

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 15209 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 17495 of 2019****With****R/SPECIAL CIVIL APPLICATION NO. 17497 of 2019****With****R/SPECIAL CIVIL APPLICATION NO. 17498 of 2019**

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SIDDHI DEVELOPERS AND BUILDERS

Versus

ASST COMMISSIONER OF INCOME TAX CIRCLE NO 3(3)

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Appearance:

DARSHAN R PATEL(8486) for the Petitioner(s) No. 1

MRS MAUNA M BHATT(174) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**

and

HONOURABLE MR. JUSTICE ILESH J. VORA**Date : 17/03/2021****COMMON ORAL ORDER****(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)**

1. As the common question of law and fact arises in these captioned writ applications with respect to the same assessee for different assessment years, they were heard together and are hereby disposed of by this common order.
2. By filing these writ applications under Article 226 of the Constitution of India, the writ applicant seeks to challenge the Notices dated 31.03.2018, 27.03.2019 and 28.03.2019 respectively issued by the respondent under Section 148 of the Income Tax Act, 1961 (for short "The Act, 1961") seeking to re-open the assessment

for the A.Y 2011-12, 2012-13, 2013-14 and 2014-15 on the ground that, the assessee had made incorrect claim for the respective years under consideration as the conditions laid down under Section 80 IB(10) (a)(iii) of the Act was not satisfied.

3. The brief facts giving rise to filing of the present writ applications are as follows:

3.1 The assessee firm is engaged in the business of development and construction of the housing projects and civil construction. The assessee during the years under consideration had derived income from the business and other sources and had completed two projects, one is the residential project and second is the residential plotting scheme.

3.2 It is the case of the revenue that, the assessee had claimed deductions under Section 80IB(10) of the Act in respect of the residential scheme and also claimed the commission expenses of Rs.6,00,000/- paid to Mr. Baldevbhai Patel (HUF) and deposited unexplained cash amount of Rs.6,50,000/-. The reassessment sought to be reopened for the years under consideration mainly on the ground of incorrect claim of the deductions and unexplained cash deposit. It is not in dispute that, for the A.Y 2011-12, 2012-13, 2013-14 and 2014-15, the scrutiny assessment was framed under Section 143(3) of the Act. In this background facts, the impugned notices as referred above came to be issued under Section 148 of the Act.

4. We may summarize the facts in brief of the respective years as under:-

4.1 SCA No.15209 of 2018 (A.Y. 2011-12)

The assessee filed its original return of income on 28.09.2011 declaring total income at Rs.6,87,68,958/-. The return was processed under Section 143(1) of the Act. The assessment under Section 143 of the Act was completed on 31.03.2014. The assessing officer reopened the assessment by issuing notice under Section 147 of the Act. At the request of the assessee, the reasons recorded have been furnished, which reads as under :

“from the records, it is noticed that the assessee has claimed deduction under explanation 7 of section 801B(10)(a) (iii) of the act for an amount of Rs 21,55,66,760/-. The assessee has claimed expense of Rs 6,00,000/towards commission paid to Baldevbhai M Patel HUF. Further, a cash deposit of Rs 6,80,000/- has been noticed in the HDFC Bank account of the assessee firm during June 2010.

As per the 801B(10) of the act, where the gross total income of an assessee includes any profits and gains derived from any business referred to in subsection(3) to (11), (11A) and (11B) (such business hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income of assessee, a deduction from such profit and gains an amount equal to such percentage and for such number of assessment years as specified in this section. Further, as per sub-section 10(a)(iii) of the section ibid, the amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March 2008 by a local authority shall be hundred percent of the profit derived in the previous year relevant to any assessment year from such housing project if such undertaking has commenced or commences development and construction of the housing project on or after the 1 day of October 1998 and completes such construction in a case where a housing project has been approved by the local authority on or after the 1st day of April 2005, within five years from the end of the financial

year in which the housing project is approved by the local authority, The assessee has claimed expense of Rs 6,00,000/towards commission paid to Baldevbhai M Patel HUF, Further, a cash deposit of Rs.6,80,000/- has been reported in the bank HDFC Bank account of the assessee firm during June 2010.

The assessee firm has claimed deduction u/s 80(18) of the act on the basis of letter No NABP Bopal Dascroi/1472 dated 28 03 2007 of Town Planning and Valuation Department of Government of Gujarat which has accepted layout plan for non-agricultural purpose furnished by the assessee. As per the conditions mentioned in the letter, the assessee was required to take permission for NA use from the District taluka Development Officer and local authority. From the records, it is seen that the assessee did not get approval of the local authority i.e. Bopal Gram Panchayat. The assessee has claimed expense of Rs 6,00,000/towards commission paid to Baldevbhai M Patel NUF and had deducted TDS @10% amounting to Rs 60,000/knowing the fact that HUF is a non-functional entity in terms of commission income. Further, cash deposit of Rs 6,80,000/has been found in the bank accounts of the assessee firm between 07/06/2010-24/06/2010.

The assessee has claimed deduction under explanation 1 of section 80IB(10)(a) (iii) of the act for an amount of Rs 21,55,66,760/-, whereas the assessee firm was not entitled to claim any such deduction. T. he assessee has claimed expense of Rs 6,00,000/towards commission paid to Baldevbhai M Patel HUF and had deducted TDS @10% amounting to Rs 60,000/- knowing the fact that HUF Is a non-functional entity in terms of commission income. Further, cash deposit of Rs 6,80,000/has been found in the bank accounts of the assessee firm between 07/06/2010-24/06/2010. Therefore, the income of Rs 21,68,46,760/- has escaped assessment. Considering the above facts, I have reason to believe that b ry omission on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, the income chargeable to tax for AY 2011-12 has escaped assessment within the meaning of Section 147 of the IT Act. ”

2. Further, this office is intimating you regarding the directions issued by the Hon'ble High Court of Gujarat in the case of Sahkari Khand Udyogh Mandal Ltd. Vs, ACIT Navsari Circle in Special Civil Application No. 3955 of 2014, The directions are reproduced hereunder;

(i) Once the AO serves to an assessee a notice of reopening of assessment under section 148 of the Income Tax Act, 1961,

and within the time permitted in such notice, the assessee files his return of income in response to such notice, the AO shall supply the reasons recorded by him for issuing such notice within 30 days of the filing of the return by the assessee without waiting for the assessee to demand such reasons.

(ii) Once the assessee receives such reasons, he would be expected to raise his objections, if he so desires, within 60 days of receipt of such reasons.

(iii) If objection are received by the AO from the assessee within the time permitted hereinabove, the AO would dispose of the objections, as far as possible, within four months of date of receipt of the objections filed by the assessee.

(iv) This is being done in order to ensure that sufficient time is available with the AO to frame the assessment after carrying out proper scrutiny. The requirement and the time-frame for supplying the reasons without being demanded by the assessee would be applicable only if the assessee filed his return of income within the period permitted in the notice for reopening. Likewise the time frame for the AO to dispose of the objections would apply only if the assessee raises objections within the time provided hereinabove. This, however, would not mean that if in either case, the assessee misses the time limit; the procedure provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) would not apply. It only means that the time frame provided hereinabove would not apply in such cases.

3. As reasons for reopening are provided, you are requested to file your reply/submission and objection, if any on or before 24/05/2018. In case of non compliance or no response by the above mentioned time it will be deemed that you have nothing to say in this regard and proceedings will be finalized accordingly.”

The assessee had raised the objections vide its communication dated 13.02.2014, which came to be rejected by the respondents vide order dated 04.09.2018.

4.2 SCA No.17495 of 2019 (A.Y. 2012-13)

The assessee filed its original return of income on 28.09.2012

declaring total income at Rs.NIL. The return was processed under Section 143(1) of the Act. The case was selected for scrutiny and the assessment under Section 143(3) of the Act was completed on 31.03.2014 determining the total income at Rs.NIL. Thereafter, notice under Section 148 of the Act was issued on 31.03.2019 and at the request of the assessee, the reasons recorded have been furnished on 13.06.2019, which reads as under :

“From the records, it is seen that, the assessee did not get approval of the local authority i.e. Bopal Gram Panchayat. The assessee has claimed deduction Explanation 1 of Section 80IB (a)(iii) of the Act for the amount of Rs.14,49,73,764/- has escaped assessment.

The assessee had raised the objections vide its communication dated 15.07.2019, which came to be rejected by the respondents vide order dated 23.09.2019.

4.3 SCA No.17497 of 2019 (A.Y. 2013-14)

The assessee filed its original return of income on 28.09.2013 declaring total income at Rs.5,01,81,040/- after claiming deduction under Section 80IB (10) of the Act of Rs.2,94,04,567/-. The return was processed under Section 143(1) of the Act. The case was selected for scrutiny and the assessment under Section 143(3) of the Act was completed on 28.03.2016 determining the total income at Rs.5,01,81,040/-. Thereafter, the notice under Section 148 of the Act was issued on 27.03.2019 and at the request of the assessee, the reasons recorded have been furnished on 23.05.2019, which reads as under :

“From the records, it is seen that, the assessee did not get approval of the local authority i.e. Bopal Gram Panchayat. The assessee has

claimed deduction Explanation 1 of Section 80IB (a)(iii) of the Act for the amount of Rs.2,94,04,567/- has escaped assessment.

The assessee had raised the objections vide its communication dated 09.07.2019, which came to be rejected by the respondents vide order dated 23.09.2019.

4.4 SCA No.17499 of 2019 (A.Y. 2014-15)

The assessee filed its original return of income on 14.10.2014 declaring total income at Rs.14,25,95,530/-. The return was processed under Section 143(1) of the Act. The case was selected for scrutiny and the assessment under Section 143(3) of the Act was completed on 27.12.2016. Thereafter, the notice under Section 148 of the Act was issued on 23.09.2019 and at the request of the assessee, the reasons recorded have been furnished on 23.05.2019, which reads as under :

“From the records, it is seen that, the assessee did not get approval of the local authority i.e. Bopal Gram Panchayat. The assessee has claimed deduction Explanation 1 of Section 80IB (a)(iii) of the Act for the amount of Rs.49,98,237/- has escaped assessment.

The assessee had raised the objections vide its communication dated 09.07.2019, which came to be rejected by the respondents vide order dated 23.09.2019.

5. Being aggrieved by the disposal of the objections and issuance of notices for reopening of the assessment (for A.Y 2011-12, 2012-13, 2013-14 and 2014-15), the writ applicant has come up before this Court by filing present writ applications.

6. We have heard Mr. Darshan R. Patel, the learned Counsel appearing for the writ applicants and Mrs. Mauna Bhatt, the learned Sr. Standing Counsel assisted by Mr. Karan Sanghani, the learned counsel appearing for the Revenue.

7. Mr. Darshan R. Patel, the learned counsel appearing for the writ applicant has contended that, the impugned notices liable to be quashed and set aside on the ground that, it has issued merely on the basis of change of opinion. In this regard, he would submit that, the assessing officer is not authorized to reopen the assessment merely on the basis of change of opinion and reconsideration of the same without any tangible material available on record. He further submits that, in the present case, during the course original assessment proceedings, the issue of claim of deduction under Section 80IB(10) of the Act was discussed at length and the assessee had explained in detail regarding each condition being fulfilled for claiming deduction and also submitted necessary approval of the concerned authorities and the assessing officer was satisfied with the details furnished and finally assessment under Section 143 (3) of the Act was framed without any further addition or disallowance of the claim. In this circumstances, the learned counsel has urged that, in the original proceedings, the assessing officer had formed an opinion and therefore, issuance of notices on the same materials in the absence of any tangible material is, mere a change of opinion, which cannot permissible in law.

8. Mr. Manish Bhatt, the learned Senior Counsel appearing for the revenue opposed the writ applications and contended that the revenue is justified in reopening the assessment beyond a period of four years, as during the original assessment proceedings, the assessee had not disclosed the material facts such as N.A.permission, details of Mr. Baldevbhai Patel (HUF) and source of fund for cash deposit of Rs.6,50,000/-. Therefore, the assessing officer has reason to believe that, the amount for each year under consideration has escaped assessment and such escapement was occasioned by reason of failure to disclose fully and truly material facts necessary for the assessment of the respective years.
9. Having heard the learned counsel appearing for the respective parties and having gone through the materials placed on record, the only question falls for our consideration is whether the revenue is justified in reopening the assessment for the respective years ?
10. It is an admitted fact that, in all the cases on hand, the assessment was framed under Section 143 (3) of the Act and during the assessment proceedings, the notices were issued under Section 142(1) of the Act and in response to the notices, detailed reply was filed, whereby, the assessee had furnished the copy of approval dated 28.03.2007 issued by the Town Planning & Valuation Department, Ahmedabad for commencement of construction activities, copy of the Notification of village Bopal falling under the

jurisdiction of AUDA, copy of revised approval and layout plan, copy of BU permission and the copy of Form No.10CCB report for A.Y.2011-12, 2012-13. It is required to be noted that, pursuant to the notice under Section 142(1) of the Act, the assessee had furnished bank statements, copies of ledger account, TDS statement etc. for each relevant year.

11. We take the notice of the fact that, in the previous assessment proceedings, the issue of deduction under Section 80IB(10) of the Act was discussed at length by the assessing officer and after considering the report in Form 10CCB, the assessing officer came to a conclusion that, the conditions for claiming deductions as envisaged are fulfilled. However, the issue of commission paid to one Mr. Baldevbhai Patel (HUF) and cash deposit of Rs.6,50,000/-, the assessing officer had not discussed in the assessment order, but the details on both the issues were called for and it was duly complied by the assessee and the assessing officer thought fit not to make any additions, nor raise any adverse view.

12. It is a settled principle of law that, a mere fresh application of mind to the same set of facts or mere a change of opinion does not confer jurisdiction upon the assessing officer to issue notice under Section 148 of the Act.

13. In the case of ***Binani Industries Ltd. Vs. CCT, [(2007) 15 SCC 435]***, the Apex Court observed that, a mere change of opinion while pursuing the same materials cannot be a reason to believe

that the case of escaped assessment exists requiring assessment proceedings to be reopened. On the same issue, the Apex Court in the case of ***A.L.A Firm Vs. CIT [1991 (2) SCC 558]***, observed that, if the conscious application of mind is made to the relevant facts and materials available or existing at the relevant point of time while making the assessment and again different or divergent view is reached, it would tantamount to change of opinion.

14. In the background of the aforesaid facts, we have examined all the material facts as well as the reasons recorded for reopening of the assessment for the years under consideration. We are of the opinion that, the impugned action on the part of the respondent to issue the impugned notices under Section 148 of the Act is without authority of law and therefore, the same are required to be quashed and set aside on the following reasons:-

(A) The reasons recorded by the assessing officer led to belief about the escapement of assessment is nothing, but mere a change of opinion, which cannot sustainable in law.

(B) The issue of claim of deduction under Section 80IB(10) of the Act was thoroughly examined at the stage of original assessment by the assessing officer and had considered various details and consciously arrived at the conclusion not to disallow the deduction claimed by the assessee for the respective years under consideration. Even on the issue of commission paid to Mr. Baldevbhai Patel and cash deposit of

Rs.6,50,000/-, sufficient explanation was made by the assessee and accordingly, for the A.Y. 2011-12, the assessing officer did not add this amount for the purpose of tax. Therefore, it is presumed to have accepted the contention of the assessee even there was no express reference in the assessment order.

(C) Considering the facts of the present case, no any tangible material came in the hands of the assessing officer after concluded assessment and therefore, in absence of any tangible materials, the reassessment on the basis of change of opinion cannot be permissible.

(D) We have examined the materials on record, which show that, at the time of filing the return of income as well as during the course of original assessment proceedings, the assessee had disclosed all the material facts fully and truly and there was no false and untrue declaration on the part of the assessee with regard to approval of the project by the concerned authorities to avail the benefit of claim of deduction under Section 80IB (10) of the Act.

15. In view of the aforesaid reasons, we have no hesitation to hold that, there was no basis or jurisdiction for the assessing officer to form a belief that, any income of the assessee for the respective assessment years, had escaped assessment within the meaning of Section 147 of the Act and the reasons recorded could not have led to formation of any belief that, the income has escaped

assessment within the meaning of the aforesaid provisions. Therefore, the impugned Notices dated 31.03.2018, 27.03.2019 and 28.03.2019 issued under section 148 of the Act are required to be quashed and set aside and accordingly the same are hereby quashed.

16. For the foregoing reasons, all the writ applications succeed and are hereby allowed. There shall be no order as to costs.

(J. B. PARDIWALA, J)

(ILESH J. VORA, J)

SUCHIT