

IN THE INCOME-TAX APPELLATE TRIBUNAL "A" BENCH MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 7074/Mum/2016 (Assessment Year 2007-08)

Lodha Construction (Dombivali), Now merged with Lodha Developers Pvt. Ltd.), 412, 4 th Floor, 17G Vardhaman Chamber, Cawasji Patel Road, Horniman Circle, Fort, Mumbai-400001 PAN: AABFL3409M	Vs.	DCIT Central Circle-7(3) Room No. 655, Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant

Respondent

Appellant by : Ms. Aarti Sathe (AR)

Respondent by : Shri Michael Jerald (Sr.DR)

Date of Hearing : 04.02.2020

Date of Pronouncement : 20.03.2020

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the order of Id. Commissioner of Income Tax (Appeals)-49 Mumbai in short 'Id. CIT(A)' in Appeal No.CIT(A)-49/IT-102 & 103/2015-16, dated 07.10.2016 for Assessment Year 2007-08. The assessee has raised the following grounds of appeal:

1) On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the re-opening of the assessment beyond four years, despite the reasons for re-opening communicated to the Appellant, not even having a whisper of any allegation of failure to disclose fully and truly all material facts at the time of original assessment.

2) On the facts and circumstances of the case and in law, the learned CIT(A) erred in concluding that the proviso to section 147 was satisfied on the basis of the contents of an internal correspondence sent by the Assessing Officer, for

obtaining the approval of the Commissioner of Income Tax, ignoring the fact that the reasons furnished to the Appellant cannot be supplemented in any manner.

3) On the facts and circumstances of the case and in law, the learned CIT(A) erred in relying on the decision of the Supreme Court in the case of CIT vs P.V.S. Beedies (P) Ltd reported in 103 Taxman 294, which justified a re-opening of assessment on the basis of audit objection based on facts, whereas, in this case the audit objection was on a point of law and such re-opening on the basis of audit objection on a point of law is not permitted as per the decision of the Supreme Court in the case of 'Indian & Eastern Newspaper Society vs CIT reported in [1979]2 Taxman 197.

4) On the facts and circumstances of the case and in law, the learned CIT(A) erred in concluding, that the flat cancellation receipts are not eligible for deduction u/s 80IB.

2. The assessee vide application dated 11.04.2019 filed on 22.04.2019 has raised the following additional ground of appeal:

(1) On the facts and circumstances of the case and in law the Id CIT(A) erred in concluding that interest income of Rs.21,20,487/- are not eligible for deduction under section 80IB instead of net interest income of Rs. 5,25,128/-.

(2) On the facts and circumstances of the case and in law the Id CIT(A) erred in concluding that bank charges recovered from customers & sundry creditors and other balance written back are not eligible for deduction u/s 80IB.

3. Brief facts of the case are that the assessee company is engaged in the business of development and construction. The assessee declared its income for AY 2007-08 of Rs. 5,25,128/-, while filing return of income on 31.10.2007. The assessee claimed deduction under section 80IB. The case was selected for scrutiny and assessment was completed under section 143(3) on 29.12.2009 accepting the return of income. Subsequently, the assessment was re-opened under section 147. The Notice under section 148

dated 18.02.2014 was issued and served upon the assessee. Following the reasons of re-opening were recorded.

“In this case the assessment was completed u/s 143(3) of the Income Tax Act 1961 on 22th December 2009 at a total income of Rs 525128/-. Assessee has filed return of income on 30.10.2007 declaring total income at 525128/-. Perusal of the records reveal that for the period under consideration the assessee has shown total sales of Rs. 25,77,66,506/- and net profit of Rs. 10,09,11,188/- as per P/L account was shown. As per the computation of income, net profit from business activity of Rs. 10,09,11,188/- was increased to Rs. 10,49,36,726/- by way of Rs. 3,77,692/- on a/c of Disallowable prior period expenses, Rs. 44,2537/- on a/c of Donation and 4,05,423/- on account of provision to gratuity. Rs. 36,87,656/- on account provision for doubtful debts and 35,642/- on account of disallowable expenses u/s 40A(3). The deduction u/s 80IB has been claimed on income of Rs. 10,49,36,726/-

It is seen that the profit as per P& L a/c of Rs. 10.09 crores is inclusive of income accounted for as other income of Rs. 40,99,635/- out of which assessee has not claimed 80IB deduction on income of Rs. 5,25,128/- which is on account of interest income, Therefore assessee has claimed 80IB deduction on Rs 35,74,507/(40,99,635-5,25,128) falling under the head "Other income". Section 80IB clearly stipulates that an undertaking developing and building housing projects approved before 31.03.01 by the local authority shall be entitled to avail 100% deduction of the profits derived from such housing projects. The Net profit of 2007-08 is inclusive of other income of Rs 35,74,5071- viz income not related to the building of housing projects. This income is not eligible for any such deduction U/S 80IB and should be taxed in the hands of the assessee under the normal provisions of the I T Act, 1961. Failure to do so has resulted in escapement of income to that extent.

Further, it is observed that the assessee has claimed deduction U/S 80IB to the extent of Rs. 10,49,36,726/-. Net profit from business activity is only Rs. 10,09,11,188/- and the same has been increased to a Gross Total Income of Rs. 10,49,36,726/- by way of Rs. 3,77,692/- on a/c of Disallowable prior period expenses, Rs. 44,253/- on a/c of Donation and 4,05,423/- on account of provision to gratuity, Rs. 36,87,656/- on account provision for doubtful debts

and 35,642/- on account of disallowable expenses u/s 40A(3). These disallowances do not fall in the category of eligible profits derived from the business activity of construction of buildings, hence, these do not qualify for deduction U/S 80IB of the IT Act, 1961.

The deduction U/S 80IB is a 'profit linked incentive' admissible to only the eligible business of the assessee. Here the assessee is doing a business of building and construction and the profit resulting from the said activity can only be claimed as deduction, which in the instant case is Rs. 10,09,11,188/-. The amount of Rs. 3,77,692/-, 44,253/-, Rs. 4,05,423/-, 36,87,656/- and Rs. 35,642/- which has been claimed additionally, is because of violation of provisions of Section 40(a)(ia) and Section 40(a) of the IT Act, 1961 and on a/c of Donation respectively, which is not a profit derived from activity of the eligible undertaking and hence is not attributable to the profit of the eligible undertaking.

The assessee has included an the amount of Rs. 3,77,692/-, Rs. 4,05,423/-, Rs. 36,87,656/- and Rs. 35,642/- and disallowance on account of donation of Rs. 44,253/-, in gross total income and subsequently claimed the same also as deduction U/S 80IB. The disallowances u/s 40(a) and 40(a)(ia) cannot be construed to have been derived as or includable in the profit of the eligible undertaking and do not enhance the real income of the assessee. Further, disallowance of these expenses is due to non compliance of certain provisions of the Act, which does not enhance the actual income of the assessee. Therefore the claim of the assessee for 80IB deduction on disallowance on the above mentioned disallowances and donation is not a valid claim and income to that extent has escaped assessment."

4. In response to the notice under section 148, the assessee filed its reply dated 01.03.2014 and contended that return filed on 30.10.2007 may be treated as a return in response to the said notice. The assessee filed objection vide its objection dated 11.02.2015. The objection of assessee was disposed of separately. The Assessing Officer after serving statutory notice under section 143(2) and 142(1) proceeded for re-assessment. The

Assessing Officer in the re-assessment order passed under section 143(3) r.w.s. 147 made the following disallowance:

- (a) Disallowance of prior period expenses of Rs. 3,77,692/-
- (b) Disallowance u/s 37- donations of Rs. 44,253/-
- (c) Disallowance of provision for doubtful debts of Rs. 36,87,656/-
- (d) Provision for gratuity of Rs. 4,05,423/-
- (e) Disallowance u/s. 40A(3) of Rs. 35,642/-,
- (f) Treated the interest income of Rs. 35,74,507/- and Rs. 15,95,359/- as income from 'other sources' which was claimed by assessee as a part of profit derived by eligible unit under section 80IB.

5. On appeal before the Id. CIT(A), the action of Assessing Officer in re-opening was upheld and other additions/disallowance as mentioned in para 3 (a) to (e) was allowed (deleted), however, the treated the interest income of Rs. 21,20,487/- as a part of profit derived by eligible undertaking against the net interest income of Rs. 5,25,128/- was dismissed. Further, flat cancellation receipt was not held as eligible for deduction under section 80IB(10) and directed the Assessing Officer to treat the same under the head "Income from other Sources". Further aggrieved, the assessee has filed the present appeal before the Tribunal.

6. The assessee has also filed an application for admission of additional evidence under Rule 29 of Income Tax Rules. In the application, the applicant/assessee has contended that in re-opening assessment order the Assessing Officer made various disallowances, the addition except interest income of Rs. 15,95,359/- as a part of profit and other income of Rs.

35,74,507/- as a part of profit derived by eligible undertaking was deleted. It is further stated that during the hearing before lower authorities, the assessee could not file details of other income because these were old record and on account of merger of assessee with other group companies, records were not easily traceable. Hence, the lower authority had no chance to appreciate such details. The additional evidence has a direct bearing on the issue involved in the present appeal and may be admitted. In the application for admission of additional evidence, the assessee has relied upon the decisions of Hon'ble Madhya Pradesh High Court in CIT vs. Satya Setia (143 ITR 486) and Hon'ble Andhra Pradesh High Court in CIT vs. G.V. Rattiah and Co. (256 ITR 351). Along with the application, the assessee has filed charts showing the details of miscellaneous receipts from customer, bank charges (income), cancellation charges, details of sundry creditor and other balance written off.

7. The Id. AR of the assessee submits that Rule 29 of Income Tax (Appellate Tribunal) Rules, 1963 empowered the bench to admit the additional evidence. The additional evidence filed by assessee is relevant and goes to the root of the matter. The additional evidence may be admitted for better appreciation of the issue/ground raised by assessee.
8. On the other hand, the Id. DR for the revenue submits that in case, the Hon'ble Bench considered the relevancy of document filed by assessee by way of additional evidence, the issues with regard to which the assessee has

filed additional evidence may be restored to the file of Assessing Officer for examination and verification of evidence and to pass the order afresh.

9. We have considered the contention of both the parties on the application of additional evidence. We have noted that the lower authorities treated the interest income and various other receipts which consist of flat cancellation charges and other miscellaneous income as 'Income from other sources'. Considering the relevancy of statement furnished by assessee which consists of details of bank charges recovered, details of cancellation charges, details of sundry creditors and other balance returned back during the relevant Financial Year, we admit the plea of assessee about additional evidence. We have noted that the assessee has infact furnished the statement of various receipts in a tabulated form and no corresponding evidence is placed on record. Thus, we admit the plea of additional evidence and will dealt with the issue of additional evidence at appropriate stage later.

10. We have also heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue on merits i.e. validity of re-opening and other grounds of appeal. We have also perused the material available on record. The Id. AR of the assessee submits that original assessment under section 143(3) was completed on 22.12.2009 accepting the returned income and allowing deduction of section 80IB. Notice under section 148 was issued on 08.02.2014. The case

was re-opened after 4 year from the end of relevant Assessment Year. Reasons recorded were furnished to the assessee vide letter dated 06.10.2015. On perusal of reasons recorded it is clear that Assessing Officer was of the opinion that disallowance made by assessee in computation of income is not eligible for deduction. The ld. AR submits that re-opening is based on Audit Report. The issue on which case was re-opened and mentioned in the reasons recorded were already before the Assessing Officer in the original assessment proceeding. The computation of income reflecting the disallowance made by Assessing Officer was before the Assessing Officer. The reasons recorded were merely a change of opinion. The ld. AR further submits that ld. Commissioner of Income Tax (CIT) had also issued a show-cause notice under section 263 on the same very issue for A.Y 2008-09. The assessee responded to the notice under section 263 on 7th March 2013 and 14th March 2013. Considering the reply of assessee, the proceeding under section 263 was dropped.

11. Before lower authorities, the assessee submitted that case is re-opened after expiry of 4 years from the end of relevant A.Y., ignoring the fact that assessee has furnished all details before completion of original assessment under section 143(3). After the completion of original assessment, no new material has come in the notice of Assessing Officer, suggesting that income has escaped assessment. Such re-opening after 4 years when all

material were placed before the Assessing Officer in original assessment is not permitted by law.

12. On the other hand, the Id. Departmental Representative (DR) for the revenue supported the order of the lower authorities. The Id DR further submits that the Id CIT(A) in its finding has not raised quarry and accepted the claim of assessee without verification of facts. So far as the contention of Id AR for the assessee that reopening was made after four year from the end of relevant assessment year and there is no allegation that there was any failure on the part of assessee in disclosing full and true material facts necessary for assessment for the year. The Id DR submits that Id CIT(A) in para 6.3 of his order has clearly held that while seeking the approval of Commissioner of Income tax (CIT) the assessing officer clearly recorded for failure on the part of assessee in disclosing fully and truly material facts.

13. We have considered the submission of both the parties. We have also deliberated on the various case laws relied by the lower authorities. It is matter of record that original assessment under section 143(3) was completed on 22.12.2009 accepting the returned income and allowing deduction of section 80IB. Subsequently, case was reopened under section 147. Notice under section 148 was issued on 08.02.2014. The case was reopened after 4 year from the end of relevant Assessment Year. Before Id CIT(A) the assessee submitted that the case was reopened after 4 years

from the end of relevant assessment and there is no reference in the reasons recorded that there was any failure in disclosing fully and truly all the facts. The Id CIT(A) affirmed the action of assessing officer by taking view that that while obtaining the approval of CIT under section 151 the assessing officer has clearly held that there was failure on the part of the assessee in disclosing fully and truly all the material facts. Before us, the Id. AR of the assessee while pressing application for additional evidences vehemently argued that all the details, except interest income of Rs. 15,95,359/- as a part of profit and other income of Rs. 35,74,507/- as a part of profit derived by eligible undertaking was not before lower authorities. The assessee could not file details of other income because these were old record and on account of merger of assessee with other group companies, records were not easily traceable. Hence, the lower authority had no chance to appreciate such details and that the additional evidence has a direct bearing on the issue involved in the present appeal and may be admitted.

14. Now, we are faced with two diagonal submissions on behalf of the assessee as noted above. Considering the facts that we have already accepted the plea of assessee on application for allowing for filing additional evidence. Therefore, we affirms the view of Id CIT(A) that while obtaining the approval of CIT under section 151 the assessing officer has clearly held that there was failure on the part of the assessee in disclosing fully and truly

all the material facts. Hence, the grounds No. 1 to 3 is decided against the assessee.

15. Ground No. 4 and additional Ground No. 1&2 relates deduction of various components of income under section 80IB. Considering the facts that the assessee in its application for admission of additional evidence has accepted that the interest income of Rs. 15,95,359/- as a part of profit and other income of Rs. 35,74,507/- as a part of profit derived by eligible undertaking was not before lower authorities and that the assessee could not file details of other income because these were old record and on account of merger of assessee with other group companies, records were not easily traceable, which we have accepted. Though, no documentary evidences except the details of the chart is furnished before us, therefore, these grounds of appeal are restored back to the file of assessing officer to decide the issue afresh after verification of facts and evidences in accordance with law. The assessee is also directed to furnish the evidence to substantiate its claim. In the result these grounds of appeal are allowed for statistical purpose.

16. In the result the appeal of the assessee is partly allowed.

17. Order pronounced in the open court on 20/03/2020.

Sd/-
SHAMIM YAHYA
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 20.03.2020
SK

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "A" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

**Dy./Asst. Registrar
ITAT, Mumbai**