
(2010) 02 BOM CK 0039

Bombay High Court

Case No: Income Tax Appeal No. 2197 of 2009

The Commissioner of
Income Tax-24

APPELLANT

Vs

KNR Patel (JV)

RESPONDENT

Date of Decision: Feb. 25, 2010

Acts Referred:

- Finance Act, 2007 - Section 80IA
- Income Tax Act, 1961 - Section 263, 80IA, 80IA(4)

Citation: (2010) 322 ITR 97

Hon'ble Judges: J.P. Devadhar, J; D.Y. Chandrachud, J

Bench: Division Bench

Advocate: Suchitra Kamble, for the Appellant; Percy J. Pardiwalla Madhur Agarwal and Rajesh Poojari, instructed by Mint and Confrers, for the Respondent

Judgement

D.Y. Chandrachud, J.
Admit.

2. The appeal arises out of an order passed by the ITAT on 27th February, 2009 pertaining to assessment years 2003-04. By the order of the Tribunal, proceedings initiated by the Commissioner of Income Tax u/s 263 of the Income Tax Act, 1961 have been set aside.

3. The Revenue has formulated the following questions of law in an appeal u/s 260A:

a) Whether on the facts and circumstances of the case and in law, the ITAT is correct in setting aside the order passed u/s 263 by the Commissioner of Income Tax, without discussing the facts of the case and the clauses of the agreement between NHAI and the assessee ?

b) Whether on the facts and circumstances of the case and in law, the ITAT is correct in ignoring relevant facts and findings in the order under appeal ?

c) Whether on the facts and circumstances of the case and in law, the ITAT is correct in allowing the deduction u/s 80IA(4) of the Income Tax Act, 1961 in view of the provisions and clarifications of Section 80IA with retrospective effect from 01-04-2000 of the Income Tax Act, 1961 ?

4. In the assessment proceedings relating to assessment year 2003-04, the assessee claimed the benefit of a deduction u/s 80IA. The Assessing Officer by his order dated 30th December, 2005 granted to the assessee the benefit of the deduction claimed u/s 80IA(4), save and except for certain items to which it may not be necessary to advert for the purpose of this proceeding. On 28th March, 2008 the CIT invoked the provisions of Section 263 and was of the view that the order passed by the Assessing Officer was erroneous as it was prejudicial to the interests of the Revenue. In arriving at this view, the CIT based his order on the following foundation: (i) The assessee is not a developer of the project since it has not invested its own funds for development and it was the National Highway Authority of India (NHAI) which had invested its funds and had been entrusted with the task of completing and maintaining the Highway infrastructure by the Union Government; (ii) There was a lack of application of mind on the part of the Assessing Officer who had passed the assessment order, to this issue; (iii) The assessment order was mainly based on the decision of the Mumbai Bench of the Appellate Tribunal in (2005) 94 ITD 411 (Mum). However, the decision in Patel Engineering was distinguishable on facts; (iv) In any event, the retrospective amendment to Section 80IA(4) by Finance Act of 2007 would lead to the conclusion that the order passed by the Assessing Officer was erroneous. The CIT has adverted to the provisions of Section 263 and after relying upon the judgment of the Supreme Court in [Commissioner of Income Tax, Bangalore Vs. Shree Manjunatheaware Packing Products and Camphor Works](#), held that the record would include the explanation to Section 80IA.

5. The order of the CIT was the subject matter of an appeal before the ITAT. The Tribunal in paragraph 3 of its order, proceeded on the basis that the revisional jurisdiction u/s 263 has been exercised by the CIT in view of the explanation inserted into Section 80IA by the Finance Act of 2007 with retrospective effect from 1st April, 2000. The Tribunal observed that but for the explanation, there is no dispute that the assessee had satisfied all the requisite conditions for claiming relief under the Section. In paragraph 5 of its judgment, the Tribunal held that the decision of the Jaipur Bench in the case of M/s. Om Metals Infraprojects Ltd. and of the Mumbai Bench in Patel Engineering (supra) arose in similar circumstances and the representative appearing on behalf of the revenue could not seriously make any distinction in the facts of the present case vis-a-vis those relied upon by the AR.

6. There is merit in the submission which has been urged on behalf of the Revenue in this proceeding that the Tribunal has ex-facie misconstrued the order of the CIT u/s 263 and

has not dealt with either of the reasons which have been indicated by the CIT for exercising the jurisdiction u/s 263. As already noted earlier, the CIT, in the exercise of his jurisdiction u/s 263 observed that the assessee is not a developer within the meaning of Section 80IA; that the decision in Patel Engineering is distinguishable on facts and that in any event, the explanation to Section 80IA inserted by Finance Act of 2007 would demonstrate that the order of the Assessing Officer is erroneous. Neither of these three reasons, which form the basis of order of the CIT have been dealt with by the Tribunal. In fact, as noted earlier, the Tribunal in paragraph 3 of its decision proceeded on the basis that the revisional jurisdiction had been exercised by the CIT only on the basis of the explanation inserted into Section 80IA(13) by the Finance Act of 2007. That ex-facie is not a correct reading of the order passed by CIT. The Tribunal referred to the orders of its Jaipur Bench in Om Metals Industrial Co. Ltd. and of the Mumbai Bench in Patel Engineering Ltd. and then proceeded to observe that the DR could not seriously make any distinction in the facts of the present case vis-a-vis those relied upon by AR. That would go to suggest that an effort, as a matter of fact, was made to distinguish those cases. The Tribunal has not indicated any reasons why, if at all, it was of the view that the earlier two decisions were not distinguishable. In these circumstances, though the ultimate conclusion of the Tribunal is that the Assessing Officer had taken a possible view, we are of view that the Tribunal ought to have dealt with the reasons which had weighed with the CIT in the exercise of his jurisdiction u/s 263. Unless those reasons were found to be without any basis, a case for setting aside the exercise of jurisdiction by the CIT would not be made out.

7. Since the Tribunal has not considered the appeal in its perspective, we are of the view that it would be appropriate and proper to remand the proceedings back to the Tribunal for a fresh decision in the light of the observations made by us earlier. In order to facilitate a fresh exercise upon remand, the impugned order dated 27th February, 2009 is set aside and the appeal pertaining to assessment year 2003-04 shall stand restored to the file of the Tribunal. In view of this, it is not necessary to render any findings on the questions of law as formulated by the Revenue. The appeal is disposed of accordingly. There shall be no order as to costs.