

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
[Conducted through E-Court at Ahmedabad]**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. No.438/Rjt/2015
(Assessment Year: 2007-08)

The ITO
Ward-1(1)(3)
Rajkot

Vs. M/s.Swapnalok Developers
C/o.Bhupendra T. Pachani
“Aakashdeep”, Kalavad Road
11-A, Sainagar Co-op. Society
Rajkot

[PAN No. ABAFS 8095 A
(Appellant) ..

(Respondent)

Appellant by : Shri Ranjit Singh, CIR-DR
Respondent by : Shri D.M. Rindani, AR

Date of Hearing 04/09/2019
Date of Pronouncement 22/10 /2019

ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax (Appeals)-1, Rajkot [CIT(A) in short] vide appeal no.CIT(A)-I/Rjt/0228/14-15 dated 30/06/2015 arising in the assessment order passed under s.143(3) r.w.s.147 of the Income Tax Act, 1961(hereinafter referred to as "the Act") dated 02/03/2015 relevant to Assessment Year (AY) 2007-08

2. The Revenue has raised the following grounds of appeal:-

1. *The ld.CIT(A) has erred facts in law as well as on facts in not upholding the re-opening of assessment u/s.147.*

2. *The ld.CIT(A) has erred in law as well as on facts in deleting the additions made by the AO by re-opening assessment u/s.147 and reducing the claim of deduction made u/s.80IB(10) on account of interest on partner's capital and remuneration.*
3. *The appellant craves for leave to alter, amend and/or add any ground of appeal.*

2. The 1st issue raised by the Revenue is that the learned CIT(A) erred in holding the proceedings under section 147 of the Act as invalid.

3. At the outset, we note that the learned CIT (A) has quashed the assessment framed under section 147 of the Act by observing that it was based on the change of opinion. Before we embark upon enquiry whether the learned CIT (A) was correct in quashing the assessment framed under section 147 of the Act, it is pertinent to refer the reasons recorded for initiating the proceedings under section 147 of the Act. The reasons recorded reads as under:

“2. On verification of records it was noticed that the assessee firm has claimed deduction under section 80IB(10) of the I.T.Act for the assessment year 2007-08 at Rs. 3,92,64,437/- On verification of partnership deed of the firm dated 02.12.2004, it is noticed that the assessee is a partnership firm consisting of ten partners having equal share @ 10%. As per the contents of the partnership deed simple interest @ 12% per annum was to be paid to the partners on the balance amount to their credit of the capital or current account. Further as per the provisions of partnership deed Shri Mahendrakumar D. Zalawadia one of the working partner of the firm has to be paid remuneration under section 40(b) (v) of the I.T.Act. It was however, noticed that the assessee has not provided for the interest and remuneration as per the contents of the partnership deed. By not providing for interest and remuneration to the partner, the assessee was benefited for higher claim of deduction under section 80IB (10) of the I.T.Act as non-provision resulted in higher profit to the firm. The interest payable to partners works out to Rs. 10,25,271/- and remuneration payable to Shri Mahendra D. Zalavadia, comes to Rs. 1,58,79,299/-. Total interest and remuneration payable comes to Rs. 1,69,05,070/-. Since an amount of Rs. 1,69,05,070/- being interest and remuneration for A;Y.2007-08 were not allowed to the partner eligible as per the provisions of partnership deed, the assessee was allowed excessive deduction under section 80IB (10) of the I.T.Act to that extent. Such excess deduction u/s.80IB(10) of the I.T.Act granted to the firm is required to be disallowed.

3. Since an amount of Rs.1,679,05,070/- has not been allowed to the partners of the firm as interest and remuneration, as per the provisions of partnership deed, the assessee has been allowed excess deduction u/s.80IB(10) of the I.T. Act, to that extent within the meaning of explanation 2(c)(iii) to sec. 147 of the I.T.Act.

4. I have therefore reasons to believe that income has escaped assessment within the meaning of sec.147 of the I.T.Act.”

4. The learned CIT (A) has quashed the assessment framed under section 147 of the Act by observing that the initiation of proceedings therein was nothing but the change of opinion based on same set of documents which were examined by the AO in the assessment proceedings framed under section 153A of the Act vide order dated 19th December 2012 and even prior to that assessment order framed under section 143(3) of the Act vide order dated 18th December 2009.

However, the learned DR for the Revenue before us submitted that the assessee in order to claim higher deduction under section 80IB(10) of the Act has not provided interest on capital and remuneration to partner as per the deed of partnership.

5. On the other hand, the learned AR before us filed a paper book running from pages 1 to 26 and submitted that the issue regarding the deduction under section 80IB(10) claimed by the assessee was raised by the AO during the assessment proceedings under section 143(3) of the Act. The learned AR in support of his contention drew our attention on page 16-17 of the paper book where the question regarding the claim under section 80-IA was raised, particularly, the question no. 20 to 23 by the AO.

The learned AR also drew our attention on page 18-20 of the paper book where the reply of the assessee was placed against the notice issued under section 142(1) of the Act.

Both the learned DR and the AR before us relied on the order of the authorities below to the extent favourable to them.

6. We have heard both the parties and perused the records, especially the impugned orders and the submission made therein by the learned counsel for the assessee. In the present case the assessment was framed under section 153A of the Act vide order dated 19th December 2012 in which return of assessee accepted without making adverse remark. Before that there was also the assessment framed under 143(3) of the Act. During the assessment proceeding under section 143(3) of the Act, the AO has questioned about the deduction u/s 80IA(10) claimed by the assessee in the year under consideration. The relevant query/question raised by the AO reads as under:

“80IA Deduction

20. *Nature of business activities carried out during the F.Y. 2006-07.*

21. *Please furnish the evidence that such enterprise is owned by company registered under or by consortium of such company (name, address, PAN, copy of agreement, if any.)*

22. *Furnish the date on which operating and maintaining facility/activities started.*

23. *Please produce the copy of agreement with Central Govt./State Govt./Local Authority or any other statutory body for such business activities.”*

7. The assessee in response to such notice has made a reply vide letter dated NIL by furnishing the explanation regarding the claim of deduction which can be verified from page 20 of the paper book.

Thus, it is clear that the AO in the original assessment proceedings has conducted enquiries about the impugned deduction. Therefore, the reopening under section

147 of the Act based on the same set of documents examined during the original proceedings is not sustainable. In this connection we find support and guidance from the judgment of Hon'ble Apex Court in the case of CIT versus Kelvinator India Ltd reported in 320 ITR 561 wherein it was held as under:

“the Assessing Officer has power to reopen, provided there is 'tangible material' to come to conclusion that there is escapement of income from assessment. Under the Direct Tax Laws (Amendment) Act, 1987, the Parliament not only deleted the words 'reason to believe' but also inserted the word 'opinion' in section 147. However, on receipt of representations from the companies against omission of the words 'reason to believe', the Parliament re-introduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer.”

We also draw support and guidance from the judgment of Hon'ble Gujarat High Court in the case of Gujarat Power Corporation Ltd versus ACIT reported in 26 Taxmann.com 51 wherein it was held as under:

“37. Coming to the second question, as recorded, contention of the petitioner is that as in the present case, once the Assessing Officer examines a certain claim of the assessee in the original assessment proceedings, raises queries, receives replies, but thereafter makes no additions or disallowances, without giving reasons, it would not be permissible to reopen the assessment even within four years on very same grounds. The contention of the revenue is that in absence of any direct discussion in the assessment order, the Assessing Officer cannot be stated to have formed any opinion and that therefore, reopening within a period of four years of such an assessment would be permissible.

38. In this context, we may recall that as held by the Apex Court in the case of (1) Kelvinator of India Ltd. (supra), even after 1.4.1989, reopening of an assessment previously framed after scrutiny would not be permissible on a mere change of opinion and that the Assessing Officer must have some tangible material to form a belief that income chargeable to tax has escaped assessment. The concept of change of opinion is not done away with in the newly amended section 147 of the Act.”

Thus, in view of the above we hold that the reopening of the impugned case under section 147 of the Act in itself is invalid and against the laws settled by the Hon'ble Supreme Court/ Gujarat High Court in the cases cited above.

We also note that the learned CIT (A) also held the reassessment framed under section 147 of the Act as invalid by observing that the claim of deduction was

allowed after due verification in enquiries in prior assessment order framed under section 153A and 143(3) and notice under section 148 was issued without any tangible material.

8. The learned DR, at the time of hearing, has not brought anything on record contrary to the finding of the learned CIT (A). Therefore, we do not find any reason to interfere in the finding of the learned CIT (A). As we have quashed the assessment framed under section 147 of the Act, therefore we are not inclined to decide the issue on merits. In view of the above, the ground of appeal filed by the Revenue, on technical reason as elaborated above, is dismissed.

9. In the result, the appeal of the Revenue is dismissed.

This Order pronounced in Open Court on 22 / 10 /2019

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 22/ 10 /2019

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, राजकोट / ITAT, Rajkot