

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.3690/Mum/2023

(निर्धारण वर्ष / Assessment Years: 2009-10)

Pooja Developers Shop No. 4 (Damini Wines) Shiv Shakti Building, JN Road, Near Apna Bazar, Mumbai-400080.	बनाम/ Vs.	ITO-29(2)(5) [Current Jurisdiction Ward 41(1)(3), Mumbai] Kautilya Bhavan, Bandra Kurla Complex, Mumbai- 400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAIFP5595M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Snehal Shah	
Revenue by:	Shri H. M. Bhatt (Sr. DR)	

सुनवाई की तारीख / Date of Hearing: 05/03/2024

घोषणा की तारीख /Date of Pronouncement: 22/03/2024

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi, dated 21.08.2023 for AY. 2009-10.

2. At the outset, the Ld. AR of the assessee submitted that the assessee is challenging the notice issued u/s 148 of the Income Tax Act, 1961 (hereinafter “the Act”) is bad in law since the condition precedent as provided by u/s 147 of the Act has not been satisfied. Therefore, we are inclined to adjudicate the legal issue raised by the assessee and for examining the same, we need to extract the “*Reasons Recorded*” by the AO for re-opening assessment. The reasons for re-opening of the assessment reads as under: -

“On verification of records, It is seen that the assessee was developing housing project within the limits of Pimpri Chinchwad Municipal Corporation on plot bearing survey No 185 Hissa No 185/4B, 185/5, 185/68. During the year project was under



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construction. The assessee follows WIP method of account and has declared estimated profit every year. The assessee has shown net profit Rs, 7,74,122+ and the same has been claimed as deduction u/s. 801B(10) of the Act. On going through the records it is observed that the first commencement certificate for this project was granted by Pimpri Chinchwad Municipal Corporation on 21/05/2004, The explanation to the provisions of section 801B(10) of the I. T. Act, read as under:

(ii) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building pins of such housing project is first approved by the Local authority;

(iii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such is issued by the local authority.

Considering the facts of the case it is seen that the project under consideration was commenced on the basis of first commencement certificate, which was granted on 21/05/2004, Therefore following the dictum of statutory provision for availing deduction u/s, 801B(10) (t ought to have been completed on or before 31/03/2009, within the stipulated time provided in the statute, but it is evident from (he part completion certificate dated 31/03/2009 and revised commencement certificate issued again on 31/03/2009 by the focal authority that the project has not been completed within the stipulated time. Hence there was 9 belief that the assessee has been allowed excess deduction u/s. 801B(10) of the IT, Act.”

3. From the records, it is noted that the assessee had filed its return of income for AY. 2009-10 declaring total income at Rs. Nil by filing return of income on 15.09.2009. Later, the case of the assessee was scrutinized u/s 143(3) of the Act vide order dated 23.12.2011 wherein the AO noted that the gross total income as per the statement of total income was Rs.5,93,98,880/- less deduction of the same amount u/s 801B(10) of the Act being ‘Nil’ was accepted and thus the return filed by the assessee was accepted by AO. Thereafter, the AO had issued notice u/s 148 of the Act dated 30.03.2016 on the strength of the reasons for re-opening as noted (supra). From the reasons recorded



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(supra), it is noted that AO on verification of records took note of the fact that the project (housing) which assessee was developing commenced on the basis of first commencement certificate granted on 21.05.2004 on Plot Bearing Certificate No.185/4B, 185/5 and 185/6B. Therefore, according to the AO, for availing deduction u/s 80IB(1) of the Act, assessee ought to have completed the project on or before 31.03.2009. However, the project has not been completed which fact is evident from the “*Part Completion Certificate*” dated 31.03.2009, hence according to the AO, the assessee has been allowed excess deduction u/s 80IB(10) of the Act in the year under consideration, therefore he had the “*Reasons to believe, escapement of income*”.

4. In this context, the Ld. AR brought to our notice that similar issue [*deduction u/s 80IB(10) of the Act within time limit*] came up before this Tribunal in assessee’s own case for earlier years AY. 2006-07 to AY 2008-09 wherein on similar/identical reasons, the AO had re-opened the assessment. Pursuant to it, the assessee has challenged the action of the AO re-opening of the assessment, which issue came up for consideration before this Tribunal and the Tribunal for AY. 2006-07 and AY 2007-08 (ITA No 7751/Mum/2014 & ITA. No 7752/Mum/2014) and for AY 2008-09 (ITA No 7763/Mum/2014). And he drew our attention to the order of Tribunal dated 02.02.2018 for AY 2008-09 and AY 2007-08; for AY 2007-08, wherein the Tribunal held on the legal issue as under: -

“6. We have considered the rival submissions and perused the material on record in the light of the decisions relied upon. As far as the factual aspect of the issue is concerned, undisputedly assessment in case of the assessee for the impugned assessment year was originally completed u/s. 143(3) of the Act on 23.12.2009. It is



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also a fact on record that the notice u/s. 148 of the Act was issued by the Assessing Officer on 17.09.2012. Therefore, there is no doubt that the notice u/s. 148 of the Act was issued after the expiry of four years from the end of the relevant assessment year. Section 151(1) of the Act postulates sanction by prescribed authority for issuance of notice u/s. 148 of the Act by the Assessing Officer. As per the proviso to section 151(1) of the Act as existed during the relevant assessment year, in case of an assessee where assessment u/s. 143(3) has already been completed, no notice u/s. 148 can be issued after expiry of four years from the end of the relevant assessment year, unless, the Principal Chief Commissioner or the Chief Commissioner or Principal Commissioner or Commissioner is satisfied on the reasons record by the Assessing Officer that It Is a fit case for issue of such notice. From perusal of the notice Issued u/s. 148 of the Act dated 17.09.2012, a copy of which is placed at page 37 of the paper-book, it is very much evident that the Assessing Officer has mentioned that such notice is being issued after obtaining necessary satisfaction of the Additional CIT Range 12(1). Further, at the time of hearing, learned AR has submitted before us a copy of the form for recording the reasons for initiating proceedings u/s. 148 of the Act, which reveals that the satisfaction for issuance of notice u/s. 148 of the Act was recorded by the Additional CIT, Range 12(1), Mumbai. Thus, the aforesaid facts brought on record demonstrate that the recording of satisfaction for issuance of notice u/s. 148 of the Act was not by any of the authorities prescribed under the proviso to section 151(1) of the Act. The learned DR has not brought any material before us to controvert the aforesaid factual position. That being the case, the notice issued u/s. 148 of the Act being not in accordance with the provisions of section 151 of the Act is invalid. Consequently, the proceedings conducted in pursuance of such notice as well as the assessment order passed u/s. 143(3) r.w.s. 147 of the Act in pursuance thereto is rendered invalid. It Is relevant to observe, in assessee's own case for A.Y. 2006-07, the assessment order was quashed by the Tribunal under identical facts due to lack of satisfaction by the prescribed authority in terms of proviso to section 151(1) of the Act. The Hon'ble Bombay High Court has expressed similar view in the case of Ghanshyam K Khabrani Vs. ACIT (2012) 346 ITR 443. In view of the aforesaid, we have no hesitation in quashing the impugned assessment order. The grounds raised are allowed.

7. As we have decided the appeal on legal issue, the grounds raised on merits by the assessee are of mere academic nature and, hence, required no adjudication. Resultantly, the assessee's appeal is allowed to the extent indicated above.”

5. And the Ld. AR also drew our attention to the decision of the Tribunal on the legal issue for AY. 2008-09 wherein the Tribunal has decided the legal issue as under: -



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“13. We have considered rival submissions and perused materials on record. We have also examined the case laws cited before us. Undisputedly, in the present case, assessment in case of the assessee was originally completed after scrutiny under section 143(3) of the Act vide order dated 30th December 2010. Though, the re-opening of assessment under section 147 of the Act for the impugned assessment year is before the expiry of four years from the relevant assessment year, however, the validity of the reopening of assessment has to be one tested keeping in view the following factors. Firstly, whether the issue on which the assessment was re-opened as per the reasons recorded was examined at the time of original assessment; secondly, whether the formation of belief that income has escaped assessment has a live link with the materials on record and thirdly, whether the re-opening of assessment under section 147 of the Act is on the basis of some tangible material. Before proceeding further On the issue, it is necessary to look into the reasons for re-opening of assessment as reproduced by the Assessing Officer in Para-2 of the impugned assessment order.

"On verification of records, it is seen that the assessee was developing housing project within the limits of Pimpri Chinch ward Municipal Corporation on plot bearing survey No 185 Hissa No 185148, 18515, 185168. During the year the project was under construction. The assessee follows WIP method of accounting and has declared estimated profit every year. The assessee has shown net profit of Rs.47,73,163/- and the same has been claimed as deduction u/s 8018(10) of the Act. On going through the records it is observed that the first commencement certificate for this project was granted by

Pimpri Chinch ward Municipal Corporation on 21.05.2004. The explanation to the provisions of section 801B8(10) of the I.T. Act, read as under:

(ii) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building Plan of such housing project is first approved by the local authority;

(iii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority.

Considering the facts of the case it is seen that the project under consideration was commenced on the basis of first commencement certificate, which was granted on 21.05.2004. Therefore, following the dictum of statutory provisions for availing deduction u/s 8018(10) it ought to have been completed on or before 31/03/2009, within the stipulated time provided in the



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statute, but it is evident from the part completion certificate dated 31.03.2009 and revised commencement certificate issued again on 31.3.2009 by the local authority that the project has not been completed within the stipulated time. Hence there was a belief that the assessee has been allowed excess deduction u/s 8016(10) of the IT. Act.”

14. As could be seen from the reasons recorded, the Assessing Officer re-opened the assessment on the basis that the assessee is not eligible to claim deduction under section 801B(10) for the housing project as it was not completed on or before 31st March 2009. Thus, in the context of the reasons recorded, It has to be seen whether the Assessing Officer while completing the original assessment under section 143(3) of the Act has examined the Issue relating to assessee’s claim of deduction under section 801B(10) of the Act relating to housing project. Notably, the assessee in the return of income filed for the impugned assessment year has Claimed deduction under section 801B(10) of the Act and as required under the statute has also furnished an audit report in form no. 10CCB in support of the deduction claimed. In course of the original/assessment proceedings, the Assessing Officer when wanted to examine the eligibility of the assessee’s claim under section 801B(10) of the Act, the assessee vide letter dated 25th November 2010, has submitted its reply not only answering the queries raised by the Assessing Officer but has also furnished all supporting documentary evidences in support of the claim of deduction. The Assessing Officer while completing the assessment under section 143(3) of the Act on 30th December 2010, allowed assessee’s claim of deduction under section 801B(10) in respect of the housing project after examining the documentary evidences as well as being satisfied with the fact that the assessee has fulfilled the conditions for claiming deduction under section 801B(10). This fact is evident from the following observations of the Assessing Officer in the original assessment order passed under section 143(3) of the Act.

"4, Assessee is developing housing project within the limits of Pimpri Chinchwad Municipal Corporation. During the year under consideration, the project was under construction and some of the flats are booked and advances received from these people. The assessee/s following WIP method of accounting and has declared estimated profit every year on the cost incurred during that year.

Assessee has shown net profit of Rs. 47,37,504/- and the same is claimed as exempt u/s 801B(10) of the I.T. Act, 1961.

5. Assessee has furnished the copy of plan approved by the Pune Municipal Corporation as Residential Project. Assessee has also furnished the necessary audit report in Form no. 10CCB.



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6. The income disclosed and the details fag by the assessee has been verified and the income returned by the assessee is accepted.”

15. Thus, as could be seen from the aforesaid observations of the Assessing Officer, assessee’s claim of deduction under section 801B(10), the only issue on the basis of which the re-assessment proceedings under section 147 of the Act has been Initiated, was not only verified and examined by the Assessing Officer during the original assessment proceedings, but, the Assessing Officer having formed an opinion that the housing project has fulfilled the necessary conditions of section 801B(10) of the Act allowed assessee’s claim of deduction under the said provisions. Therefore, it is not a case where the Assessing Officer has not examined the issue on which re-opening of assessment was made which could lead one to conclude that no opinion was formed by the Assessing Officer on the issue during the original assessment proceedings. At this stage, it has to be seen whether any tangible material came to the possession of the Assessing Officer post completion of original assessment which could have enabled him to re-open the assessment under section 147 of the Act. In this regard, one has to refer to the reasons recorded for re-opening of assessment. On a perusal of the reasons recorded by the Assessing Officer for re-opening of assessment under section 147 of the Act, as reproduced hereinbefore, it is very much clear that on verification of record which was available at the time of original assessment the Assessing Officer formed the belief that income chargeable to tax has escaped assessment as the assessee was not eligible to avail deduction under section 801B(10) due to non-completion of the housing project before 31st March 2009. Even, letter dated 17th October 2013 issued by the Assessing Officer during the re-assessment proceedings (paragraph-3), a copy of which is at Page-32 of the paper book, clearly demonstrates that only on re-examining the documents submitted by the assessee in course of original assessment proceedings in support of deduction claimed under section 801B(10), he has formed a belief that the assessee was not eligible to claim such deduction as the housing project was not completed before 31st March 2009. Thus, the aforesaid facts available on record clearly establish that there was no tangible material available before the Assessing Officer at the time of recording reasons for reopening the assessment that income chargeable to tax has either escaped assessment or has been under assessed. It is evident, on re-examination of the very same material considered by the Assessing Officer while allowing assessee’s claim of deduction under section 801B(10) of the Act during the original assessment proceedings, the re-assessment proceedings have been Initiated. The Assessing Officer on examining the documentary evidences brought on record by the assessee at the time of original assessment having formed an opinion that the assessee is eligible to claim deduction under section 801B(10) of the Act in respect of the housing project, on re-appraisal of the same material on record the Assessing Officer cannot form a different opinion regarding assessee’s eligibility to claim deduction under section 801B(10) of the Act to initiate the re-assessment proceedings under section



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147 of the Act, as it tantamount to change of opinion resulting in review of the decision taken by the Assessing Officer in the original assessment.

16. The Hon'ble Supreme Court in case of CIT v/s Kalvinator of India Ltd., [2010] 320 ITR 561 (SC) after taking note of the amendment brought to section 147 of the Act w.e.f. 1st April 1989 has held that though, post amendment the power to re-opening is much wider, however, a schematic interpretation to the words "reason to belief" has to be given, otherwise, the Assessing Officer would exercise arbitrary power by re-opening the assessment on mere change of opinion. The Hon'ble Court held that the Assessing Officer has no power to review but has power to re-assess and such power to re-assess has to be based on fulfilment of certain pre-conditions one of which is, such re-assessment cannot be on the basis of a mere change of opinion. The Hon'ble Court held, even after 1st April 1989, the Assessing Officer has power to re-open provided there is tangible material to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of belief. If we apply the aforesaid ratio laid down by the Hon'ble Supreme Court to the facts of the present case it is to be seen that the Assessing Officer while completing the original assessment has examined all facts and materials relating to assessee's claim of deduction under section 801B(10) of the Act in respect of the housing project and only after proper application of mind has allowed assessee's claim of deduction, While re-opening the assessment, the Assessing Officer had no tangible material to come to the conclusion that there is escapement of income. Only on re-appraisal of the material available at the time of original assessment the Assessing Officer has re- opened the assessment under section 147 of the Act by forming a belief that the assessee is not eligible to claim deduction under section 801B(10) of the Act due to non-completion of the project within the stipulated time. Thus, consideration of facts and material on record in the light of well settled legal principle leads to the irresistible conclusion that the Assessing Officer has re-opened the assessment on a mere change of opinion without having in his possession any tangible material. Therefore, it amounts to review of the original assessment order passed in case of the assessee, hence, is legally impermissible. Therefore, we are of the considered opinion that re-opening assessment under section 147 of the Act in the instant case is not valid; consequently, the impugned assessment order passed in pursuance thereto is also invalid and has to be quashed. Accordingly, we do so."

6. We note that the "*Reasons Recorded*" by AO for the earlier AY. 2008-09 has been recorded by the Tribunal at para no. 13 (supra), which we find to be *pari-materia* with that of the year under consideration i.e. AY. 2009-10. We note that the original assessment



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for the year under consideration u/s 143(3) of the Act was passed by AO on 23.12.2011; and the AO has issued notice for re-opening u/s 148 of the Act on 30.03.2016 which is after expiry of four (4) years from the end of the relevant assessment year. In such a scenario, the first proviso to section 147 of the Act would also come into play. Therefore, AO had to satisfy two pre-conditions before successfully re-opening the assessment i.e, before issuing notice u/s 148 of the Act the AO has to first record his “*Reasons to believe, escapement of income*” and in addition has to satisfy one more requirement of law, that the assessee in the original assessment had not disclosed fully and truly all the material facts necessary for the assessment. We note that in the original assessment, the AO had noted at para no. 3 of his assessment order about the housing project in question and noted that the assessee had claimed deduction u/s 80IB(10) of the Act to the tune of Rs.5,93,98,880/- and after verification of the claim has accepted the claim after due application of mind. And it is further, noted from perusal of the reasons recorded (supra) that AO had belief of escapement of income only after verifying the records of the assessee viz assessment folder wherein original assessment proceedings would be available including assessee’s submission on this issue. Therefore, we find that there was no new/tangible material other than the documents already available in the original assessment records. In such a scenario, it can be safely inferred that AO has re-opened the assessment on mere *change of opinion*, which impugned action AO is not permitted to do because he doesn’t enjoy the power of review as held by the Hon’ble Supreme Court in the case of CIT v/s Kelvinator



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of India Ltd., [2010] 320 ITR 561 (SC) wherein the Hon'ble Apex Court after taking note of the amendment brought to section 147 of the Act w.e.f. 1st April 1989 has held that though, post amendment the power to re-opening is much wider, however, a schematic interpretation to the words "*reason to belief*" has to be given, otherwise, the AO would exercise arbitrary power by re-opening the assessment on mere *change of opinion*. The Hon'ble Court clarified that the AO has no power to review but has power to re-assess and such power to re-assess has to be based on fulfilment of certain pre-conditions one of which is, such re-assessment cannot be on the basis of a mere change of opinion. The Hon'ble Court held, even after 1st April 1989, the AO has power to re-open provided there is tangible material to come to the conclusion that there is escapement of income from assessment. And the reasons must have a live link with the formation of belief. And when we apply the aforesaid ratio laid down by the Hon'ble Supreme Court to the facts of the present case, it is seen that the AO while completing the original assessment has examined all facts and materials relating to assessee's claim of deduction under section 801B(10) of the Act in respect of the housing project and has allowed assessee's claim of deduction and it cannot be said that there was no application of mind of AO. While re-opening the assessment, the AO had no tangible material to come to the conclusion that there is escapement of income. In the present case, AO only on re-appraisal of the material available at the time of original assessment has re-opened the assessment under section 147 of the Act by forming a belief that the assessee is not eligible to claim deduction under section



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801B(10) of the Act due to non-completion of the project within the stipulated time. Thus, considering the facts and material on record in the light of well settled legal principle leads to the irresistible conclusion that the AO has re-opened the assessment on mere change of opinion without having in his possession any tangible material. Therefore, it amounts to review of the original assessment order passed in case of the assessee, which is legally impermissible. Therefore, we are of the considered opinion that re-opening assessment under section 147 of the Act in the instant case is not valid; consequently, the impugned assessment order passed in pursuance thereto is also invalid and has to be quashed. Further it is noted that the “Reasons Recorded” for re-opening the assessment for AY. 2008-09 is *pari-materia* with that the “Reasons Recorded” for AY. 2009-10 and the Tribunal for AY. 2008-09 has found that there was no tangible material in the hands of the AO to re-open the assessment and that AO only on verification of the records of the original assessment completed u/s 143(3) of the Act has resorted to re-opening, which action of AO is nothing but on change of opinion which is not permissible as held by the Hon’ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd., (supra), and the Tribunal held that such an action of AO for AY. 2008-09 tantamount to review of the original assessment passed which power the AO does not possess. Therefore, the Tribunal had quashed the re-opening of assessment for AY. 2008-09. The Ld. AR’s contention that the issue is covered in favour of the assessee by this Tribunal’s orders could not be controverted by the Ld. DR. And finding that there is no change in facts or law, we respectfully



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following the ratio of the order of the Co-ordinate Bench of this Tribunal in assessee's own case for AY. 2008-09 (supra) and on the find given by us (supra) quash the impugned order notice u/s 148 of the Act dated 30.03.2016. Consequently, the re-assessment framed by AO is null in the eyes of law. Since assessee succeeds on the legal issue, other grounds have become academic. Hence not adjudicated.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 22/03/2024.

Sd/-
(S RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 22/03/2024.
Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai