आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.23/Ind/2022
(Assessment Year: 2014-15)

D. K Construction E 2/21, Pandit Deeendayal complex, Arera Colony, Bhopal	Vs.	ITO 2(3) Bhopal
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAAFD7121P		

Assessee by	Shri S.S. Deshpande, AR
Revenue by	Shri Ram Kumar Yadav, CIT- DR
Date of Hearing	04.09.2024
Date of Pronouncement	09 .09.2024

O R D E R

Per Vijay Pal Rao, JM :

This appeal by assessee is directed against the order dated 03.12.2021 of the Commissioner of Income Tax (Appeal) Bhopal, for A.Y.2014-15. The assesse has raised following grounds of appeal:

> *"1. That on the facts and in the circumstances of the case of the assessee the Ld. Commissioner of Income Tax was not justified in confirming the disallowance of Rs. 21,75,187/- claimed by the assessee u/s 801B(10) with regards to its project DK Honey Homes.*

2 That on the facts and in the circumstances of the case of the assessee the Ld. Commissioner of Income Tax was not justified in confirming the disallowance of Rs. 4394/ made by the AO towards interest paid on TDS."

2. At the time of hearing Ld. AR of the assesse has stated at bar that due to smallness of disallowance the assessee does not press ground no.2 of the grounds of appeal and the same may be dismissed as not pressed. Ld. DR has raised no objection if ground no.2 of the assesse's appeal is dismissed as not pressed. Accordingly ground no.2 of the assesse's appeal is dismissed being not pressed.

3. Solitary issue remains to be considered is regarding the disallowance of claim of deduction u/s 80IB(10) in respect of project D.K. Honey Homes. The assessee has filed an application u/s 158A(1) of the Act along with declaration in form 8 which reads as under:

"1. That the following question(s) of law is pending in my case before the Supreme Court in a Special leave petition under article 136 of the Constitution of India in respect of the assessment year 2005-06 & 2008-09

A copy of the statement of the case and the question(s) of law referred to the Supreme Court is/are enclosed.

A Copy of the judgment of the High Court and grounds of appeal to the Supreme Court is/are enclosed.

2. That the said question(s) of law is/are identical with the question(s) of law arising in my case in respect of the

assessment year 2014-15 which is pending before ITAT Indore, Bench Indore.

3. That if the Income Tax Appellate Tribunal Indore Bench agrees to apply to the case referred to in paragraph 2 above the final decision on the question of law in the case referred to in paragraph 1 above, I the assessee mentioned in paragraphs 1 and 2 above, shall not raise the said question(s) of law in the case referred to in paragraph 2 above in appeal before any appellate authority or for a reference before the High Court under section 256 or the Supreme Court under section 257 or in appeal before the Supreme Court under section 261."

3.1 Ld. AR of the assesse has submitted that the issue involved in ground no.1 of the assesse's appeal is identical as substantial question of law pending adjudication before the Hon'ble Supreme Court in assesse's own case in a Special Leave Petition (C) No.35004 & 35005 of 2015 for A.Y.2005-06 & 2008-09. He has further submitted that the assesse undertakes to bound by the outcome of the decision of Hon'ble Supreme Court in SLP filed by the assesse for A.Ys.2005-06 & 2008-09 on the identical question of law and shall not raise such question of law for the assessment year under consideration i.e.2014-15 in appeal before the Hon'ble High Court or before the Hon'ble Supreme Court. Accordingly Ld. AR has pleaded that the tribunal may pass an appropriate order by considering declaration of the assessee. The Bench called for a report from the AO about the correctness of the claim of the assesse that an identical question of law is pending before the Hon'ble Supreme court in SLP filed by the assesse for A.Ys. 2005-06 & 2008-09.

3.2 In the report dated 03.09.2024 the AO stated that in the appeals of revenue for A.Y.2009-10,2010-11 & 2011-12 the issue is not identical to the question of law raised by the assesse in the SLP before the Hon'ble Supreme Court. The AO has not given any report for the A.Y.2014-15 in respect of the declaration filed by the assessee as an identical issue involved in ground no.1 of the assesse's appeal and question of law pending before the Hon'ble Supreme Court in SLP No.35004 & 35005 of 2015 for A.Ys.2005-06 & 2008-09. Therefore, it can be safely inferred that the AO has not questioned the declaration filed by the assessee. We further note that the CIT(A) recorded the relevant fact in respect of this issue in para 3.2.2 as under:

> *"3.2.2 As regards to housing project 'D K Honey Homes' the project was approved by local authorities on 26.04.2003 and therefore, as per provisions of section 80IB(10)(a)(i) of the Act, the construction of the project was to be completed on or before 31.03.2008. The appellant claimed that the construction of housing project was completed on 21.03.2008 and the appellant had applied for obtaining the completion certificate to the local authorities. However, the completion certificate was issued by local authorities on 24.12.2010 mentioning that the project was completed on 31.03.2008. The appellant during appellate proceedings as well as during assessment proceedings has contended that similar issue was dealt with by Hon'ble ITAT Indore in the case of appellant for AY 2006-07 in ITA No 243/Ind/2010 dated 06.12.2010 and for AY 2005-06 to 2007-08 in ITA No 521 & 522/Ind/2010 dated 30.11.2011 wherein, Hon'ble ITAT has allowed claim of deduction u/s 801B(10) w.r.t project D K Honey Homes stating that the date of issue of letter is not important, but the date mentioned in letter certifying completion of project is important. The appellant has also brought to my notice that deduction w.r.t the said project was also allowed by my Id predecessor for AYs 2010-11 & 2011-12."*

3.3 This fact as recorded by the CIT(A) clearly shows that the local authority has issued completion certificate on 24.12.2010 but the assessee claimed that the project was competed on 31.03.2008 which is within the time limit prescribed u/s 80IB(10)(a)(i) of the Act. This fact is also recorded by the CIT(A) that the completion certificate was issued by the local authority on 24.12.2010 mentioning project was completed on 31.03.2008. However, the CIT(A) has disallowed the claim of the assessee by following decision of Hon'ble jurisdictional High Court in case of *CIT vs. Global Reality reported 379 ITR 107*. The Finding of the CIT(A) in para 3.2.3 & 3.2.4 is as under:

> *"3.2.3 Considering entire factual matrix, it can safely be held that the completion certificate for the said project was to be acquired on or before the specified date i.e. 31.03.2008, however, the same was issued by local authority on 24.12.2010. Hon'ble High Court of MP in the case of CIT vs M/s Global Reality in ITA No 40/2012 and in the case of appellant in review petition dated 05.01.2016 has held that issuance of completion certificate, after the cutoff date by the local authority, but mentioning the date of completion of project before the cutoff date, does not fulfill the condition specified in clause (a) of section 80IB(10) read with Explanation (ii) there under. The completion certificate granted by the local authority must bear the date of having been issued before the cut-off date. The relevant extract of the decision of the Hon'ble Court in the case of Global Reality (supra) is reproduced as under:-*
>
> *26. We accordingly hold that issuance of completion certificate, after the cut off date by the Local Authority but, mentioning the date of completion of project before the cut off date, does not fuijill the condition specified in clause (a) of Section 80IB (10) read with Explanation (ii) thereunder. We reject the argument of*

the assessee that the effect of amended clause (a) of sub-Section 10 of Section 80IB, which has come into force with effect from 1st April, 2005, has retrospective effect or that it is unjust in any manner or incapable of compliance at all. Similarly, the requirement of securing completion certificate issued by the Local Authority before the cut off date is not directory, in view of the express provision in Section 80IB(10)(a) and the Explanation (ii) thereunder. The completion certificate granted by the Local Authority must bear the date of having been issued before the cut off date.

27. That takes us to the argument of the assessee that the stipulation in Section 801B(10)(a) of completion certificate issued by the Local Authority before the cut off date, cannot be applied in the case of assessee following the work in progress accounting method. In our opinion, the provision in the form of Section 801B(10)(a), applies uniformly to all the assessees be it following work in progress accounting method or otherwise. The benefit of deduction under this provision can be availed by the assessee following the work in progress accounting method provided he has complied with the stipulation of having produced completion certificate issued by the Local Authority before the cut off date, as may be applicable in his case. In other words, if the housing project was approved by the Local Authority before 1st April, 2004, he must submit completion certificate issued by the Authority having been issued before the 31st March, 2008. Whereas, in the case of housing project approved on or after 1st April, 2004, the assessee can avail of the benefit provided completion certificate issued by the Local Authority is within four years from the end of the financial year in which the concerned housing project was approved by the Local Authority. If this condition is not fulfilled, the assessee who maintains work in progress accounting method and has claimed deduction under Section 801B(10)(a) must suffer the consequence of disallowance or withdrawal of the benefit claimed by him on that count.

28. Accordingly, these appeals succeed. The impugned judgment of the Tribunal is set aside; and in the facts of the

present case, the decision of the Assessing Officer to disallow deduction under Section 801B(10)(a) of the Income Tax Act is upheld. No order as to costs.

3.2.4 In view of the decision of Hon'ble MP High Court in the case of Global Reality (supra), the appellant failed to obtain necessary completion certificate from local authorities before the specified date or cut-off date with respect to project D K Honey Homes' and therefore, the AO was fully justified in disallowing claim of appellant for deduction u/s 80IB(10) of the Act. Further, the appellant has submitted that on the similar set of facts and issue, Hon'ble Apex Court has stayed the decision of Hon'ble M.P. High Court on 08.07.2019 in the case of Global Estate Vs. CIT. I find that there is no stay granted in the case of the appellant. Thus, disallowance made by the AO amounting to Rs. 21,75,187/- in respect of project D K Honey Homes is upheld. Accordingly, this ground of appeal is dismissed."

3.4 It is pertinent to note that the question of law before the Hon'ble High Court in case of *CIT vs. Global Reality (supra)* in para 7 &8 as under:

"7. Thus, the challenge in the present appeals filed by the Department is limited to the opinion of the Tribunal on the scope and application of Section 801B (10) (a), as amended w.e.f. 01.04.2005. According to the Department, the Tribunal has misconstrued the effect of amended Section 80IB (10) (a). That benefit is available only to the specified housing projects (approved prior to 01.04.2005), completed within the prescribed time.

8. Accordingly, in all these appeals, the substantial question of law is about the sweep of the amended Section 801B (10) (a); and consequently the correctness of disallowance of assessee's claim in that behalf, due to non-submission of the completion certificate issued by the Local Authority before 31.03.2008."

3.5 The Hon'ble High Court in case of *CIT vs. Global Reality (supra)* has concluded in para 26 as under:

> *"26. We accordingly hold that issuance of completion certificate, after the cut off date by the Local Authority but, mentioning the date of completion of project before the cut off date, does not fulfill the condition specified in clause (a) of Section 80IB (10) read with Explanation (ii) thereunder. We reject the argument of the assessee that the effect of amended clause (a) of sub-Section 10 of Section 80IB, which has come into force with effect from 1st April, 2005, has retrospective effect or that it is unjust in any manner or incapable of compliance at all. Similarly, the requirement of securing completion certificate issued by the Local Authority before the cut off date is not directory, in view of the express provision in Section 80IB(10)(a) and the Explanation (ii) thereunder. The completion certificate granted by the Local Authority must bear the date of having been issued before the cut off date.*

3.6 The judgment in case of *CIT vs. Global Reality (supra)* was followed by the Hon'ble High Court in assesse's case while passing decision dated 21st August 2015 in para 2 & 3 as under:

> *"2. In the leading I.T.A. No.40/2012 and connected cases decided today by a separate Judgment, the substantial question of law has been answered in favour of the Department. For the reasons stated in the said judgment, even these appeals filed by the Department must succeed on the same terms.*
>
> *3. Accordingly, these appeals are allowed by setting aside the impugned judgment of the Tribunal with regard to the deduction claimed by the assessee under Section 80IB(10)(a) of the Income Tax Act and instead the decision of the Assessing Officer to disallow the said deduction is upheld. No order as to costs."*

4. Thus, it is clear that for A.Y.2005-06 & 2008-09 the Hon'ble High Court has reversed the decision of this Tribunal in assesse's own case by following judgment in case of *CIT vs. Global Reality (supra).* The assesse has filed the write petition before the Hon'ble Supreme Court and raised various question of law however, a question of law in sub-para (b) & (c) are relevant on the point under consider are as under:

> *"(b) Has not the High Court erred in law in disallowing the claim for deduction under Section 801B (10) (a) of the Act relying upon the Explanation-(ii) thereof, on the ground of non submission of Completion Certificate on or before 31.03.2008 when the Petitioner has fulfilled all the conditions for H entitlement to deduction prescribed in the main provision of Section 80IB (10)(a)?*
>
> *(c) Has not the High Court erred in disallowing the claim for deduction under Section 801B (10) (a) of the Act, inspite of a finding of fact by the Income Tax Appellate Tribunal, the Ultimate fact finding Authority, that the Completion Certificate dated 24.12.2010 filed by the Petitioner clearly mentions that the project was completed in March, 2008?*

4.1 As it is clear from the finding of CIT(A), the ground no.1 raised by the assessee before us as well as question of law raised by the assesse before Hon'ble Supreme Court that the issue raised before tribunal is identical to the question of law raised in the SLPs filed by the assesse and pending before the Hon'ble Supreme Court for A.Ys.2005-06 & 2008-09. Therefore, it is incumbent on the tribunal to pass an order in writing as per sub-section (3) of section 158A of the Act. The Hon'ble Bombay High Court in case of *Titanor*

*Components Ltd. v. CIT323 ITR 26*6 has analyzed the provisions of section 158A and held in para 7 to 12 as under:

> *"7. The appellant Company wants depreciation to be calculated on the amount of actual costs incurred by it for acquiring assets from WIMCO. The Department has obtained surveyor's report about valuation of those assets and has granted the benefit of depreciation as per Section 32 on the valuation as worked out in the said valuation report by the surveyor. This exercise for the first assessment years i.e 1990-91, and 1991-92 is already under consideration of the Delhi High Court. It is to be noted that if the order of Delhi ITAT is maintained, the appellant Company will not be entitled to any benefit for subsequent assessment year in relation to which appeals have been filed before this Court. However, if the said order of Delhi ITAT is set aside and depreciation under Section 32 is held to be admissible on actual costs for acquisition, the benefit of additional amount of depreciation every year becomes available to the appellant Company. It is, therefore, apparent that the subject-matter of appeal is pending before the Delhi High Court. The purpose of Section 158-A needs to be looked into in this background. Its bare perusal shows that it has been enacted to avoid necessity of filing fresh challenge, every year, either before the appellate forums prescribed under the Act itself or then before the High Court or the Hon'ble Apex Court. The proceedings pending before the Delhi High Court constitute "other case" for the purpose of this provision and the cases pending before the ITAT Panaji Bench were "relevant case". The subsection contemplates application of final adjudication in the other case to the question of law in such relevant case. If the Assessing Officer or the appellate authority agrees to apply in the other case the final adjudication on the question of law in the other case, the assessee need not raise such a question of law in relevant case in appeal before any appellate authority or in appeal before the High Court under Section 260-A or in appeal before the Supreme Court under Section 261. As per sub-section (5), after decision on question of law in "other case" becomes final, it has to be applied to the "relevant case" by the Assessing Officer or the appellate Authority as the case may be and the assessment order can be amended suitably. sub-section (2) of section 158a states that when such a declaration is furnished to the appellate authority, the appellate authority has to call for report from the Assessing Officer and that report has to be on the correctness of the claim made by the*

assessee. In other words, the contention of the assessee that the question of law raised in relevant case is pending for consideration in other case needs to be ascertained by calling report from such Assessing Officer. The said provision permits the appellate authority to grant opportunity of hearing to the Assessing Officer. Sub-section (3) requires the appellate authority to pass an order, in writing, admitting the claim of the assessee or then rejecting his claim if it is not so satisfied. Sub-section (4) states that when the claim is admitted, the appellate authority may dispose of the relevant case without awaiting the final decision on the question of law in the other case and the assessee is not entitled to raise, in relation to that case, such question of law in appeal before any appellate authority or the High Court or the Supreme Court.

8. Thus, if in the present circumstances the claim of the assessee/present appellant was accepted by the ITAT, its appeals could have been disposed of in terms of section 158(4)(a) and he would not have been required to file Appeals before this Court as contemplated by ***clause (b) of sub-section (4).*** *The provisions clearly show that the ITAT is required to pass an order after ascertaining the claim made by the assessee about "other case". In the facts before this Court, the ITAT has overlooked the* ***provisions of sub-section (2)(3)(4) and (5) of Section 158A*** *totally and has considered only the following portion of Section 158A(1):*

"a declaration in the prescribed form and verified in the prescribed manner, that if the [Assessing] Officer or the appellate authority, as the case may be, agrees to apply the in the relevant case the final decision on the question of law in other case, he shall not raise such question of law in the relevant case in appeal before any appellate authority or [in appeal before the High Court under section 260A or in appeal before the Supreme Court under section 261]".

9. Thus salutary provisions made by the Parliament to put an end to unnecessary litigation and to reduce number of cases required to be followed in letter and spirit, have been defeated in the present matter. The word "agrees" used in Section 158A(1) does not mean that the Assessing Office or the appellate authority has been given any unbridled authority not to agree. The subsequent provisions clearly require the authority to consider the facts and thereafter to either admit the declaration filed by the assessee or then reject it. The appellate authority is therefore required to judicially evaluate the reasons for "not agreeing" given by Assessing Officer and pass a

reasoned Order keeping in mind the design in adding Section 158A to the Act. It is because of this application of mind envisaged by Section 158A that an order passed by the appellate authority or the assessing officer has not been made amenable to further challenge either by way of an appeal or revision or reference. The Parliament expects the authorities empowered under the said provisions to act in accordance with the spirit of the provisions made and, therefore, only after an order is made either way with due application of mind, the order has been made "not appealable" or "not revisable". As already observed above, the ITAT here has failed to apply its mind as required and therefore, the very purpose of putting Section 158A in the statute book has been frustrated.

10. Mr. Rivonkar has argued that the order passed under Section 158A(3) is not open to challenge in the present appeals. The learned Senior Advocate has contended that the impugned order is under Section 254(1) of the Act. The scheme of Section 158A clearly shows that after declaration as contemplated by Section 158A(1) is filed either before the Assessing Officer or the appellate authority, a separate order is required to be passed as contemplated under Section 158A(3) either admitting the claim or rejecting the claim. There is no question of hearing the parties on merits, in appeal, at that stage. If arguments on such a declaration and also arguments on appeal are heard together and ultimately, the declaration is accepted as required by Section 158A(3)(i), the arguments on merits heard by the authority would be an exercise into futility. Even the provisions of Section 158A(6) also show that the legislature contemplated passing a separate order either admitting the claim of the assessee or rejecting his claim. In the present circumstances, there is no order passed as required by Section 158A(3). The order passed is only one and under Section 254(1) on 7.4.2006 The said order is a common order in all appeals as mentioned above. As the issue was found to be covered by the order of ITAT, Delhi Bench, the ITAT Panaji Bench has not gone into the merits of the controversy and the appeals filed by the assessee were dismissed straight away. The impugned order, therefore, cannot be read as an order under Section 158A(3) against which no appeal is provided.

11. The ITAT, Panaji Bench has not recorded any separate reasons of its own while upholding the orders passed by the Commissioner (Appeals) or the Assessing Officer. The impugned order, therefore, does not reveal why, as contended by the assessee, the actual costs incurred by it for acquisition of relevant assets could not have been

accepted as base for computing depreciation. In view of absence of this material on record, it is apparent that the impugned order cannot be sustained. As the ITAT here chose to rely upon the order of Delhi ITAT, it is clear that in view of the scheme of Section 158A, it would have been proper for it to wait till the question of law is adjudicated by the Hon'ble Delhi High Court in the appeals pending before it. In this situation, we find it appropriate to remand the matter to the ITAT, Panaji Bench, before whom declaration under Section 158A was filed by the appellant with direction to admit the claim of assessee in the said declaration and to proceed further as per section 158A(5) of the Act after the Hon'ble Delhi High Court adjudicates the appeals pending before it.

12. The appeal filed before us under Section 260A are, accordingly, allowed. The impugned orders of ITAT are quashed and set aside and the appeals being ITA NO. 4258.DEL/1999, ITA NO. 4290.DEL/2000, ITA NO. 2076.DEL/2000, ITA NO. 2077.DEL/2000, and ITA NO. 3786.DEL/1999 are restored back to its files for further action in terms of Sections 158A(3)(i) and 158A(5) of the Act. However, in the circumstances of the case, there shall be no order as to costs."

4.2 Having regard to the fact as recorded above as well as judgment of Hon'ble Bombay High Court (supra) we are satisfied that the issue involved in the present appeal of the assesse before us as raised in ground no.1 is identical to the question of law raised by the assesse in the ground (b) & (c) (reproduced in forgoing part of this order) before the Hon'ble Supreme Court in SLP for A.Ys.2005-06 & 2008-09 against the order of the Hon'ble jurisdictional High Court. Accordingly the appeal of the assesse is disposed off in terms of the declaration filed by the assessee in form no.8 as per section 158A r.w Rule 15A of the Income Tax Rules 1962. The AO is directed to apply decision of Hon'ble Supreme Court on this issue and amend if need arises the assessment order in conformity with the judgment of Hon'ble Supreme Court. The

assessee shall not be entitled to raise such question of law in appeal before any appellate authority or before Hon'ble High Court or Supreme court as shall be abide by its declaration made u/s 153A(1) in form No.8. Accordingly ground no.1 of the assesse's appeal is disposed off in the above terms.

5. In the result, the appeal of the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the open court on 09.09.2024.

Sd/-	**Sd/-**
(B.M. BIYANI)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Indore,_ 09 .09.2024

Patel/Sr. PS

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore