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**(2016) 10 GUJ CK 0006**

**GUJARAT HIGH COURT**

**Case No:** Special Civil Application No. 15175 of 2010

Amaltas Associates

APPELLANT

Vs

Income Tax Officer

RESPONDENT

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**Date of Decision:** Oct. 4, 2016

**Acts Referred:**

- Income Tax Act, 1961 - Section 147, Section 148

**Citation:** (2016) 389 ITR 340

**Hon'ble Judges:** Mr. Akil Kureshi And Mr. A.J. Shastri, JJ.

**Bench:** Division Bench

**Advocate:** Mr. Nitin K. Mehta, Advocate, for the Respondent No. 1; Mrs. Swati Soparkar, Advocate, for the Petitioner No. 1

**Final Decision:** Disposed Off

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### **Judgement**

**Mr. Akil Kureshi, J. (Oral)**—The petitioner has challenged a notice dated 30.06.2009 issued by the respondent Assessing Officer to reopen the petitioner's assessment for the assessment year 2005-06.

2. Brief facts are as under.

3. The petitioner is a partnership firm and is engaged in the business of development and construction of housing project. For the assessment year 2005-06, the petitioner had filed the return of income on 31.10.2005 declaring "Nil" income after claiming deduction of Rs.86.99 lakhs (rounded off) under section 80IB(10) of the Income Tax Act, 1961 ("the Act" for short). Such return was taken in the scrutiny by the Assessing Officer, during which, he raised multiple queries including the following.

"7. With reference to deduction under section 80 IB(10) please give the following details:

(1) Copy of approval of plan of the housing project approved by the local authorities stating date of approval, date of commencement and completion of the housing project.

(2) Please also give the evidence of plot of land and built-up area of the residential units. If commercial units are included in the project, please state the built-up area of the commercial units also.

In response to such queries, the petitioner filed detailed reply under letter dated 07.12.2007 giving details as called for. In particular, the petitioner produced the following information.

"i) Approval for development and construction of the housing project was granted on 5th August, 2004 by AUDA. Copy of the plan was furnished.

ii) It was pointed out that plot of land is more than 1 Acre and thus another condition of section 80-IB was fulfilled. Approved plan of the building was furnished to the Assessing Officer in support of this claim.

iii) The building plan was furnished to the Assessing Officer showing that the built-up area of each residential flat was less than 1500 sq. ft. and thus fulfilling the condition of section 80-IB. The Report of the Chartered Accountants in Form No. 10CCB was also duly submitted by the assessee during the course of the assessment proceedings."

4. After such scrutiny, the Assessing Officer passed the order of assessment under section 143(3) of the Act on 26.12.2007. A part of the petitioner's claim of deduction under section 80IB(10) of the Act was disallowed and the income was determined at Rs.2.47 lakhs (rounded off). According to the Assessing Officer, interest income received by the assessee did not qualify for deduction under section 80IB(10).

5. To reopen such assessment, the respondent issued the impugned notice, which as can be seen, was done within four years from the end of relevant assessment year. In order to do so, the Assessing Officer had recorded following reasons:

"The assessee has filed the return of income for A.Y. 2005-2006 on 31/10/2005 showing total income of Rs. Nil after claiming deduction of Rs.86,90,981/- under section 80IB(10) of the Income-tax Act, 1961. In this case assessment for A.Y. 2006-2007 has been finalised under section 143(3) of the I.T. Act, after disallowing assessee's claim of deduction under section 80-IB(10) of the I. T. Act, 1961 on the ground that the assessee is not the constructive owner of the land and the permission from the AUDA is also not obtained by the assessee. On a perusal of the development agreement entered into with the land owners, it is abundantly clear that the land owners have not given any right or dominion of the land to the assessee. It is, for the reason elaborately discussed in the order of assessment, also held that the assessee is merely a contractor and not a developer and hence deduction under section 80IB(10) is not allowable to the assessee. The Honorable

ITAT, Ahmedabad Bench in the case of M/s. Shakti Corporation in ITA No.1503/Ahd/2008 dated 07/11/2008 has held that if the assessee has purchased the land for fixed consideration from the land owner and has developed housing project at its own risk, then only the deduction under section 80IB(10) is allowable to the assessee. In the case of the assessee, it has not purchased the land from the land owner and also the permission from the AUDA not obtained by the assessee and hence, deduction under section 80IB(10) is not allowable to the assessee. In view of the above, I have every reason to believe that due to illegitimate claim of the deduction of Rs.86,90,981/- made and allowed to the assessee under section 80IB(10) of the I.T. Act, the income chargeable to tax has escaped assessment within the meaning of section 147 of the I. T. Act."

6. The petitioner raised objections to the notice of reopening under a letter dated 25.05.2010. It appears that such objections were not disposed of by the Assessing Officer. On the ground that without disposing such objections, the Assessing Officer was proceeding further with the assessment, the petitioner filed this petition.

7. In background of such facts, counsel for the petitioner submitted that the Assessing Officer having scrutinised the petitioner's claim of deduction under section 80IB(10) of the Act in the original assessment, cannot reopen the assessment on the same ground. He further submitted that the issue of the deduction under section 80IB(10) of the Act has been sufficiently made clear by this Court in case of **Commissioner of Income-Tax v. Radhe Developers, reported in (2012) 341 ITR 403 (Guj)**. In case of this very assessee, the Tribunal had in the subsequent assessment year held that the Revenue was not justified in rejecting the claim of deduction. Such judgment of the Tribunal is confirmed by the High Court while rejecting the Revenue's Tax Appeal No.1372 of 2011. Counsel also made a grievance about the Assessing Officer proceeding with the assessment without disposing of the petitioner's objections.

8. On the other hand, learned counsel Shri Nitin Mehta for the department opposed the petition contending that in the original scrutiny assessment, the question whether the assessee had acted as a contractor or was a developer, did not come up for consideration. Whether the judgment of this Court in case of Radhe Developers (supra) would apply or not is a matter of facts to be judged on the basis of material on record. Notice of reopening was therefore valid.

9. Ordinarily, in view of the judgment of the Supreme Court in case of **GKN Driveshafts (India) Ltd. v. Income Tax Officer, reported in (2003) 259 ITR 19**, we would have insisted that the Assessing Officer should dispose of the objections. However, in view of the facts of this case, at this stage, we are not inclined to adopt such a route.

10. From the reasons recorded by the Assessing Officer for issuing notice for reopening, one would gather that he disputes the petitioner's claim of deduction

under section 80IB(10) of the Act on the ground that the assessee was not the owner of the land and the permission from AUDA was also not obtained by the assessee. According to the Assessing Officer, the development agreement showed that the owners had not given any right or dominion over the land to the assessee. In this context, he referred to an elaborate order of assessment passed in case of the assessee for the subsequent assessment years. The Assessing Officer sought to distinguish the facts of the case from those of M/s. Shakti Corporation, decided by the Tribunal.

11. In short, therefore, without so saying, the Assessing Officer was hinting at the assessee not being a developer of a housing project and therefore, income not being eligible for deduction under section 80IB(10) of the Act.

12. For multiple reasons on such grounds, the reopening would not be permissible. Firstly, as noted, in the original scrutiny assessment, deduction under section 80IB(10) of the Act was the main claim of the assessee which came up for scrutiny. The Assessing Officer raised several queries, asking the assessee to justify such claim, to which, the assessee gave detailed reply, producing evidence and materials on record. In that view of the matter, it would be extremely doubtful whether the Assessing Officer can later on examine another facet of the same claim, contending that such aspect was not scrutinised during the original assessment. It is not the case of the Assessing Officer that in response to the queries raised during such assessment, the assessee did not make true or proper disclosures. The reasons recorded did not rely on any material outside the record.

13. Quite apart, the very issue on the basis of which, reopening is resorted to is squarely covered by the judgment of this Court in case of Radhe Developers (supra) which came to be confirmed by the Supreme Court when the Revenue carried the judgment in appeal and the Special Leave Petition was dismissed. By a judgment delivered today, we have also rejected the Revenue's Tax Appeal No.1372 of 2011 concerning this assessee and its claim of deduction under section 80IB(10) of the Act for the subsequent year. The Tribunal had allowed the assessee's appeal. Before the High Court, Revenue had argued that the case of the assessee did not fall within the facts of Radhe Developers (supra) or Shakti Corporation. Such a contention was rejected. Other grounds raised were also not accepted.

14. In view of such facts, we find that the reasons recorded by the Assessing Officer for reopening the assessment lack validity.

15. Impugned notice is therefore quashed. Petition is allowed and disposed of. Rule is made absolute.