 267 ITR 161 (Bom)*
- d) *Prashant Project Ltd. vs. Asst. CIT (2011) 333 JTR 368 (Bom)*
- e) *Hindustan Petroleum Corporation Ltd. vs. Dy. CIT (2010) 328 JTR 534 (Bom)*
- f) *Nihntent Technologies (P) Ltd v Dy CIT (2011) 59 DTR 281 (Bom)*
- g) **Shrlrsm** Foundry Ltd v. Dy.CJT(2012) 250 CTR 116 (Bom.)
- h) **Monitor** India (P) Ltd v. UOI (2012) 68 DTR 313 (Bom)
- i) **HCL Corporation Ltd.** v. ACIT (2012) 66 DTR 473 (Ddhi)(High Court)
- j) *Kimplas Trenton Fittings Ltd. v.ACJT(2012) 340 ITR 299'(Bom.)*
- k) *Weilntertrade (P) Ltd &Anr vs. JTO (2009) 308 ITR 22*

7. The Ld.DR, on the other hand, strongly supported order of Ld.CIT(A) and submitted that the AO has validly reopened the assessment on the basis of audit objection memo received for earlier years which suggests escapement of income within the meaning of section 147 of the Act, on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment which is evident from the facts gathered by the AO in re-assessment proceedings where the AO has narrated discrepancies in audit report and also inconsistencies in date of commencement and date of completion of the project. The assessee fails to answer the issues pointed out by the AO which means the assessee has not disclosed all facts necessary for completion of assessment at the time of original assessment proceedings u/s 143(3), therefore, there is failure on the part of the assessee and hence, the proviso provided u/s 147 does not

apply to assessee's case. The Ld.DR further submitted that the assessee also failed to file necessary evidence required for completion of assessment which is the reason for reopening of assessment, therefore, there is no merit in the arguments of the assessee that the AO has reopened assessment on mere change of opinion without any material which suggests escapement of income.

8. We have heard both the parties and perused the material available on record. The AO reopened the assessment u/s 147, on the ground that income chargeable to tax had been escaped assessment on account of wrong claim of deduction u/s 80IB(10) of the Act, in respect of housing project which is otherwise not available to the assessee. The AO has recorded reasons for reopening of the assessment. On perusal of copy of reasons recorded for reopening of assessment, we find that the AO has referred to the financial statement filed by the assessee for the relevant financial year to form a reasonable belief of escapement of income. Except this, the AO never referred to any material which suggests escapement of income. Therefore, from the reasons recorded by the AO, one thing is very clear that to form a reasonable belief of escapement of income the AO relied upon the materials, i.e. financial statements which were already in the possession of the AO at the time of original assessment proceedings u/s 143(3) of the Act. In this legal

background, when we examine reopening of assessment on the ground of escapement of income on account of wrong claim of deduction u/s 80IB(10) in respect of housing project, one has to see whether the assessee has disclosed fully and truly all materials necessary for assessment at the time of original assessment proceedings u/s 143(3) of the Act or not. It is an admitted fact that the assessment has been completed u/s 143(3) of the Act. It is also an admitted fact that the assessment has been reopened after 4 years from the end of the relevant assessment year. When these two conditions are fulfilled the Proviso provided to section 147 comes into operation. As per the said Proviso, where an assessment has been made for the relevant assessment year u/s 143(3), no action shall be taken under this section after the expiry of 4 years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. In this case, admittedly, the assessment has been completed u/s 143(3), where the AO has examined the issue of deduction claimed u/s 80IB(10) of the Income-tax Act, 1961 and also made disallowance of part of deduction claimed under the said section which is evident from the fact that the AO has elaborately discussed the issue in the body of the assessment order

at para 2 on pages 2 to 4. From this, it is abundantly clear that the assessee has disclosed fully and truly all necessary facts required for his assessment and the AO has examined the claim at the time of original assessment proceedings u/s 143(3) of the I.T. Act, 1961. Once the issue has been examined in the original assessment proceedings with necessary evidences, then reopening of assessment on the same issue after expiry of 4 years from the end of the relevant assessment year is permissible only when the AO alleges that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of assessment. Unless, the AO alleges that the assessee has failed to disclose fully and truly all material facts necessary for assessment, then no action shall be taken under this section after the expiry of 4 years from the end of the relevant assessment year. This legal position is strengthened by the decision of Hon'ble Bombay High Court in the case of Jashan Textile Mills (P) Ltd vs DCIT (supra), German Remedies Ltd vs DCIT 2006) 287 ITR 494, CIT vs Former Finance (2003) 264 ITR 566 where in all cases, the Courts have clearly observed that the assessment cannot be reopened unless the AO alleges that there is a failure on the part of the assessee to disclose fully and truly all material facts and if the AO does not record such a failure, he would not be entitled to proceed u/s 147. We further notice that even

this is a classic case of change of opinion as the AO has examined the issue of deduction claimed u/s 80IB(10) in assessment proceedings u/s 143(3) and after being satisfied with the explanation furnished by the assessee, allowed the claim. The AO reopened the assessment on the same issue without there being any change in facts and also no new material came to his possession subsequent to completion of original assessment proceedings u/s 143(3) to form a reasonable belief of escapement of income. The sole reason for the AO to reopen the assessment is based on the reopening of assessment for AY 2006-07, which in turn, is based on audit objection. Therefore, we are of the considered view that the AO has reopened the assessment merely on change of opinion without there being any material in his possession which suggests escapement of income. This legal position is supported by the judgement of Hon'ble Supreme Court in the case of CIT vs Kelvinator of India Ltd (supra), where the Hon'ble Supreme Court has categorically held that assessment cannot be reopened merely on change of opinion. We further observe that the AO has allowed deduction claimed u/s 80IB(10) in the original assessment u/s 143(3) and once deduction claimed u/s 80IB(10) has been allowed, the same cannot be withdrawn in re-assessment proceedings unless there is material changes in facts. In this case, the AO has failed to bring on

record any change in facts prevailed at the time of original assessment and assessment proceedings u/s 147 of the Act. Therefore, we are of the view that it is a case of mere change of opinion and hence, the reopening of the assessment is bad in law and liable to be quashed. Accordingly, we quash re-assessment order passed by the AO.

11. In the result, the cross objection filed by the assessee is allowed.

ITA No.4266/Mum/2015

12. The revenue has filed this appeal challenging order of the CIT(A) deleting the addition made by the AO towards disallowance of deduction claimed u/s 80IB(10) of the Income-tax Act, 1961 and assessment of income derived from letting out of properties held as stock in trade. Since, we have already quashed re-assessment proceedings, the issues challenged on merit in the revenue's appeal become academic in nature, hence, the same do not require adjudication. Hence, the appeal filed by the revenue in ITA No.4266/Mum/2015 is dismissed as infructuous.

13. In the result, appeal filed by the revenue is dismissed and the CO filed by the assessee is allowed.

Order pronounced in the open court on 18th July, 2018.

Sd/-

sd/-

(Joginder Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 18th July, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Sr.PS, ITAT, Mumbai