

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.2138/PUN/2017
निर्धारण वर्ष / Assessment Year: 2008-09

Goel Ganga Construction, 3 rd Floor, San Mahu Complex, Bund Garden Road, Opp. Poona Club, Pune- 411001. PAN : AAGFG1939G	Vs.	ITO, Ward- 7(3), Pune.
Appellant		Respondent

Assessee by : Shri Rajiv Thakkar
Revenue by : Shri M. Jasnani

Date of hearing : 08.03.2022
Date of pronouncement : 11.03.2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the assessee directed against the order of Id. Commissioner of Income Tax (Appeals)- 5, Pune [‘CIT(A)’ for short] dated 09.05.2017 for the assessment year 2008-09.

2. Briefly, the facts of the case are that the appellant is a partnership firm engaged in the business of builders. The return of income u/s 139 of the Income Tax Act, 1961 (‘the Act’) for the

assessment year 2008-09 was originally filed on 13.10.2008. Against the said return of income, the assessment was completed by the Dy. Commissioner of Income Tax, Circle-2, Pune (Assessing Officer') vide order dated 29.12.2010 passed u/s 143(3) of the Act accepting the returned income and allowing deduction u/s 80IB(10) of Rs.6,96,40,134/-. Subsequently, the Assessing Officer issued notice dated 31.03.2015 u/s 148 proposing to re-assess the income for the assessment year 2008-09 and calling upon the appellant to file the return of income. The reasons recorded for issuance of notice u/s 148 are extracted below :-

"1. The assessee engaged in the construction of residential project viz. Swar Ganga and Ganga Skies at Pimpri Village, Pune and claimed deduction U/s 80IB(10) of Rs. 6,96,40,134/-. Verification of the records revealed that during the previous year the assessee had received interest of Rs. 2,22,20,568/- on loans and advances given to associated concerns. The same was set off against the interest payable HUDCO and other unsecured loans in respect of Swar Ganga project. The net interest of Rs. 4,14,417/- was debited to P & L account (vide schedule 'O' r.w. schedule 03) and profits thereof was claimed deduction U/s 80IB(10). Instead the gross interest should have been considered separately and taxed as income not derived from housing project. The omission to allow it as a part of income of housing project resulted to excess deduction of profit U/s 80IB(10) by Rs. 2,22,20,568/- involving tax effect of Rs. 75,52,771/-.

2. Further, interest received of Rs. 32,68,660/- related to project Ganaga Skies was reduced from the cost of work in progress of that project. This resulted in lowering of WIP expense and inflating of the profit in future. This involves potential tax effect of Rs. 11,11,018/-"

3. Based on the above reasons recorded for reopening the assessment, a notice u/s 148 dated 31.03.2015 was issued. In response to the said notice u/s 148, the appellant vide letter dated 08.05.2015 submitted that the original return of income filed by the appellant be treated as return in response to notice u/s 148 and also requested for providing reasons recorded for reopening the assessment. Against the said return of income, the reassessment proceedings was completed by the Assessing Officer vide order dated 05.02.2016 passed u/s 147 r.w.s. 143(3) of the Act assessing the total income of Rs.2,76,54,400/-. While doing so, the Assessing Officer brought to tax the interest income of Rs.2,65,53,465/- under the head 'Income from other sources' while allowing the deduction u/s 80IB(10) of Rs.6,96,40,134/-.

4. Being aggrieved by the above assessment order, an appeal was filed before the Id. CIT(A) challenging the validity of reopening of the assessment on the ground that the assessment was sought to be reopened on mere change of opinion on the very same set of facts, information, as was available in the original assessment proceedings. The Assessing Officer had failed to comply with the

first proviso to section 147 of the Act i.e. contending that there is no failure on the part of the assessee to disclose truly and fully all material facts necessary for the purpose of making the assessment. In support of the this contention, the assessee had relied upon the following judgments :-

- (i) CIT vs. Kelvinator of India Ltd., 187 Taxman 312 (SC).
- (ii) ACIT vs. ICICI Securities Primary Dealership Ltd., 348 ITR 299 (SC).
- (iii) Crompton Greaves Ltd. vs. ACIT, 55 taxmann.com 59 (Bom.).
- (iv) Lupin Ltd. vs. ACIT, 46 taxmann.com 369 (Bom.).

5. On merits, it was contended that the funds borrowed from HUDCO were utilized for the purpose of advancing loans to the group concerns for business purpose, no borrowed funds have been utilized for the purpose of utilizing in the housing project in respect of which deduction of profits were claimed u/s 80IB(10) of the Act. Thus, it was contended that the interest expenditure incurred on the funds borrowed from HUDCO cannot be claimed as deduction against the profits earned from the housing project whose profits are eligible for deduction u/s 80IB(10) and there was a direct nexus between the borrowed funds and loans & advances made to the

sister concerns. Therefore, the interest expenditure can be only set-off against the interest income earned on the loans & advances made to the sister concerns. Further, it was pleaded that interest earned on loans and advances made to the sister concerns is eligible for deduction u/s 80IB(10) placing reliance on the certain judicial precedents.

6. The ld. CIT(A), on due consideration of the submissions, had upheld the validity of the reassessment proceedings by holding that the reassessment proceedings were initiated by the Assessing Officer based on the information received from audit party placing reliance on the decision of the Hon'ble Supreme Court in the case of *Larsen & Toubro Ltd. vs. State of Jharkhand*, 79 taxmann.com 267 (SC) held that the audit objection constitutes the information which forms part of the fresh tangible information enabling the Assessing Officer to form an opinion that the income got escaped assessment tax. The ld. CIT(A) also placing reliance on the decision of the Hon'ble Supreme Court in the case of *CIT vs. P.V.S. Beedies (P.) Ltd.*, 237 ITR 13(SC) held that reopening the assessment on the basis of factual error pointed out by the audit party is valid in law.

Thus, the ld. CIT(A) upheld the validity of the reassessment proceedings.

7. On merits, the ld. CIT(A) held that the Assessing Officer is correct in taxing the interest earned on the loans and advances made to the sister concerns under the head 'Income from other sources'.

8. Being aggrieved by the decision of the ld. CIT(A), the appellant is before us in the present appeal.

9. It is contended that the ld. CIT(A) was not justified in upholding the validity of the reassessment proceedings, inasmuch as, there was no fresh tangible material enabling the Assessing Officer to form an opinion that the income got escaped assessment to tax. Secondly, there was no failure on the part of the appellant to disclose all material facts necessary for the purpose of making the assessment. In this regard, he also placed reliance on the decision of the Hon'ble Bombay High Court in the case of Acron Developers (P.) Ltd. vs. DCIT, 135 taxmann.com 191 (Bom.).

10. On merits, it is contended that the loans and advances were made to the sister concerns out of business expediency and, therefore, the interest expenditure of Rs.2,22,20,568/- incurred on

loans borrowed from HUDCO should be set-off against the interest income earned on the loans and advances made to the sister concerns.

11. On the other hand, ld. Sr. DR submitted that the audit objection constitutes a fresh information, which enabled the Assessing Officer to form an opinion that income escaped assessment to tax placing reliance on the decision of the Hon'ble Supreme Court in the case of P.V.S. Beedies (P.) Ltd. (supra). He further submitted that the appellant has filed untrue facts before the Assessing Officer at the time of original assessment by claiming set-off of the interest expenditure incurred against the interest income. The falsity of the information was exposed by the audit party. Thus, it was submitted that there was failure on the part of the appellant to disclose truly and fully all material facts that was necessary for the purpose of making the assessment.

On merits, the ld. Sr. DR submitted that in the absence of nexus between the borrowed funds and the loans & advances, as the loans were borrowed from HUDCO for the purpose of business i.e. building, construction housing project. Therefore, there was no

nexus between the borrowed funds and loans & advances made to the sister concerns. In the absence of such nexus, the interest expenditure cannot be set-off against the interest income earned on the loans & advances made to the sister concerns.

12. We heard the rival submissions and perused the material on record. The ground no.1 relates to the preliminary ground challenging the very validity of the reassessment proceedings. The appellant sought to challenge the very validity of the reassessment proceedings primarily on the ground that there was no fresh tangible information which came into the possession of the Assessing Officer enabling him to form an opinion that the income got escaped assessment to tax. Secondly, on the ground that there was no failure on the part of the appellant to disclose truly and fully all material facts necessary for the purpose of making the assessment. As regards to the first contention of the appellant, it is an admitted position that the reassessment proceedings were initiated by the Assessing Officer only after audit objection was raised. The Audit party who pointed out that the interest income earned on the loans & advances made to the sister concerns should be assessed under the

head 'Income from other sources' without setting off any interest expenditure. This information in the form of audit objection had enabled the Assessing Officer to form an opinion that the income got escaped assessment to tax. The Hon'ble Supreme Court in the case of P.V.S. Beedies (P.) Ltd. (supra) had laid down that an audit objection constitutes information. Therefore, the contentions that there was no fresh tangible material brought on record by the Assessing Officer cannot be accepted. Secondly, as regards to the second contention of the appellant that there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for the purposes of making the assessment as laid down in the first proviso to section 147 of the Act cannot be accepted, as it is evident from the original return of income filed that the assessee made claim that interest expenditure incurred on the loans borrowed from HUDCO for the purpose of housing project against the interest earned on the loans & advances made to the sister concerns, knowing fully well that there was no nexus between the borrowed funds and loans & advances to the sister concerns. It is settled position of law that for the purpose of allowing the

expenditure against the interest income earned, the loans should be borrowed for the purpose of earning the interest income as laid down by the Hon'ble Supreme Court in the case of Seth R. Dalmia vs. CIT, 110 ITR 644 (SC). The falsity of the claim was exposed by the audit party. Therefore, the assessee cannot claim that there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for the purpose of making the assessment. The reliance placed by the ld. Counsel for the assessee on the decision of the Hon'ble Bombay High Court in the case of Acron Developers (P.) Ltd. vs. DCIT, 135 taxmann.com 191 does not come rescue of the appellant, inasmuch as, there was no tangible material on record to conclude that the income had escaped assessment, whereas in the present case there was tangible material in the form of audit objection. Thus, we do not find any merit in the contentions raised by the assessee challenging the validity of the reassessment proceedings. Therefore, we uphold the validity of the reassessment proceedings. Accordingly, the ground no.1 stands dismissed.

13. The ground nos.2 and 3 challenges the action of the lower authorities in assessing the interest income earned on the loans and advances made to the sister concerns under the head 'Income from other sources'. It is an admitted position that the interest expenditure was incurred on loans borrowed from HUDCO for the purpose of housing project. The contention of the appellant that the loans and advances were made to the sister concerns for the business purpose and out of business expediency cannot be accepted for the reason that the appellant had not led any evidence proving the business expediency, as it is question of fact which requires to be proved by leading necessary evidence. Even assuming for a moment, the loans and advances were made to the sister concerns for business purpose, there is necessity for charging interest and secondly, the loans were borrowed from HUDCO only for the purpose of business of housing project not for the purpose of advancing loans to the sister concerns. Therefore, there was no nexus between the borrowed funds and amounts advanced to the sister concerns. In these circumstances, in the absence of nexus between the borrowed funds and amounts advanced to the sister

concerns, the question of allowing interest against the interest earned from the loans and advances to the sister concerns does not arise in terms of law laid down by the Hon'ble Supreme Court in the case of Seth R. Dalmia (supra). Thus, we do not find any merit in the contention raised by the appellant. Hence, the ground nos.2 and 3 raised by the assessee stands dismissed.

14. In the result, the appeal filed by the assessee stands dismissed.

Order pronounced on this 11th day of March, 2022.

Sd/-
(S. S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 11th March, 2022.

Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-5, Pune.
4. The Pr. CIT-4, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.