

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 17TH DAY OF JANUARY 2019 / 27TH POUSHA, 1940

ITA. No.84 of 2012

AGAINST THE ORDER IN ITA NO.210/2009 OF THE INCOME TAX APPELLATE
TRIBUNAL, COCHIN BENCH DATED 30.12.2011

APPELLANT/APPELLANT:

M/S.SKYLINE BUILDERS
RAJAJI ROAD, ERNAKULAM.

BY ADVS.
SRI.M.GOPIKRISHNAN NAMBIAR
SRI.K.JOHN MATHAI
SRI.P.GOPINATH (SR.)

RESPONDENT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX
C.R. BUILDING, I.S. PRESS ROAD, ERNAKULAM,
KOCHI-682018.

SRI.PKR MENON, SR.COUNSEL FOR GOI [TAXES]
SRI.JOSE JOSEPH, SC

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 17.01.2019,
ALONG WITH ITA.87/2012, ITA.89/2012 & ITA.94/2012, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 17TH DAY OF JANUARY 2019 / 27TH POUSHA, 1940

ITA. No.87 of 2012

AGAINST THE ORDER IN ITA NO.222/2009 OF THE INCOME TAX APPELLATE
TRIBUNAL, COCHIN BENCH DATED 30.12.2011

APPELLANT/APPELLANT:

M/S SKYLINE BUILDERS
RAJAJI ROAD, ERNAKULAM.

BY ADVS.
SRI.M.GOPIKRISHNAN NAMBIAR
SRI.K.JOHN MATHAI
SRI.P.BENNY THOMAS
SRI.P.GOPINATH (SR.)

RESPONDENT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX
C.R. BUILDING, I.S. PRESS ROAD, ERNAKULAM,
KOCHI-682018.

SRI.PKR MENON, SR.COUNSEL FOR GOI [TAXES]
SRI.JOSE JOSEPH, SC

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 17.01.2019,
ALONG WITH ITA.84/2012, ITA.89/2012 & ITA.94/2012, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 17TH DAY OF JANUARY 2019 / 27TH POUSHA, 1940

ITA.No. 89 of 2012

AGAINST THE ORDER IN ITA NO.224/2009 OF THE INCOME TAX APPELLATE
TRIBUNAL, COCHIN BENCH DATED 30.12.2011

APPELLANT/APPELLANT:

M/S.SKYLINE BUILDERS
RAJAI ROAD, ERNAKULAM.

BY ADVS.
SRI.M.GOPIKRISHNAN NAMBIAR
SMT.PREETHA S.NAIR
SRI.K.JOHN MATHAI
SRI.P.BENNY THOMAS
SRI.P.GOPINATH (SR.)

RESPONDENT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX
C.R. BUILDING, I.S. PRESS ROAD, ERNAKULAM,
KOCHI-682018.

SRI.PKR MENON, SR.COUNSEL FOR GOI [TAXES]
SRI.JOSE JOSEPH, SC

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 17.01.2019,
ALONG WITH ITA.84/2012, ITA.87/2012 & ITA.94/2012, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

THURSDAY, THE 17TH DAY OF JANUARY 2019 / 27TH POUSHA, 1940

ITA.No. 94 of 2012

AGAINST THE ORDER IN ITA NO.350/2010 OF THE INCOME TAX APPELLATE
TRIBUNAL, COCHIN BENCH DATED 31-01-2012

APPELLANT/APPELLANT:

M/S.SKYLINE BUILDERS
RAJAI ROAD, ERNAKULAM.

BY ADVS.
SRI.M.GOPIKRISHNAN NAMBIAR
SMT.PREETHA S.NAIR
SRI.K.JOHN MATHAI
SRI.P.BENNY THOMAS
SRI.P.GOPINATH (SR.)

RESPONDENT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX
C.R. BUILDING, I.S. PRESS ROAD, ERNAKULAM,
KOCHI-682018.

SRI.PKR MENON, SR.COUNSEL FOR GOI [TAXES]
SRI.JOSE JOSEPH, SC

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 17.01.2019,
ALONG WITH ITA.84/2012, ITA.87/2012 & ITA.89/2012, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENTK. Vinod Chandran, J.I.T.A. No.84 of 2012

The above appeals raise questions with respect to the claim under Section 80IB of the Income Tax Act, 1961 [for brevity, 'the Act] for the assessment years 2001-2002, 2003-2004, 2005-2006 & 2006-2007. The Tribunal, affirmed the order passed by the Commissioner of Income Tax [CIT] under Section 263 of the Act, revising the assessment made, allowing the claim under Section 80IB of the Act. The CIT found that the essential conditions of the claim is not satisfied. The Tribunal affirmed the order of the CIT under Section 263 of the Act, against which questions of law are raised in all the assessment years.

2. In the assessment year 2001-2002, there is a question of limitation, which admittedly

had not been raised before any of the authorities under the Act. The question of limitation being a mixed question of fact and law, it could be raised at the point of an appeal under Section 260A of the Act also; if the facts are clear and require no adjudication. The dates are not in dispute with respect to the orders passed, which alone would enable an adjudication on the question of limitation. We hence frame the following question of law in so far as the appeal for the year 2001-2002:

"Whether the Tribunal was correct in having affirmed the order under Section 263 of the Act for reason of the period of limitation having expired at the time when the order was passed?"

3. The period of limitation under Section 263(2) of the Act is expiry of two years from the end of the financial year, in which the order sought to be revised was passed. There is quite a bundle of facts, in so far as the orders

passed for the subject year. Annexure-A dated 10.12.2003 is the first order of assessment passed under Section 143(3) of the Act. Therein, there was no consideration of the claim under Section 80IB of the Act. The claim made by the assessee under Section 80IB of the Act through a revised return filed on 12.11.2003 was not allowed. An appeal was filed before the CIT, in which the ground of rejection of the claim was taken. The CIT (Appeals) by Annexure-B directed consideration of the claim. The claim as made in the return was considered by Annexure-I order and an order passed, allowing deduction of Rs.70,651/- under Section 80IB of the Act.

4. A search proceeding was initiated under Section 132 of the Act and notice was issued under Section 153A of the Act, pursuant to which, a return was filed by the assessee. The assessment was completed as per Annexure-C for the year 2001-2002, where there was no

consideration of the claim under Section 80IB of the Act, obviously for reason of the claim having already been allowed by the Assessing Officer by Annexure-A. The significant fact, which weighed with the Commissioner, acting under Section 263 of the Act was the fact that the assessee when filing the return pursuant to the notice under Section 153A, enhanced the claim under Section 80IB to Rs.11,88,622/-, in addition to that claimed under the revised return filed at the stage of Section 143(3) proceedings.

5. The Commissioner, by Annexure-E order dated 25.03.2009, sought to revise the entire claim of Rs.11,88,622/-, which included Rs.70,651/- as allowed in Annexure-I order. The reasons for finding prejudice to the Revenue as seen from Annexure-E order are; (i) separate account for the eligible bills were not being maintained for determining profit having regard

to the provisions of Section 80IB of the Act read with Section 80IA(5); (ii) the accounts of eligible business were not audited by an accountant and (iii) the report of audit in Form No.10CCB was neither filed with the return of income nor during the course of assessment proceedings or the proceedings under Section 153A.

6. The learned Counsel appearing for the appellant/assessee would contend that there was no consideration of the claim under Annexure-C, especially since the same was already considered and allowed in the proceedings under Section 143(3) in an order giving effect to the appellate order at Annexure-B. If at all; the revision had to be done, of the original order passed allowing the claim under Section 80IB, which is Annexure-I dated 31.08.2005. The limitation commencing from the end of the financial year, in which the order is passed, it

commences from 31.03.2006 and Section 263 has to be invoked before 31.03.2008. The order has been passed on 25.03.2009, long after the expiry of limitation.

7. The learned Senior Counsel, Government of India [Taxes] would seek to sustain the order under Section 263 of the Act. It is pointed out that the claim to the extent of Rs.11,88,622/- was never made in the original return or in the revised return. In fact at the time of the original proceedings, the assessee had only claimed an amount of Rs.70,651/-, that too in a revised return. This was the claim, which was allowed as per the original order at Annexure-A. The further claim was made in the return filed as against the notice issued under Section 153A of the Act, which the assessee was not entitled to raise. The original assessment had resulted in the claim being allowed to the extent of Rs.70,651/-, which alone was claimed at that

time. There could be no enhancement of such claim in a return filed pursuant to a notice under Section 153A.

8. The search proceedings cannot inure to the benefit of the assessee, in so far as making a claim far in excess of that claimed in the original assessment and which had resulted in final determination. It is also submitted that the conditions with respect to the claim as per the provisions under Section 80IB of the Act were also not complied with. Hence, the limitation commences only from Annexure-C order dated 28.12.2007, wherein though there is no discussion as to the claim under Section 80IB of the Act, the assessee having claimed it in the returns, the same is inferred to have been allowed, which was sought to be revised by Annexure-D.

9. We cannot, but observe that the

Commissioner making the order under Section 263 of the Act never raised the contention of a claim, in excess of that originally made being not permissible in a proceeding under Section 153A of the Act. If such a ground had resulted in the order being revised, the issue would have been viewed by us in a totally different perspective. The grounds, for invoking Section 263, as we noticed non-compliance of the conditions for allowing the claim under Section 80IB of the Act viz: the separate accounts being not maintained, the accounts being not audited and the report of audit having not been filed. These are fundamental aspects in allowing the claim under Section 80IB, which applies to the claim made in the revised return of Rs.70,651/- and that claimed in excess in the return filed under Section 153A of the Act. These grounds applicable to the claim in the revised return, stood allowed and at the point when revision was

attempted, had attained finality.

10. As of now we find that the reasons stated for revising the order under Section 263 of the Act are those extracted herein above, which go to the root of the claim made under Section 80IB of the Act, which would apply to the entire amounts claimed; that in the revised return originally filed and in the return filed under Section 153A of the Act. Without revising the earlier order at Annexure-I, it would not be possible to disallow the claim further made under the return filed pursuant to notice issued under Section 153A of the Act by revising Annexure-C order. The grounds as stated in Section 263 order was available to the Revenue even as against the original order passed at Annexure-I. No interference of the allowance granted by the Assessing Officer having been attempted under Section 263 of the Act; the issue stands settled for that assessment year.

As for the enhanced claim made under Section 80IB not being sustainable in a return filed pursuant to a notice issued under Section 153A; it was never raised by the CIT in the order under Section 263.

11. In such circumstances, we are of the opinion that the limitation in so far as interfering with the claim under Section 80IB of the Act has to commence from the first order at Annexure-I, which is dated 31.08.2005. The order under Section 263 of the Act had been passed long after the limitation expired and hence we are unable to sustain the same. We answer the question of law in favour of the assessee and against the Revenue, in so far as the limitation aspect is considered.

I.T.A. No.87 of 2012

12. In this appeal also, the question of limitation arises. We find that there was a

miscellaneous application filed before the Tribunal as M.A. No.59/Kochi/2012, which has been allowed on this question by order dated 07.09.2012. There is no challenge from the order by the Revenue.

In such circumstances, I.T.A. No.87 of 2012 would stand rejected as infructuous.

I.T.A. NoS.89 & 94 of 2012

13. With respect to the assessment years 2005-2006 and 2006-2007, the contention of the assessee is that the assessment order was not revisable under Section 263 of the Act for reason of it having merged with the appellate order. The following question of law arises from the appeals:

"Whether in the facts and circumstances of the case, ought not the Tribunal have set aside the order under Section 263 of the Act for reason of the

order revised having merged with the appellate order?"

14. We see that the assessment orders were passed rejecting the claim under Section 80IB of the Act and the assessee challenged it in appeal. The Appellate Authority agreed with the contention of the appellant with respect to the claim made under Section 80IB of the Act. The appellant was found eligible under Section 80IB of the Act and the Assessing Officer was directed accordingly. In both the years we find from the first appellate orders that there was a direction issued to the Assessing Officer to grant the claim.

15. In such circumstances, we have to answer the questions of law in favour of the assessee and against the Revenue. We find that the order of assessment was not available for revision under Section 263 of the Act for reason of it having merged with the First Appellate

Order. The Revenue could have taken up the matter in further appeal, but however the choice was to proceed under Section 263, which was erroneous. We hence allow these appeals.

I.T.A 87 of 2012 is closed refusing to answer the question of law raised and the other three I.T.A's are allowed answering the questions of law in favour of the assessee and against the revenue setting aside the order under Section 263, for the respective assessment years. Parties to suffer their respective costs.

Sd/-

K. VINOD CHANDRAN

JUDGE

Sd/-

ASHOK MENON

JUDGE

APPENDIX OF ITA NO.84/2012

PETITIONER'S EXHIBITS:

ANNEXURE-A	TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 2001-02 DATED 10/12/2003 U/S.143(3) OF THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 2(2), ERNAKULAM.
ANNEXURE-B	TRUE COPY OF THE ORDER DATED 10/06/2005 ISSUED BY THE COMMISSIONER OF INCOME TAX (APPEALS) TO THE APPELLANT.
ANNEXURE-C	TRUE COPY OF THE ASSESSMENT COMPLETED UNDER SECTION 153A READ WITH SECTION 143(3) DATED 28/12/2007 ISSUED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE 1, ERNAKULAM TO THE APPELLANT.
ANNEXURE-D	TRUE COPY OF THE REPLY DATED 31/01/2009 SENT BY THE APPELLANT'S CHARTERED ACCOUNTANT TO THE COMMISSIONER OF INCOME TAX (CENTRAL) .
ANNEXURE-E	TRUE COPY OF THE ORDER U/S. 263 OF THE INCOME TAX ACT FOR THE YEAR 2001-02 OF THE COMMISSIONER OF INCOME TAX (CENTRAL) DATED 25/03/2009 ISSUED TO THE APPELLANT.
ANNEXURE-F	TRUE COPY OF THE ORDER U/S. 263 OF THE INCOME TAX ACT FOR THE YEAR 2002-03 OF THE COMMISSIONER OF INCOME TAX (CENTRAL) DATED 22/09/2008 ISSUED TO THE APPELLANT.
ANNEXURE-G	TRUE COPY OF THE APPELLANT TRIBUNAL'S ORDER DATED 30/12/2011 ISSUED TO THE APPELLANT.
ANNEXURE-H	A TRUE COPY OF THE NOTICE DATED 17.08.2005 ISSUED BY THE ASSESSING AUTHORITY.
ANNEXURE-I	A TRUE COPY OF THE EXTRACTS OF THE ORDER DATED 31.08.2005.
ANNEXURE-J	A TRUE COPY OF THE ORDER DATED 24.12.2009 PASSED BY THE ASSESSING AUTHORITY.

APPENDIX OF ITA NO.87/2012

PETITIONER'S EXHIBITS:

ANNEXURE-A	TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 2003-04 DATED 27/02/2006 U/S. 143(3) OF THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 2(2) ERNAKULAM TO THE APPELLANT.
ANNEXURE-B	TRUE COPY OF THE ASSESSMENT ORDER DATED 28/12/2007 U/S. 153A READ WITH SEC.143(3) ISSUED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 2(2) ERNAKULAM TO THE APPELLANT.
ANNEXURE-C	TRUE COPY OF THE REPLY DATED 31/01/2009 SENT BY THE APPELLANT'S CHARTERED ACCOUNTANT TO THE COMMISSIONER OF INCOME TAX (CENTRAL) .
ANNEXURE-D	TRUE COPY OF THE ORDER U/S. 263 OF THE INCOME TAX ACT FOR THE YEAR 2002-03 OF THE COMMISSIONER OF INCOME TAX (CENTRAL) DATED 22/09/2008 ISSUED TO THE APPELLANT.
ANNEXURE-E	TRUE COPY OF THE ORDER U/S. 263 OF THE INCOME TAX ACT FOR THE YEAR 2003-04 OF THE COMMISSIONER OF INCOME TAX (CENTRAL) DATED 25/03/2009 ISSUED TO THE APPELLANT.
ANNEXURE-F	TRUE COPY OF THE APPELLATE TRIBUNAL'S ORDER DATED 30/12/2011 ISSUED TO THE APPELLANT.

APPENDIX OF ITA NO.89/2012

PETITIONER'S EXHIBITS:

ANNEXURE-A	TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 2005-06 DATED 28/12/2007 U/S. 143(3) OF THE ASSISTANT COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE 2(2), ERNAKULAM TO THE APPELLANT.
ANNEXURE-B	TRUE COPY OF THE ORDER DATED 03/09/2008 ISSUED BY THE COMMISSIONER OF INCOME TAX (APPEALS) TO THE APPELLANT
ANNEXURE-C	TRUE COPY OF THE REPLY DATED 31/01/2009 SENT BY THE APPELLANT'S CHARTERED ACCOUNTANT TO THE COMMISSIONER OF INCOME TAX (CENTRAL) .
ANNEXURE-D	TRUE COPY OF THE ORDER U/S. 263 OF THE INCOME TAX ACT FOR THE YEAR 2002-03 OF THE COMMISSIONER OF INCOME TAX (CENTRAL) DATED 22/09/2008 ISSUED TO THE APPELLANT.
ANNEXURE-E	TRUE COPY OF THE ORDER U/S. 263 OF THE INCOME TAX ACT FOR THE YEAR 2005-06 OF THE COMMISSIONER OF INCOME TAX (CENTRAL) DATED 25/03/2009 ISSUED TO THE APPELLANT.
ANNEXURE-F	TRUE COPY OF THE APPELLATE TRIBUNAL'S ORDER DATED 30/12/2011 ISSUED TO THE APPELLANT.

APPENDIX OF ITA NO.94/2012

PETITIONER'S EXHIBITS:

ANNEXURE-A	TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 2006-07 DATED 28/12/2007 U/S. 143(3) OF THE ASSISTANT COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE 2(2), ERNAKULAM TO THE APPELLANT.
ANNEXURE-B	TRUE COPY OF THE ORDER DATED 03/09/2008 ISSUED BY THE COMMISSIONER OF INCOME TAX (APPEALS) TO THE APPELLANT.
ANNEXURE-C	TRUE COPY OF THE REPLY DATED 31/01/2009 SENT BY THE APPELLANT'S CHARTERED ACCOUNTANT TO THE COMMISSIONER OF INCOME TAX (CENTRAL) .
ANNEXURE-D	TRUE COPY OF THE ORDER U/S. 263 OF THE INCOME TAX ACT FOR THE YEAR 2002-03 OF THE COMMISSIONER OF INCOME TAX (CENTRAL) DATED 22/09/2008 ISSUED TO THE APPELLANT.
ANNEXURE-E	TRUE COPY OF THE ORDER U/S. 263 OF THE INCOME TAX ACT FOR THE YEAR 2005-06 OF THE COMMISSIONER OF INCOME TAX (CENTRAL) DATED 25/03/2009 ISSUED TO THE APPELLANT.
ANNEXURE-F	TRUE COPY OF THE APPELLATE TRIBUNAL'S ORDER DATED 31/01/2012 ISSUED TO THE APPELLANT.