

IN THE INCOME TAX APPELLATE TRIBUNAL

“B” BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND

SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA No.1584/Bang/2018
Assessment Year : 2007-08

The DCIT, Circle – 7 (2) (1), Bangalore.	vs.	M/s. Eagleton Property Holdings, #2581, 9 th Main Road, BSK 2 nd Stage, Bangalore – 560 070. PAN: AABFE9867C
APPELLANT		RESPONDENT

&

C.O. No. 111/Bang/2018
(in ITA No. 1584/Bang/2018)
(By Assessee)

Assessee by	:	Shri V. Sridhar, CA
Revenue by	:	Shri R.N. Siddappaji, Addl. CIT (DR)
Date of hearing	:	06.03.2019
Date of Pronouncement	:	15.03.2019

ORDER

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the revenue and the C.O. is filed by the assessee and these are directed against the order of Id. CIT (A)-10, Bangalore dated 23.02.2018 for Assessment Year 2007-08.

2. The grounds raised by the revenue in its appeal are as under.

“1. The order of the learned CIT(A) is opposed to law and facts of the case.

2. "The CIT(A) erred in circumstances of the case and in law in opining that the assessee is a developer and not a contractor without appreciating the fact that the assessee has entered into construction agreements with each individual owners and hence the assessee is only a Building Contractor and not a Developer and Builder".

3. "Whether on the facts and circumstances of the case, the CIT(A) was justified in law in allowing the appeal on proportionate basis in respect of units having built up area of less than or equal to 1500 Sq ft"?

4. "Whether on the facts and circumstances of the case, the CIT(A) was justified in law in rejecting the District Valuation Officer's Report and directing the AO to take details of measurements of individual

units and decide on the allowability of the deduction as claimed u/s 801B(10)"?

5. The CIT(Appeals) erred in not considering the fact that even if some of the residential units of the housing project exceeded the prescribed limit of 1500 sq ft, the benefit of section 8018(10) cannot be given to the entire project".

6. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

7. The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above."

3. The grounds raised by the assessee in its C.O. are as under.

"1. The order of CIT(A) is against both law and facts of the case.

2. The CIT(A) erred in not passing a speaking order when the respondent specifically mentioned that in the original order the deduction U/s 8016(10) was allowed after detailed examination and there is no failure on the part of the respondent to disclose fully truly all material facts necessary for the assessment.

3. The CIT(A) failed to pass an order in respect of the appellants ground that it is a change of opinion which is not permitted in law.

4. The CIT(A) erred in not passing a speaking order on the reason for reopening since the reasons for reopening does not contain the conclusion of assessing officer for reopening the assessment, the reason given for reopening is a mere reasons sent for commissioner's approvals for reopening.

5. The CIT(A) erred not passing a speaking order in respect of the assessing officer not having independently come to a conclusion in the reason for reopening rather than merely reproducing the note sent to commissioner for approval.

6. The CIT(A) erred not following the Jurisdictional High Court decision for the failure of the assessing officer in not passing a speaking order against the reason for the reopening which is vital before passing order U/s 143(3), r.w.s. 147 of the Act.

7. For these and other grounds that may be adduced at the time hewing the appeal may kindly be allowed and justice rendered."

4. At the very outset, it was submitted by Id. AR of assessee that as per ground no. 6 raised by assessee in its C.O., this is the claim of the assessee that the objections raised by the assessee against the validity of reopening has not been disposed of by the AO by way of a separate

speaking order and therefore, the assessment order has to be quashed. He also submitted that this issue is covered in favour of the assessee by the judgement of Hon'ble Karnataka High Court rendered in the case of Deepak Extrusions Pvt. Ltd. Vs. DCIT in Writ Appeal No. 1725/2017 (T-IT) dated 15.03.2017. He also submitted that the copy of the judgement is available on pages 64 to 76 of paper book. He drawn our attention to Para nos. 11 to 13 of this judgement available on pages 74 to 76 of paper book.

5. The Id. DR of revenue supported the orders of authorities below. He also submitted that even if separate speaking order has not been passed by AO for disposing of the objections of the assessee against reopening, the assessment order may be irregular but not illegal and hence, the matter may be restored back to the file of AO for passing a separate speaking order for disposing of the objections raised by assessee against validity of reopening and in support of his contention he placed reliance on a judgment of Hon'ble Apex Court rendered in the case of Home Finders Housing Ltd. vs. ITO as reported in 94 Taxmann.com 84 and he filed a copy of this judgment. He also submitted a copy of the judgment of Hon'ble madras High Court rendered in the same case as reported in 93 Taxmann.com 371. He pointed out that in this case, it was held by Hon'ble madras High Court that non compliance of procedure indicated by Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. vs. ITO, 259 ITR 19 would not make order void or non est and such a violation is a procedural irregularity which could be rectified by remitting the matter to the authority and Hon'ble apex court dismissed the SLP filed by the revenue against this judgment of Hon'ble Madras High Court.
6. We have considered the rival submissions. First of all, we examine this factual aspect as to whether any order was passed by the AO to dispose of the objections raised by the assessee against the validity of reopening. We find that on pages 15 and 16 of paper book are the reasons recorded by the AO for reopening and on pages 17 to 21 of the paper book is the letter dated 25.02.2015 of the assessee addressed and submitted before the AO and as per this letter, objections were raised by assessee against the

validity of reopening and nothing has been brought on record before us to show that these objections were disposed of by the AO by way of a separate speaking order. Before us, reliance has been placed by the learned AR of the assessee on the judgment of Hon'ble Karnataka High Court rendered in the case of Deepak Extrusions Pvt. Ltd. vs. DCIT (supra). We find that in this case, it was held that the assessment order is set aside. We also find that in this judgment, Hon'ble Karnataka High Court has also referred to its own earlier judgement rendered in the case of M/s. Vardhman Metals Vs. ITO in Writ Appeal No. 219/2015 dated 26.10.2016.

7. We also reproduce the relevant Para of the order of CIT (A) for ready reference. This issue was decided by CIT (A) as per para 5.4 of his order which is reproduced hereinbelow for the sake of ready reference.

*“5.4 Another issue which the appellant raised was that the AO has not followed the guidelines issued by the Hon'ble Supreme Court in the case of GKN Drive Shafts (India) Ltd. vs ITO (2003) 259 ITR 19. It is seen that the AO has not disposed of the objections of the appellant by speaking order separately. However, he has disposed of the objections of the AO in the assessment order and thereafter he has proceeded to make the assessment. Reference is drawn to the case of Principal Commissioner of Income-tax-2, Vadodara v Sagar Developers[2016] 72 taxmann.com 321 (Gujarat) and also in case of Areva T&D India Ltd v ACIT [2007] 165 Taxman 123 (Madras), the court held that the intention of the Supreme Court in the case of GKN Drive shafts (India) Ltd. v. ITO (supra) was never to declare the order of assessment illegal and to permanently prevent the AO from passing any fresh order of assessment merely on the ground that the AO did not dispose of the objections before passing the order of assessment. Thus the Court held that not passing an order on the objections of the assessee cannot be fatal to the assessment proceedings and the same is a mere irregularity. In view of the same it cannot be said that the assessment is bad in law. **In the result ground nos. 1-8 are dismissed.**”*

8. From the above Para, it is seen that Id. CIT(A) has considered the judgement of Hon'ble Apex Court rendered in the case of GKN Drive shafts (India) Ltd. Vs. ITO as reported in (2003) 259 ITR 19 and also the judgement of Hon'ble Gujarat High Court rendered in the case of Pr. CIT Vs. Sagar Developers as reported in [2016] 72 taxmann.com 321 (Gujarat) and also the judgement of Madras High Court rendered in the case of Areva T&D India Ltd. Vs. ACIT as reported in [2007] 165 Taxman 123 (Madras)

and he has stated that it was held by both these High Courts that the intention of Hon'ble Apex Court in the case of GKN Drive shafts (India) Ltd. Vs. ITO (supra) was never to declare the order of assessment illegal and to permanently prevent the AO from passing any fresh order of assessment merely on the ground that the AO did not dispose of the objections before passing the order of assessment.

9. Now in the light of these findings of Id. CIT (A), we first reproduce the relevant portion of the judgement of Hon'ble Karnataka High Court rendered in the case of Deepak Extrusions Pvt. Ltd. vs. DCIT (supra) being paras 11 to 13 of this judgement from pages 74 to 76 of paper book for ready reference.

“11. If the facts of the present case are examined in the light of aforesaid legal position, it is an admitted position that the reasons for re-opening of the assessment by issuing of the notice under Section 148 of the Act were supplied to the appellant assessee. It is also admitted position that the appellant assessee after receipt of such reasons raised objections. It is also undisputed position that the Assessing Officer did not dispose of the objections prior to proceeding with the assessment further and proceeded to pass the order for assessment. Under the circumstances, it can be said that the mandatory procedure of disposal of the objection by Assessing Officer before proceeding with the assessment has not been followed and exercise of power can be said as not only vitiated, but the order of assessment cannot be sustained.

12. If the decision of the Assessing Officer is illegal on the face of it, in our view, it would fall in the exceptional category of making departure from the normal principles of self impose limitation of not to interfere in a matter where there is existence of alternative statutory remedy.

13. In view of the aforesaid, the impugned order passed by the learned Single Judge is set aside. The impugned order of assessment is also set aside.

It is observed that the Assessing Officer shall be at liberty to proceed in the matter in accordance with law.

The appeal is allowed to the aforesaid extent.

Considering the facts and circumstances, no order as to costs.”

10. From the above paras of this judgement of Hon'ble Karnataka High Court, it is seen that although the assessment order was set aside but it was also

held that the AO will be at liberty to proceed with the matter in accordance with the law. Hence it is not held in this case that the AO cannot pass any fresh assessment order after disposing of the objections raised by the assessee against the validity of reopening of the assessment. Respectfully following this judgement of Hon'ble Karnataka High Court, we hold that in the present case, the assessment order is set aside because the same was passed by the AO without first disposing of the objections raised by the assessee against validity of reopening of the assessment. Respectfully following this judgement of Hon'ble Karnataka High Court, we set aside the assessment order and we hold that the AO shall be at liberty to proceed in the matter in accordance with law. Ground no. 6 of the assessee's Cross Objection is allowed for statistical purposes.

11. In view of this decision as per which the assessment order is set aside and liberty is granted to the AO to proceed in the matter as per law, other grounds raised by the assessee in C.O. and grounds raised by revenue in its appeal do not call for any adjudication at the present stage.
12. In the result, the appeal filed by the revenue is dismissed as infructuous and the C.O. of the assessee is allowed in the terms indicated above.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(LALIET KUMAR)
Judicial Member

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Bangalore,
Dated, the 15th March, 2019.
/MS/

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Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.