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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: July 12, 2018

+ W.P.(C) 3162/2014

FINEST PROMOTERS PVT. LTD. & ANR. Petitioners

Through: Mr. Tarun Gulati, Mr. Shashi
Mathews, Ms. Rachana Yadav,
Mr. Ankit Sachdeva, Mr. Anupam
Mishra & Mr. Vasu Nigam, Advs.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Arun Bhardwaj, Adv. for UOI/
R-1.
Mr. Asheesh Jain, Sr. Standing
Counsel for R-3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

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S. RAVINDRA BHAT, J.

1. The petitioner is aggrieved by the withdrawal of approval granted to it, by the first respondent (hereafter "DIPP"), Union Commerce Ministry under the Industrial Park Scheme 2002 (hereafter "the scheme") and Section 80IA of the Income Tax Act; the notification (No. 21/2014) dated 27.03.2014 withdrawing the earlier approval given by another notification (dated 09.02.2007) too stands challenged.

2. The facts of the case are that the petitioner applied under the “non-automatic” procedure outlined in the scheme on 02.03.2006 in the relevant form. Earlier, on 23rd February, as required by local state law (the Punjab Scheduled Road and Controlled Areas Restriction of Unregulated Development Rules 1965 hereafter called “the Punjab Rules”) the petitioner’s architect certified that the building was complete and that it could apply for occupancy certificate. The petitioner with the state authorities and the local body with respect to the building exchanged correspondence; on 10/16 May 2006, in this context the petitioner wrote to the Director of Industries, stating that the building completed by it was ready. It was pointed out that the building was constructed on an area of 24299 square meters of which 4818.3 square meters was earmarked for common areas and that the building was approved by the Senior Town Planner of Haryana (Gurugram). On 4/8 August 2006, the petitioner wrote to the Joint Director, District Industries Centre, submitting details of its constructed area, pointing out that it comprised three basements and measured 14715.55 square meters.

3. On 19/21st August 2006, the Joint Director, District Industries Centre was told that the area specified in the petitioner’s application was calculated on super area basis, which was also the premise on which the units were leased to tenants. It was further stated that such area was arrived at by multiplying in ‘loading factor’ to the actual area based on normal industrial practice. This ‘loading’ was in respect of common area facilities to be used by tenants such as staircase, lobby etc.

4. On 23.08.2006, Joint Director furnished a detailed memorandum to the Director of Industries, Government of Haryana responding to the petitioner's application pointing out that it had taken effective steps to construct the building and also obtained necessary approvals to implement its project. In this letter too, Joint Director pointed out that the total built up area was 14715.55 sq. mtrs. Therefore, the Joint Director recommended the petitioner's request for 'non-automatic' approval as an industrial part. The Director of Industries too recommended by a letter dated 27.09.2006, including his report; itself mentioned the total built up area as 14715.55 sq. mtrs. Subsequently, the Central Government considered proposal in December 2006 and approved it by letter dated 5/18th December 2006. The petitioner's application for exemption under Rule 18C(4), notifying its property as an industrial park under Section 80-IA of the Income Tax Act was later approved on 19.12.2006/09.02.2007. From then onwards, it filed various reports in Form I, IPS II with the DIPP.

5. From time to time, the Office of the DIPP, in its communications kept pointing out various issues with respect to the built up area. In order to clarify and clear the confusion the petitioner applied for amendment of the existing approval on 30.03.2013. Later, it followed up its development by furnishing all relevant details on 10.06.2013. The Empowered Committee of the DIPP met in November 2013 to consider the petitioner's request. In a detailed letter of 06.11.2013, the petitioner pointed out how the variance in the project [from the original contemplated 24299.75 sq. mtrs. to 14715.55 sq. mtrs.] took place and also emphasized that there was no change in the area. Later, detailed written submissions were made. Its complaint is that, in

these background, by the impugned letter/order, the approval given under Section 80-IA(4) was unilaterally withdrawn, without granting any liberty. This notification was preceded by a letter/order which too has been challenged. The relevant part of the letter states, *inter alia*, that the original approval was based upon the petitioner's undertaking that the Industrial Park would be constructed on an area of 24299.75 sq. mtrs. but that on 30.03.2013, it sought approval for amendment stating that the constructed area was reduced to 14715.55 sq. mtrs. The material portion of the said letter/order reads as follows:

"6. As per clause 4 of this Department's approval letter dated 05.12.2006 and clause 11 of the Notification dated 09.02.2007 of the CBDT, the conditions mentioned in the approval and those mentioned in the Industrial Park Scheme, 2002 are to be adhered to during the period when benefits under this scheme are to be availed and in case of failure to comply with any of these conditions, the Government may withdraw the approval.

7. It has however been noticed that the undertaking has not adhered to the conditions laid down in the approval letter as well as in the notification issued by CBDT. In view of this, the approval already granted to the undertaking vide letter of even number dated 05.12.2006 hereby stands withdrawn as there has been violation of the following conditions:

- (i) The undertaking failed to ensure commencement of the Industrial Park by 31.03.2006 which is evident from the Occupation certification dated 20.10.2006 issued by Senior Towner Planner, Gurgaon and as per Clause 47 of Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Rules, 1965 of Act No.41 of 1963, any new building or a part of it*

cannot be occupied until and unless Occupation certificate has been issued for that building or for a part thereof.

- (ii) *Occupation certificate issued by Senior Town Planner, Gurgaon in respect of the Park is for 8094.02 sq. mtrs. (ground floor to fifth floor) plus 2 Mumty, 2 Machine room and 1 water pump room on the terrace, whereas the undertaking at the time of submission of its initial application had declared area of the park as 24299.75 sq. Mtrs., which is a case of false representation.”*

6. Mr. Tarun Gulati, learned counsel urges that the basic premise on which the impugned order was made is erroneous because the DIPP proceeded to consider the request for amendment, without considering the entire record. It was highlighted in this regard that all the reports of the Joint Director and the District Industries Center clearly pointed out that the total built up area of the project was 14715.55 sq. mtrs. These reports were a matter of record, based on which approval was granted and subsequently a notification issued. The withdrawal of the notification therefore was completely baseless and on a misappreciation of all the circumstances. It is pointed out further that the petitioner invested substantial sums of money on the basis of their approval and that neither the approvals of the scheme nor the Income Tax Act or the Rules under which it specifies any minimum constructed area, at any given point of time. It is submitted that in these circumstances, the withdrawal of the notification based upon the impugned order, has resulted in irreversible prejudice.

7. It is submitted that the impugned order and the notification withdrawing the benefit also cited that the completion of the project was not

within the period contemplated but was delayed. It is submitted in this regard, the scheme as well as the Statute permitted a grace period of one year. In the present case, the construction was completed in such extended period. Relying on *M/s. Silverland Developers Pvt. Ltd. V/s. Empowered Committee & Ors.* [W.P. (C) 744/2011], it is urged that the impugned order to the extent it holds that the construction was not completed within time is unsustainable in law.

8. The DIPP in its counter affidavit and its counsel during the course of hearing did not dispute that the letters written by the District Industries Center, Government of Haryana as well as the Joint Director, DIC, Gurgaon, intimating to it about the area had mentioned that the total constructed space was 14715.55 sq. mtrs. It is, however, stated that this was the time when the complete verification of the report had not been carried out. The counter affidavit states that the Empowered Committee noted that the petitioner applied for Occupancy Certificate on 08.05.2006, which was issued on 20.10.2006. It also states that the Deputy Secretary, CBDT informed that the undertaking in the documents furnished to the Income Tax Authorities claimed the area built up to be 8094.02 sq. mtrs. The Occupancy Certificate too mentions 8094.02 sq. mtrs. Having regard to all these facts, and given that the petitioner initially applied and undertook to construct 24299.75 sq. mtrs., the withdrawal of the notification based upon the reasoning in the impugned order cannot be faulted with. It is not denied that the completion of the petitioner's project was within the extended one-year period and that the ruling in *Silverland Developers Pvt. Ltd.* (supra) would apply. It is, however, stated that the DIPP preferred Special Leave Petition against the

judgment of the Bombay High Court in *Silverland Developers Pvt. Ltd.* (supra).

9. It is apparent from the facts stated above that the petitioner's consistent stand is that the DIPP was always made aware of the fact that the built up area was 14715.55 square meter. When it applied for change or amendment, to conform to this fact, in 2013, the DIPP's Empowered Committee formed the opinion that its initial application, on the basis of which the petitioner sought approval for construction of an industrial park with an area of 24299.75 sq. mtrs. and the undertaking which was furnished at that stage, had been breached and that the petitioner in fact constructed a lesser area. The committee felt that the actual area constructed was 8094.02 sq. mtrs., which violated the approval given and the notification dated 07.02.2007. The other ground is that the construction in fact was completed after the period allowed.

10. The detailed letter with the IPS-1 form furnished to the DIPP on 23.02.2006 in this case, discloses that out of the total of 24299.75 sq. mtrs proposed to be area, the land area was 4818.30 square meters; the earmarked commercial area was 1948 square meters and the contemplated industrial allocable area was 17533.45 square meters. Such being the circumstances, when the final approval was communicated, the area apparent from the letter dated 21.07.2006 (No. 1927) issued by the Senior Town Planner (containing floor wise details) disclosed that the building was constructed and approved for 14715.55 square meters. This was communicated to the Director of Industries on 04.08.2006. This area finds repeated mention in all the *inter se* communications of the state department of industries; it was also part of the

record when the case was recommended for approval to the Central Government on 23.08.2006. In these circumstances, the petitioner's explanation that the repeated communications of the DIPP kept mentioning the larger – original application area of 24299.75 sq. mtrs. which impelled it to seek amendment of the notification, is reasonable. Para 8 of the 2002 scheme, under which the notification was initially issued and which was later revoked, clearly states, by the proviso that the "*before withdrawal, the undertaking being industrial park shall be given an opportunity of being heard*". In the present case, there does not appear to have been any prior opportunity; even the written submissions given to the committee was not considered or adverted to. The material facts, such as the approval given by the town planning authorities, the repeated *inter se* correspondence between the Haryana Director of Industries (based on whose recommendation the approval and notification were issued in 2007) and the explanation given by the petitioner were completely ignored. The DIPP just went by a bare comparison of the area in the Original Application (24299.75 sq. mtrs.) and the final built up area (14715.55 square meters). The petitioner's explanation as regards the built up area being the larger super area (for which the leases were entered into) and the actual carpet area being 8094 square meters were ignored altogether. In these circumstances, the impugned order and notification suffers from non application of mind.

11. As far as the other question (i.e. not completing the project before the approved date) is concerned the facts are that the approval was granted (to the petitioner) on 24.07.2006, by the Central Government. The letter stated that the expected date of construction was to be 15.03.2006. In the present

case, the indications, in the form of correspondence with the town planning department and other letters discloses that the construction was complete; the occupancy certificate was awaited as of February, 2006. Para 9 of the scheme (of 2002) reads as follows:

"9. General conditions.-(1) In case the commencing of the Industrial Model Town or Industrial Park or Growth Centre gets delayed by more than 1 year from the date indicated in the application, fresh approval may have to be obtained to get the benefits under the Act. This condition also applies to the existing approvals under the Industrial Park Scheme, which envisages commissioning of the Parks, latest by March 31, 2002.

(2) The tax benefits under the Act can be availed only after the number of units indicated in the application, are located in the industrial park."

In *M/s. Silverland Developers* the Bombay High Court had to deal with a similar situation, where the expected date of construction was 15.03.2006. The court, after noticing the contentions of the parties and Para 9 of the scheme, held as follows:

"21. We find merit in the contention of the Petitioners that if the position which has been adopted by the Empowered Committee were to be accepted, that would result in virtually defeating the salutary public purpose which underlies Section 80-IA (4) (iii). Notice would have to be taken of the fact that infrastructural projects require a considerable amount of investment and a time lag is involved in the completion of the project. The view of the Empowered Committee is that Para 9 of the Scheme would apply to a delay in a project beyond one year but that the delayed date of completion should not

in any event fall beyond 31 March 2006. If this were to be accepted as the correct interpretation, that will denude the benefit of Section 80-IA to project where approvals were granted a few months before 31 March 2006 and the completion date spills over beyond that date. There is no indication either in the statute or in the scheme that Parliament or its delegate intended to deprive the assessee of the benefit of Section 80-IA (4) (iii). Para 9 of the Scheme would in fact indicate an intent not to deprive the benefit of Section 80-IA (4) (iii) save and except that if the commencement of the project is delayed beyond one year a fresh approval would have to be obtained to get the benefits under the Act.”

12. It is clear therefore, that in the absence of any stipulation as to the minimum requirement of industrial park under the scheme as well as under the Income Tax Act, the unreasoned order of DIPP (ignoring the record and overlooking the material explanation of the petitioner with respect to the area constructed, the super area in fact leased and that there was no suppression of facts anytime) withdrawing the earlier notification cannot survive. As regards the other ground, i.e. non-construction beyond the scheme, the court notices that the approval was in fact issued after the date mentioned by the DIPP. Following the reasoning in *Silverland* (supra) of the Bombay High Court, that reason cannot survive.

13. In view of the above reasons, the impugned order and notification, withdrawing the earlier notification (of 2007) is hereby quashed. The second respondent shall consider all the materials on the record and after granting proper opportunity of hearing to the petitioner, and in the light of the above discussion, issue a reasoned order, dealing with all contentions. The fresh

order shall be restricted to the question of constructed area and whether there was any material suppression, having regard to the position of the scheme and the Income Tax Act, especially that in the absence of any stipulation in either of them regarding minimum constructed area qualifying for benefit of the scheme. The writ petition is allowed in these terms without order on costs.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JULY 12, 2018



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