

**(2010) 01 BOM CK 0127**

**Bombay High Court**

**Case No:** Writ Petition No. 2097 of 2009

Mistry Lalji Narsi Development  
Corporation

APPELLANT

Vs

Assistant Commissioner of  
Income Tax and Others

RESPONDENT

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**Date of Decision:** Jan. 19, 2010

**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 143(3), 147, 148, 149, 150

**Citation:** (2010) 229 CTR 359 : (2010) 323 ITR 194

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

**Bench:** Division Bench

**Advocate:** S.E. Dastoor, Niraj Sheth and Atul K. Jasani, for the Appellant; K.R. Chaudhari, for the Respondent

**Final Decision:** Allowed

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**Judgement**

D.Y. Chandrachud, J.

Rule. The learned Counsel appearing on behalf of the respondents waives service. With the consent of the learned Counsel, taken up for hearing and final disposal.

2. The challenge in these proceedings under Article 226 of the Constitution of India is to the validity of a notice issued by the Asstt. CIT, 16(1), Mumbai seeking to reopen the assessment for asst. yr. 2003-04 in exercise of powers conferred by Section 148 of the IT Act, 1961.

3. The assessee is a partnership firm, which is engaged in the business of development and construction. The assessee was carrying on development at Mistry Complex, J.B. Nagar, Andheri (East), Mumbai. For asst. yr. 2002-03, a deduction u/s 80IB(10) was claimed and allowed to the assessee in respect of project IIA. The dispute before the Court in these proceedings pertains to asst. yr. 2003-04 in

respect of which for project IIA and project IIB, a deduction was sought u/s 80IB(10). An assessment order was passed u/s 143(3) on 30th Dec, 2005. The AO, while allowing the deduction u/s 80IB(10) in respect of projects IIA and IIB noted that no deduction has been claimed for phases I and III, which were outside the time period prescribed by the statutory provision. On 31st March, 2009, a notice was issued to the assessee by the Asstt. CIT, 16(1), Mumbai u/s 148 stating that there was reason to believe that the income of the assessee in respect of which it was assessable to tax for asst. yr. 2003-04 has escaped assessment within the meaning of Section 147. Reasons were disclosed to the assessee for the reopening of the assessment on 28th April, 2009 in pursuance of a request made on 20th April, 2009. The sole ground which has been set up in the reasons disclosed to the assessee is that on 18th March, 2009, the Jt. CIT (CIB)-I and II, Mumbai had furnished an intimation that the claim of deduction u/s 80IB was not correct since the commencement certificate had been issued by the Mumbai Municipal Corporation on 24th July, 1993 whereas a deduction under the provision is permissible only when the undertaking has commenced construction after 1st Oct., 1998. On the ground that there was a wrong allowance of a deduction u/s 80IB(10), it was stated that there was reason to believe that the correct income chargeable to tax had escaped assessment. Objections were filed by the assessee with the Asstt. CIT on 8th June, 2009, stating that the commencement certificate dt. 24th July, 1993 upon which reliance has been placed by the Revenue, pertained to an earlier project, in respect of which no deduction u/s 80IB(10) has been claimed. This, it was noted, has also been acknowledged by the AO in para 3 of the original order of assessment. The objections were disposed of by a speaking order furnished to the assessee on 17th Sept., 2009. The order disposing of the objections of the assessee records that "the AO got from CIB the commencement certificate issued by Bombay Municipal Corporation indicating the date prior to 1st Oct., 1998". On this ground, it has been held that the AO had additional relevant material on the basis of which the AO could justifiably arrive at a belief that the income had escaped assessment. The commencement certificate issued by the municipal corporation was stated to be a crucial factor in determining the deduction u/s 80IB(10) and it has been alleged that the assessee had furnished wrong information in the course of assessment proceedings.

4. In assailing the proceedings adopted by the Department to reopen the assessment for asst. yr. 2003-04, learned Counsel appearing on behalf of the assessee submitted that: (1) During the course of the assessment proceedings a full disclosure was made by the assessee of all the material facts bearing on the deduction u/s 80IB(10); (2) The assessee had disclosed that the deduction was being claimed only in respect of Project II, for which commencement had taken place after 1st Oct., 1998 and as a matter of fact there was no claim for deduction for Projects I and II, which were not within the prescribed time period; (3) During the course of assessment, reliance was also placed upon a circular of the CBDT which clarifies that in an additional housing project an existing housing project site can qualify for

deduction u/s 80IB(10), provided it is taken up by a separate undertaking having separate books of accounts, so as to ensure that correct profits can be ascertained for the purposes of the section; (4) The AO had during the course of the original order of assessment u/s 143(3) appreciated the facts and circumstances arising out of the deduction claimed u/s 80IB(10); and (5) There was no failure on the part of the assessee to disclose all the material facts relating to the claim for deduction u/s 80IB(10) and consequently there was no basis for the exercise of the jurisdiction u/s 148 of the Act.

5. On the other hand it has been urged on behalf of the respondents that subsequent to the order of assessment, the first respondent had come in possession of certificates issued by the municipal corporation, which indicated that the projects in question had commenced before 1st Oct., 1998 and thereby beyond the period prescribed u/s 80IB(10). The affidavit-in-reply which has been filed on behalf of the respondents states that the Jt. CIT by his letter dt. 18th March, 2009 submitted information to the first respondent in respect of the claim of the assessee u/s 80IB. The affidavit states that the office of CIB submitted to the AO relevant copies of the commencement certificates issued by the municipal corporation by a letter dt. 23rd Sept., 2009. Based on this information received by the AO on 18th March, 2009 and 23rd Sept., 2009, it was observed that the assessee had wrongly claimed the benefit of Section 80IB(10) on the basis of wrong information provided during the assessment proceedings. It was on the basis of this that the first respondent claims to have formed a belief that the income had escaped assessment for asst. yr. 2003-04 and accordingly a notice was issued u/s 148.

6. Section 147 provides that if the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 - 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice in the course of the proceedings under the section. The proviso to Section 147 however stipulates inter alia that where an assessment under Sub-section (3) of Section 143 has been made, no action shall be taken after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

In the present case, it is common ground that the notice for reassessment u/s 148 was issued on 31st March, 2009. This is after the expiry of four years from the end of asst. yr. 2003-04. The validity of the notice would, therefore, have to depend on whether any income chargeable to tax had escaped assessment for asst. yr. 2003-04 by reason of the failure of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

7. Now it is an admitted position before the Court that the assessee has been granted the benefit of a deduction u/s 80IB(10) for asst. yr. 2002-03 in respect of Project IIA. As already noted earlier, no claim for deduction was made in respect of Project I since the initiation of the project was prior to 1st Oct., 1998, which is the cut off date prescribed by Section 80IB(10). For asst. yr. 2003-04, in the return filed by the assessee seeking a deduction u/s 80IB(10) in respect of Projects IIA and IIB, the net profit in respect of these two projects was disclosed as Rs. 77.77 lacs and an audit report of a chartered accountant u/s 80IB was furnished. The audit report contains inter alia a disclosure in Form 10CCB. Item 8 of the form refers to the date of commencement of operation by the undertaking as 20th Dec, 1999 and 4th March, 2002. Under Item 18Q, the date of approval by the local authority is referred to as 20th Dec, 1999 and 4th March, 2002. During the course of assessment proceedings, the assessee filed with the AO copies of the commencement certificates issued by the municipal corporation. Item 18Q of Form 10CCB requires the assessee to attach copies of the approval by the local authority and in pursuance thereof, the commencement certificates of the municipal corporation were disclosed. During the course of hearing, learned Counsel appearing on behalf of the respondents has informed the Court that the commencement certificates were duly disclosed to the AO. The AO, while passing the original order u/s 143(3), inter alia made the following observations:

The assessee firm, a partnership firm is engaged in the business of development and building construction. The assessee has claimed deduction u/s 80IB in respect of phase II of the project in respect of buildings being made at Mistry Complex, J.B. Nagar, Andheri (East), Mumbai. No deduction u/s 80IB has been claimed for phases I and III which are outside the prescribed time period. During the year, sales have been made in projects IIA and IIB (Shivam). While construction activities have taken place in project IIB (Shashi) and project III and WIP has been shown.

8. Hence, the above observations of the AO would establish his awareness of the fact that the claim of deduction u/s 80IB by the assessee was in respect of phase II of the project and that no deduction in respect of phases I and III has been claimed on the ground that they were "outside the prescribed time period". The AO noted that during the year sales had been made in Projects IIA and IIB. The record before the Court also shows that during the course of assessment proceedings, the assessee had relied upon a circular of the CBDT dt. 4th May, 2001 (sic) clarifying that any additional housing project on an existing housing project site can qualify for deduction u/s 80IB(10), subject to the fulfillment of certain conditions. For the purposes of the present case, it is not necessary for the Court to inquire into the merits of the claim for deduction. The question that arises for consideration is as to whether the conditions precedent to the exercise of the jurisdiction to reopen the assessment have been duly established. That in turn would depend upon whether there was a failure on the part of the assessee to disclose fully and truly all necessary facts necessary for the assessment for the assessment year in question.

9. The notice u/s 148 and the reasons which have been disclosed to the assessee proceed on the basis that on 18th March, 2009 the Jt. CIT had furnished an intimation to the AO that since the commencement certificates have been issued by the municipal corporation on 24th July, 1993, the claim for deduction u/s 80IB was not correct. While disposing of the objections of the assessee, once again the only material upon which reliance is placed is a copy of the commencement certificate issued by the municipal corporation. Now it is an admitted position before the Court that the commencement certificates issued by the; municipal corporation were produced before the AO during the course of the assessment proceedings. This has been accepted by counsel for the Revenue in the course of his submissions. The primary material consisting of the commencement certificates was, therefore, within the knowledge of the AO. The contention of the assessee has been that though the original commencement certificates were dt. 24th July, 1993 and 12th Feb., 1994, no claim of deduction has been made in respect of phase I of the project, which relates to the commencement of construction activity prior to 1st Oct., 1998. The case of the assessee was that he was entitled to a deduction u/s 80IB(10) in respect of that part of the construction, which commenced after 1st Oct., 1998 and that this would constitute a separate project for the purposes of the section as clarified by the circular of the CBDT. The order of the AO u/s 143(3) clearly reflects an awareness of the primary facts relating to the case. Para 3 of the assessment order, which has been extracted in the earlier part of the judgment, records that the assessee had claimed a deduction in respect of phase II of the project in respect of the building being constructed on the land in question and that no deduction under the provision has been claimed for phases I and III "which are outside the prescribed time period". Therefore, there was a disclosure by the assessee of all the primary facts relating to the claim for deduction u/s 80IB(10). There was an awareness on the part of the AO of the circumstance that the claim for deduction was not made in respect of the construction which had commenced prior to 1st Oct., 1998 which is the time prescribed by Section 80IB(10). Hence, the jurisdictional condition precedent to the exercise of powers to reopen an assessment beyond a period of four years namely, the failure of the assessee to disclose fully and truly all material facts necessary for the assessment has not been established. Significantly, the reasons which have been recorded by the AO for reopening the assessment show that reliance is placed on a commencement certificate which it is now common ground before the Court was already on record before the AO when the original order u/s 143(3) was passed. The reasons disclosed to the assessee state that copies of the commencement certificates were made available by the Jt. CIT subsequent to the order of assessment u/s 143(3). Since the documents on the basis of which assessment was sought to be reopened had already been furnished to the AO in the course of the proceedings u/s 143(3), it cannot possibly be contended that the assessee had failed to disclose documents or the material facts.

10. Moreover, it is also common ground before the Court that a deduction has been granted u/s 80IB(10) to the assessee for asst. yr. 2002-03. This statement of fact by the counsel appearing on behalf of the assessee has not been controverted by counsel for the Revenue during the course of submissions.

11. We would, while concluding once again clarify that in the present case, we are not concerned with the question as to whether a deduction u/s 80IB(10) was validly granted since the only question that falls for consideration is whether a case is made out for reopening of the assessment under the powers conferred by Section 148.

12. For the reasons aforementioned, we are of the view that recourse to the provisions of Section 148 r/w Section 147 cannot be sustained. The petition would, therefore, have to be allowed. Rule is accordingly made absolute in terms of prayer Clause (a) by setting aside the notice dt. 31st March, 2009. There shall be no order as to costs.