The High Court of Madhya Pradesh : Bench At Indore

DIVISION BENCH: HON'BLE MR. JUSTICE VIVEK RUSIA &
HON'BLE MR. JUSTICE AMAR NATH (KESHARWANI)

Income Tax Appeal No.87/2021

Appellant	-	The Chief Commissioner of Income Tax (OSD)-1 Aaykar Bhawan, CGO Complex Opposite White Church, Indore (M.P.)
	versus	
Respondent	-	M/s Sharp Infrastructure Pvt. Ltd. 302, Morya Arcade, Old Palasia, Indore (M.P.) PAN: AAICS1226R

Indore, dated 28.02.2022

As per Vivek Rusia, J:

Ms. Veena Mandlik, learned counsel for the appellant.

Heard on the question of admission.

O R D E R

The appellant, Chief Commissioner of Income Tax (OSD)-1 has filed the present Income Tax Appeal under Section 260A of the Income Tax Act, 1961 against the consolidated order dated 22.08.2019, whereby all the appeals have been disposed of on the ground that the tax effect is below the monetary limit of Rs.50,00,000/- as per CBDT Circular No.3/2018 dated 08.08.2019 (for the assessment year 2007 – 08) and also against the order dated 28.12.2020 passed by the Income Tax Appellate Tribunal (ITAT), Bench Indore in M.A. No.28/Ind/2020 whereby application for recalling of the order dated 22.08.2019 has been dismissed.

02. The facts of the case in short are as under:-

2.1. The respondent is a private limited company duly incorporated and registered under the provisions of the Companies Act. The Company had constructed a road between Jhalawar – Indore, SH-1A on a contract awarded by the

Government of Rajasthan. The contract was also included the work of construction, operation and maintenance of the road. The respondent filed an income tax return for the assessment year 2007 – 08 on 13.10.2007 declaring a total income of Rs.2,59,750/-. In the said return, the respondent had claimed deduction under Section 80IA in respect of profit and gains as an enterprise was engaged in infrastructure and development projects. The assessment was completed on 19.11.2009.

2.2. Subsequently, the case of the respondent was selected in the scrutiny, hence, the assessing authority issued a notice dated 17.09.2008 to the respondent under Section 143(2) of the Income Tax Act. That during the pendency of the said proceeding, the assessing authority has issued another notice under Section 142(1) of the Income Tax Act on 09.10.2009 calling upon the respondent to furnish various details as stated in the notice. The respondent appeared through its CA along with cash books and ledger etc. After considering the materials, the assessing authority has passed the Assessment order dated 19.11.2009 under Section 143(3) of the Income Tax Act in respect of the assessment year 2007 – 08. By the above order, the authority has disallowed the part of the deduction of Rs.79,53,563/- against Rs.79,92,473/-.

2.3. After the aforesaid final order, the respondent was served with another notice dated 22.01.2013 stating that as to why the deduction under Section 80IA which was earlier allowed by order dated 19.11.2009 be recalled. The respondent submitted a reply on 30.01.2013. After filing the reply, another show-cause notice dated 03.03.2014 issued under Section 148 of the Income Tax Act was served upon the respondent for reopening the assessment for the assessment year 2007 – 08. The respondent was called upon

to submit the return in response to the notice issued under Section 148. In response to the aforesaid notice, the respondent again submitted the earlier return stating that the same be treated as a return in response to the reassessment notice.

2.4. Vide order dated 25.02.2015, the assessing authority passed a final order withdrawing the deduction under Section 80IA to the extent of Rs.79,53,563/- and Rs.3,52,694/- and determined the total income of Rs.86,05,920/- which has resulted in the issuance of demand of Rs.34,92,440/-.

2.5. Being aggrieved by the aforesaid order, the respondent approached this Court by way of writ petition i.e. W.P. No.2244/2015 and vide order dated 24.07.2015, the writ petition was disposed of with liberty to file a statutory appeal. Accordingly, the respondent preferred an appeal before the Commissioner of Income Tax (Appeal)-II, Indore. Vide order dated 28.02.2017, the appellate authority allowed the appeal and set aside the assessment order dated 25.02.2015 on the ground that no notice under Section 148 could be issued after 31.03.2012, hence, the reassessment was done vide order dated 25.02.2015 was time-barred. It has also been held that audit objection can neither be a ground for reopening nor falls within the domain of information for the purpose of initiation of assessment proceeding as held by the Apex Court in the case of ***Indian & Eastern Newspaper Society (1979) 2 Taxman 197 (SC)*** and the Gujarat High Court in the case of ***Adani Developers (P.) Limited (2016) 66 taxmann.com 125 (Guj.)***.

2.6. Being aggrieved by the aforesaid order, the appellant preferred an appeal before the ITAT, Indore Bench which was registered as ITA No.379/Ind/2017. During the pendency of the

appeal, the Ministry of Finance issued Circular No.03/2018 dated 11th July 2018 fixing the monetary limit for filing of income tax appeal by the Department before ITAT and High Court. Since the monetary limit of pending appeals before the ITAT is Rs.50,00,000/-, hence, vide consolidated order dated 22.10.2019 learned ITAT has dismissed all the appeals of the Department along with all other appeals.

2.7. Against the said order, the appellant filed an M.A. for recalling of the order dated 22.10.2019 on the ground that show-cause notice given to the respondent was based on the revenue audit objection and based on the scrutiny of the assessment of the record, therefore, pending appeal was not liable to be dismissed on the ground of monetary limit of Rs. 50,00,000/- as specified in para-3 of the circular dated 08.08.2019. It is further submitted by the learned counsel that Clause 10 (c) of Circular No.03/2018 dated 11.07.2018 where on the revenue audit objection in the case has been accepted by the Department and the appeal was liable to be decided on its merit. The ITAT has considered the entire facts of the case and dismissed the M.A., hence, the present appeal is before this Court.

03. The appellant has suggested following substantial questions law involved in the appeal for admission and final hearing: -

> *1. Whether on the facts and in the circumstances of the case, the ITAT was justified in law in dismissing the Miscellaneous Applications of the Revenue stating that Revenue took a contrary stand before the Hon. High Court that there was no Revenue Audit Objection, whereas the Order of the Hon. High Court of M.P. in para no.3 in Writ Petition No.2244/2015 clearly states that reopening was initiated based upon the Revenue Audit Objection, though the reasons were recorded after verifying the facts and material which includes the Audit*

Objection available on record ?

2. Whether on the facts and in the circumstances of the case, the ITAT was justified in law in interpreting the facts incorrectly in respect of stand taken by the Revenue before the Hon. High Court on the issue of reopening of assessment based on Revenue Audit Objection and consequently wrongly dismissed the Miscellaneous Application ?

04. The case of the appellant is that if it is a case of reopening of assessment of the respondent of for the assessment year 2007 – 08 was based on revenue audit objection then Circular dated 11.07.2018 would not apply and appeal No.379/Ind/2017 ought to have been decided on merit instead of dismissing on the ground of monetary limits for filing the appeal below Rs.50,00,000/-. The income tax assessment of the respondent for the year 2007 – 08 was completed on 19.11.2009 allowing the deduction under Section 80IA of the Income Tax Act. The case of the respondent came under scrutiny and notice dated 17.09.2008 was issued by the assessing authority under Section 143(2) of the Income Tax Act. Respondent submitted a reply raising various objections. Another notice was issued under Section 142(1) on 09.10.2009. The respondent submitted a reply to the said notice and the final assessment order dated 19.11.2009 was passed. Thereafter, another notice under Section 148 of IT Act stating that the respondent has wrongly claimed the deduction of Rs.79,93,473/- under Section 80IA and the same was allowed to Rs.79,53,563/- on non-fulfilling of the conditions which has resulted in under assessment of income of Rs.79,53,563/-. Another deduction of Rs.7,05,386/- has also been objected. In this show-cause notice, it was specifically mentioned that the assessment was completed under Section 143(3) on 19.11.2009, which was initiated based on audit objection. Subsequent notice

under Section 148 revealed that the assessee company i.e. respondent has worked as a Special project vehicle (SPV) of M/s Nila Bharat Engineering Ltd. It is also mentioned in the notice that **in order to bring the escaping assessment** under the tax net, issued a notice under Section 148 of IT Act. For ready reference same is pasted below:-

ANNEXURE – A
M/s. Sharp Infrastructure Pvt. Ltd. A.Y. 2007 – 08

> The assessment in this case was completed u / s. 143(3) on 19.11.2009 at a total income of Rs.2,99,660/-. The assessee has claimed deduction u / s.80IA for Rs.79,92,473/- and was allowed Rs.79,53,563/-. However, it is revealed that the assessee company has worked as a special project vehicle (SPV) of M / s. Nila Bharat Engineering Ltd., Baroda who was awarded contract of widening and strengthening of a particular stretch of road. As such the work carried out by the assessee was not a new infrastructure facility and therefore does not fulfil the condition of Section 80IA to avail the deduction. Further, assessee has purchased Hydraulic Excavator from L&T Komatsu, Bangalore on 2609.2006 and the machine has passed commercial check post, Khawasa (MP) on 05.10.2006. Therefore depreciation @ 7.5% of Rs.3,52,692/- only was allowable in place of 15% of Rs.7,05,386/- claimed by it. Further during the course of assessment proceedings, in its written submissions the assessee has admitted of being engaged in operation and maintenance of the above mentioned road and no evidence has been put forth that it was a new infrastructure facility. Also, as regards the Hydraulic Excavator, the assessee has submitted that it had pruchased the machine on 26.09.2009 and the machine has been put to use. So this does not go to substantiate the date when the machine has actually been put to use due to which depreciation @ 15% cannot be allowed to the assessee.
>
> I have therefore, reason to believe that income of Rs.83,06,256/- has escaped the assessment and the assessee has filed to disclose full and true material facts for assessment within the meaning of section 147.
>
> In order to bring the income escaping assessment under the tax net, issued notice u / s. 148 of I.T Act, 1961."

It is clear from the above proceeding under Section 148 were not issued based on revenue audit objection, hence, the appeal filed by the appellant before the ITAT has rightly been dismissed under the CBDT circular No. 03/2018 dated 11.07.2018.

05. The first appellate authority has also held that aforesaid notice under Section 148 was issued on 03.03.2014 i.e. after four years from the end of the assessment year 2007 – 08. This notice nowhere says that it is issued based on revenue audit objection, hence, this case does not fall under exception 10(c) of Circular No.03/2018 dated 11.07.2018. Learned ITAT has not committed any error of law by dismissing the MA No. 28/Ind/2020 (AY-2007-08) filed for recalling of the consolidated order dated 22.08.2019 disposed of relying on circular No. 03/2018 dated 11.07.2018

We do not find any substantial question of law involved in this appeal, hence dismissed.

(VIVEK RUSIA)
J U D G E

(AMAR NATH (KESHARWANI))
J U D G E

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