

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.82 to 84/Ind/2017
Assessment Years: 2004-05, 2005-06 & 2006-07

M/s. Fortune Builders,157, Zone-1, M.P. Nagar, Bhopal		ACIT (Circle)-IIBhopal
(Appellant)	Vs.	(Respondent)
PAN No.AAAFF9074H		

Revenue by	Shri P.K. Mitra, Sr.DR
Assessee by	Shri Jayesh Doshi ,CA
Date of Hearing	15.10.2018
Date of Pronouncement	18.10.2018

ORDER

PER MANISH BORAD, AM.

These three appeals filed at the instance of the assessee pertaining to Assessment Year 2004-05, 2005-06 & 2006-07 are directed against the consolidated order of Ld. Commissioner of Income Tax(Appeals)-3 (in short 'CIT(A)'), Bhopal *dated* 8.12.2016 which are arising out of the order u/s 271(1)(c) of the Income Tax Act 1961(In short the 'Act') dated 03.03.2016 framed by ACIT(Central)-II, Bhopal.

2. As the issues raised in all the appeals relates to the legality and quantum of penalty levied u/s 271(1)(c) of the Act, these were heard together and are being disposed off by this common order for sake of convenience.

3. Common grounds are raised in all these 3 appeals. For sake of adjudication we mention the grounds raised for Assessment Year 2004-05 which also includes the additional ground raised by the assessee vide application dated 14.8.2018.

“1. a. On CIT(A) erred in confirming penalty when show cause notice I assessment order does not explicitly mentioned the limb 271(1)lc) of the Act Le. whether it IS for furnishing inaccurate particulars or concealment of income.

b. In view of the facts & circumstances & the case, CIT(A) should not have confirmed the penalty u Is 271(1)(C) of the Act.

c. Appellant prays that penalty confirmed by CIT(A) u/s 271(1)(C)of the Act, 1961 be deleted.

WITHOUT PREJUDICE TO ABOVE ADDITIONAL GROUND NO.1

2. a. CIT(A) erred in confirming penalty u Is 271(1 HC) when the issue involved is debatable.

b. In view of the facts & circumstance of the case appellant prays that penalty conflrmed by CIT(A) u/s 271(1)(C) of the Act be deleted.

Appellant humbly requested that the above ground of appeal may kindly be admitted per need justice, appellant reiterates their assurance to co-operate in early disposal of appeal”.

4. At the outset the Ld. Counsel for the assessee submitted that the penalty has been levied u/s 271(1)(c) of the Act on the disallowance of deduction claimed u/s 80IB(10) of the Act by the assessee at Rs.11,00,000/-, Rs.28,00,000/- and Rs.8,00,000/- respectively for Assessment Year 2004-05, 2006-07 and 2007-08 respectively. He submitted that the alleged notice issued u/s 274 r.w.s. 271(1)(c) of the Act is not valid as the Ld. Assessing Officer (In short Ld.A.O) has not mentioned the specific charge in the notice against the assessee as to whether the impugned penalty has been levied for concealing the particulars of income or furnishing inaccurate particulars of income. Such notices have been held to be invalid and the proceedings u/s 271(1)(c) have been held to be *void ab initio* by the Hon'ble jurisdictional High Court in the case of Principal Commissioner of Income Tax-I Vs Kulwant Singh Bhatia ITA No.9/2018 order dated 9.5.2018.

5. As regards the merits for levy of penalty, reliance was placed on the judgment of jurisdictional High Court in the case of Principal Commissioner of Income Tax V Surabhi Homes Pvt.Ltd ITA No.68-69/2016 order dated 21.03.2017 wherein the Hon'ble

Court confirmed the finding of the Tribunal holding that no penalty should have been levied u/s 271(1)(c) of the Act as no incorrect declaration has been filed by the assessee and the deduction u/s 80IB(10) of the Act was claimed on the basis of a project approval certificate.

6. Per contra Ld. Departmental Representative vehemently argued and supporting the orders of lower authorities.

7. We have heard rival contentions and perused the records placed before us.

8. In these three appeals the issue relates to penalty levied u/s 271(1)(c) of the Act at Rs.11,00,000/-, Rs.28,00,000/- and Rs.8,00,000/- for the Assessment Year 2004-05, 2005-06 and 2006-07 respectively on the disallowance of deduction claimed u/s 80IB(10) of the Act at Rs.29,99,883/-, Rs.74,42,241/- and Rs.23,04,302/- respectively.

9. Though the assessee has taken the additional ground challenging the legality of the notice issued u/s 274 r.w.s. 271(1)(c) of the Act but we would like to first deal with the merits of the case

about the justification of levying the penalty u/s 271(1)(c) of the Act on the alleged disallowance of deduction u/s 80IB(10) of the Act.

10. We find that the assessee claimed deduction u/s 80IB(10) of the Act in respect of housing project. The map was approved. Audited Report in Form 10CCB of the IT rules were issued by the Chartered Accountant. Project was approved by the local authority. However the assessee was denied deduction u/s 80IB(10) of the Act because the commercial constructed area sold by the assessee exceeded the statutory limit provided under the provisions of Section 80IB(10) of the Act which says that such commercial constructed area should not exceed 5% of the aggregate built up area of the housing project or 2000 Sq.Ft whichever is less. In the case of assessee the commercial constructed area measuring 2254 sq.ft was sold and the assessee after claiming the benefit under section 80IB(10) for the 2000 Sq.ft area offered for income the remaining area measuring 254 sq.ft for profits. In other words assessee claimed deduction u/s 80IB(10) of the Act only for 2000 sq.ft area. However, Ld. A.O took a view that as the assessee has exceeded the statutory limit of area provided in the provision of

80IB(10) it is not eligible to any deduction u/s 80IB as it has violated one of the conditions. Ld. A.O therefore concluded the assessment denying the benefit of deduction u/s 80IB(10) of the Act and also initiated the penalty proceedings u/s 271(1)(c) of the Act on the alleged disallowance.

11. Apart from this technical Issue all the other details of expenditure and revenue pertaining to construction of the project as well as sale consideration from the sale of built up area have been found to be correct. All the details thereto have been furnished in the audited financial Accounts. In the backdrop of these facts, *"whether the assessee can be visited with the benefit of u/s 271(1)(c) of the Act is to be examined"*.

12. We find that the Hon'ble Apex Court in the case of CIT V Reliance Petro Products 2010 189 Taxmann 322 wherein it has been held that;

“as assessee had furnished all details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as concealment of income on its part it was up to the authorities to accept its claim in Return or not – Merely because assessee had claimed expenditure, which claim was not

accepted or was not acceptable to Appellant, that by itself would not, in our opinion, attract penalty under Section 271(1)(c) of Act. If Court accepts contention of Appellant then in case of every Return where claim made is not accepted by Assessing Officer for any reason, assessee will invite penalty under Section 271(1)(c) of Act – That is clearly not intendment of Legislature”

13. Ld. Counsel for the assessee has also relied on the decision of Hon'ble High Court in the case of Principal Commissioner of Income Tax V Surabhi Homes Pvt.Ltd (supra) which also deals with the similar issue of penalty levied u/s 271(1)(c) of the Act on the wrong claim of the deduction u/s80IB(10) of the Act.

“The assessee claimed deduction under section 80IB(10) of the Income Tax Act, 1961 (for short the Act). The Assessing Officer rejected the claim of the assessee of such deduction under section 80IB(10) of the Act, for the reason that-the assessee does not satisfy the conditions to avail the benefit in the orders of assessment-passed on 30.12.2008 and 17.12.2009. The Assessing Officer also ordered for initiating penalty proceedings after disallowing the deduction claimed for concealing income and furnishing inaccurate particulars of income.

In pursuance to such an order, the Assessing Officer passed an order imposing penalty of RS:32,35,858/- under section 271(1)(C) of the Income Tax Act, 1961. Such order of imposition of penalty was set aside in appeal by the Commissioner of Income Tax (Appeals), wherein it was held in as under:-

4.10 In the instant case also, there is no finding on record that any

details supplied by the appellant in its returns of income for these years are found to be incorrect or false and therefore, there is no question of levying penalty u/s 271(1)(C). A mere making of a claim u/s 80IB(10) which was not allowed by the assessing officer, by itself will not amount to furnishing inaccurate particulars or concealing the income. Therefore, considering the facts and circumstances of the case and legal position of the issue, I am of the considered view that the appellant is not liable for penalty u/s 271(1)(C) for claiming deducting u/s 80IB(10) on the profits derived from a housing project in A.Ys 2006-07 & 2007-08. Accordingly, penalty orders u/s 271(1)(C) for these assessment years imposing penalty of Rs.58,78,458/-- & Rs.32,35,858/-respectively are hereby, cancelled . It is the said order which was not interfered with by the Tribunal in further appeal.

Learned counsel for the appellants placed reliance upon an order passed by the Delhi High Court reported as (2010) 327 ITR 510 [Commissioner of Income Tax Vs. Zoom Communication (P) Limited], to contend that if the issue is not debatable then the assessee is liable for penalty.

We have heard learned Counsel for the appellant and find that no question of law arises for consideration in the present appeals.

In the present case, the Assessing Officer found that the assessee has produced an a invalid project approval certificate . The invalidity was in respect of automatic cancellation of the permission to raise construction of building. Another ground for imposition of penalty was that possession was given to the allottees before obtaining the a completion certificates which is said to be in gross violation of condition NO.7 of the approval certificate.

Such facts have been taken into consideration by the Commissioner of Income Tax (Appeals), wherein the Commissioner has recorded the finding referred to above.

The fact is that the assessee claimed deduction under section 80IB(10) for the reason that the a project approval certificate was filed and the possession delivered: May-be the technical formality of obtaining completion certificate was not satisfied, but ,it will-not mean that the

assessee has claimed incorrect or false deduction. Mere non-satisfaction of a condition of deductions will not mean that the assessee has furnished incorrect return, which will make it liable for penalty.

Still further, the Commissioner of Income Tax (Appeals) and the Tribunal have given a finding of fact that there was no incorrect declaration filed by the assessee. Said is a finding of fact, which does not give rise to any substantial question of law.

Accordingly, both the appeals are dismissed.”

14. Ld. Counsel for the assessee also stated at the bar that the the appeal of the assessee i.s Fortune Builders relating to quantum addition is pending before the Hon’ble Apex Court. This fact proves that there is a “substantial question of law” in the ground raised by the assessee on the quantum addition which means that two legal views were possible at the time of claiming deduction u/s 80IB of the Act and one cannot ignore the possibility that the assessee may succeed.

15. We therefore in the given facts and circumstances of the case and respectfully following the decisions of Hon'ble jurisdictional High Court in the case of Principal Commissioner of Income Tax V Surabhi Homes Pvt. Ltd (supra) and also looking to the fact that “substantial question of law” is pending before the Hon'ble Apex Court in the case of the assessee, we are of the considered view that

the lower authorities erred in levying the penalty u/s 271(1)(c) of the Act for disallowance of deduction u/s 80IB(10) merely on a technical ground. We therefore allow the relevant ground No.3 for all the three appeals challenging the penalty confirmed by Ld.CIT(A) u/s 271(1)(c) of the Act.

16. Apropos to the additional ground relating to the legality of notice issued u/s 274 r.w.s. 271(1)(c) of the Act we refrain ourselves from adjudicating the same it being academic in nature, as we have already deleted the impugned penalty for all the three years adjudicating the merits of the case. Therefore the additional ground raised by the assessee are dismissed as infructuous.

17. The other grounds are general in nature which needs no adjudication.

18. In the result all the three appeals of the assessee are allowed.

The order pronounced in the open Court on 18.10.2018.

Sd/-

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 18 October, 2018

/Dev

Fortune Builders
ITA No.82 to 84/Ind/2017

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.

By order
Assistant Registrar, ITAT, Indore