

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.3724 OF 2010

Commissioner of Income Tax, Central II,
R.No.414,Ayakar Bhavan, M.K.Road,
Mumbai-400020.

...Appellant.

Vs.

M/s.Sheth Developers (P) Ltd.
11,Vora Palace, M.G.Road,
Next to Dena bank, Kandivali(W),
Mumbai-400 067.
Pan AAACS9943H.

...Respondent.

Mr. Vimal Gupta with Ms. Padma Divakar for the Appellant.
Mr. Percy Pardiwalla, Sr.Counsel with Mr.Atul Jasani for the
Respondent.

CORAM : S. J. VAZIFDAR &
M.S.SANKLECHA, JJ.
DATE : 27TH JULY, 2012

JUDGMENT (PER M.S.SANKLECHA, J.) :

This appeal by the revenue under Section 260A of the
Income Tax Act, 1961 (hereinafter referred to as the "said Act")
challenges the order dated 12/10/2009 of the Income Tax Appellate
Tribunal (hereinafter referred to as the said Tribunal) relating to
assessment for the block period 1/4/1995 to 21/2/2002.

2 The appellant has formulated the following questions of law for consideration of this court.

- 1) Whether on the facts and circumstances of the case and in law the Tribunal was justified in holding that deductions u/s.80IB (10) has to be allowed from the income computed as undisclosed income u/s. 69A of the Income Tax Act,1961?
- 2) Whether on the facts and circumstances of the case and in law the Tribunal was justified in allowing the claim of deduction u/s.80IB(10) where no such claim is made by the assessee in the return of income for the block period?
- 3) The appeal is admitted on Question (1) and (2).
- 4) At the instance of the Advocates for the appellant and the respondent the appeal is taken up for final disposal.
- 5) So far as Question (2) is concerned, it is an admitted position between the parties that the same stands covered in favour of the respondent-assessee and against the appellant revenue by virtue of the order of this court in **Income Tax Appeal No.3908 of 2010 between Commissioner of Income Tax V. Pruthvi Brokers and Shareholders private Limited dated 21/6/2012**. In the above case it has been held that a fresh claim could be urged before the Appellate authorities even if the claim was not made in the return of income filed

before the Assessing officer,

6) The facts relevant for the purpose of question (1) are briefly as under:

a) The respondent-assessee carries on business as builders in Mumbai and Thane. On 21/2/2002, the Income Tax Department carried out search operation under Section 132 of the said Act covering the residential and business premises belonging to the respondent-assessee's group. During the course of the search proceedings the respondent's Director declared the undisclosed income of the group at Rs.7.00 crores for the block period. However, in the return filed for the block period 1/4/1995 to 21/1/2002, the respondent showed its undisclosed income at Rs.3.50 crores. The Assessing officer while assessing the respondent for the block period by order dated 30/4/2004 computed the undisclosed income for the block period at Rs.7.68 crores.

b) In appeal before the Commissioner of Income Tax (Appeals) (hereinafter referred to as the "CIT(A)") the respondent contended that the undisclosed income was declared at Rs.7.00 crores only because at the time of making the statement the Director of respondent was unaware that deduction under Section 80IB would be available in respect of respondent's housing projects. The CIT(A) by order dated 17/8/2004 found on facts that the respondent was entitled to benefit of Section 80IB of the said Act. Further, CIT(A) held that in terms of clause (a) of the

explanation to Section 158(BB)(1) of the said Act provides that undisclosed income for the block period is to be computed after applying the relevant provisions of the said Act. This would include the provisions of Chapter VIA of the said Act. Section 80IB is a part of Chapter VIA of the said Act. On examination of the evidence the CIT(A) held that the respondent was entitled to the benefit of Section 80IB of the said Act and directed the Assessing officer to recompute the tax payable for the block period 1/4/1995 to 21/2/2002 under Section 158BB of the said Act after giving the benefit of Section 80IB of the said Act.

c) On appeal by the revenue the Tribunal by order dated 12/10/2009 upheld the order of the CIT(A). On merits, the Tribunal held that the benefit of deduction under Section 80IB of the said Act would be available in respect of undisclosed income which is being offered to tax for block period under Chapter XIVB of the said Act in view of retrospective amendment to the explanation to sub section (1) of Section 158BB of the said Act. The Tribunal relied upon the decision of the Madras High Court in the matter of ANBU Textiles Vs. Assistant Commissioner of Income Tax reported in 262 ITR Page 684.

7) Mr. Vimal Gupta, counsel for the appellant submits that the order of the Tribunal is unsustainable as benefit of the deduction under Chapter VIA of the Act cannot be extended to an assessee who has not originally disclosed his income but seeks its benefit while filing a block return under Chapter XIV B of the said Act subsequent to the

search under the said Act. In support of the above reliance was placed upon the decision of the Gujrat High Court in the matter of Fakir Mohmed Haji Hasan V. Commissioner of Income Tax [2001] 247 ITR Page 290. In the above case unexplained gold valued at Rs.48.72 lacs found in possession of the party was added to the party's income under Section 69, 69A, 69B and 69C of the Act. As the unexplained gold was confiscated the assessee sought a deduction on account of confiscation of gold as a loss. The Court held that such undisclosed /unexplained amounts did not fall under the head of profits and gains of business or profession and therefore, no deduction is available. On the basis of the above decision, it is the contention of Mr. Gupta that no deduction under Section 80IB of the said Act can be made available to the respondent while computing the tax payable under Chapter XIVB of the said Act for the block period 1/4/1995 to 21/2/2002.

8) As against the above, Mr. Pardiwala, Senior Counsel for the respondent states that the decision of the Gujrat High Court in the matter of Fakir Mohmed Haji Hasan (supra) is inapplicable to the present facts. In the present facts no question of application of Section 68,69 and 69A 69B and 69C of the said Act arises as the same has not been invoked by the appellant- revenue. Further the amount of undisclosed income was neither in the nature of unexplained investment nor unexplained money, expenses or investment which were not fully disclosed. It is an admitted position between the parties as reflected even in the order the Assessing officer that undisclosed income was in fact received by the respondent in the course of carrying on its business activities as a builder. The same was returned by the respondent as income arising from profits and gains of business or

profession and the same was accepted by the department. It was further submitted that the Tribunal was correct in holding that in view of the retrospective amendment to the Explanation to Section 158BB(1) of the said Act, the deduction under Section 80IB of the said Act (which is admittedly a part of Chapter VIB of the said Act) is to be allowed for determining the undisclosed income under Chapter XIVB of the said Act.

9) Before considering the rival submissions, it would be convenient to reproduce the amended Explanation to sub section (1) of Section 158BB of the said Act which reads as under:

“Explanation- For the purposes of determination of undisclosed income-

(a) the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of [this Act] without giving effect to set off brought forward losses under Chapter-VI or unabsorbed depreciation under sub-section (2) of Section 32;

[Provided that in computing deductions under Chapter VI-A for the purposes of the said aggregation, effect shall be given to set off of brought forward losses under Chapter VI or unabsorbed depreciation under sub-section (2) of section 32;]”

It would be pertinent to note that the words “this Act” in parenthesis were substituted by the Finance Act of 2002 with retrospective effect from 1/7/1975. Prior to the above amendment the words were “Chapter IV”. Further the proviso was also added to the explanation by the Finance Act 2002.

10 Chapter XIVB of the said Act provides for special procedure for assessment of search cases and is contained in Section 158B to Section 158BI of the said Act. Further, this chapter applies only in cases of search initiated before 31/5/2003. In this case, the search took place in 2002 and therefore, the present case is governed by Chapter XIVB of the said Act. Section 158BB of Chapter XIVB of the Act deals with computation of undisclosed income of the block period. The above explanation to sub section (1) of Section 158BB of the Act was amended by the Finance Act, 2002 with retrospective effect from 1/7/1995. Prior to the amendment, according to the explanation the total income or loss was to be computed in accordance with Chapter IV of the said Act. Consequent to the amendment by Finance Act, 2002 with retrospective effect from 1/7/1995 the total income or loss has to be computed in accordance with the provisions of this Act i.e. the said Act. Consequently, with effect from 1/7/1995 the total income/loss for the block period has to be computed in accordance with the provisions of the said Act and the same would include Chapter VI-A of the said Act. Section 80IB of the said Act is a part of Chapter VIA of the Act. In view of the above, while computing the undisclosed income for the block period the respondent-assessee is entitled to claim deduction from its income under Section 80IB of the Act. In fact, to the same effect is the decision of the Madras High Court in the matter of ANBU

Textiles (supra).

11) The further case of the appellant-revenue that in view of section 69A of the said Act the benefit of deduction under Chapter VIA of the said Act would not be available to the respondent-assessee is not well founded. In the present facts it is not the case of the revenue that the money found in possession of the respondent assessee could not be explained and/or its source could not be explained to the satisfaction of the Assessing Officer. In the present case undisclosed income found in the form of cash was explained as having been acquired while carrying on business as a builder and this explanation was accepted by the Assessing officer by having assessed the undisclosed income for the block period as income from profits and gains of business or profession. Therefore, the reliance by the revenue upon the decision of the Gujrat High Court in the matter of Fakir Mohmed Haji Hasan (supra) is not correct as the facts of that case are completely distinguishable from the present facts. In the present case, no question of application of section 68,69 and 69A, 69B and 69C of the said Act arises as the same has not been invoked by the Department. It is an admitted position between the parties as reflected even in the order the Assessing officer that undisclosed income was in fact received by the respondent in the course of carrying out its business activities as a builder. The same was returned by the respondent as income arising from profits and gains of business or profession and the same was accepted by the department unlike in the matter of Fakir Mohmad Haji Hasan (supra) .

12) In view of the above the order dated 12/10/2009 of the

Tribunal cannot be faulted. Therefore, question (1) above is answered in the affirmative in favour of the respondent- assessee and against the appellant-revenue. Question (2) is answered in the affirmative in favour of the respondent- assessee and against the appellant-revenue.

The appeal is, therefore, dismissed. No order as to costs.

(M.S.SANKLECHA,J.)

(S.J. VAZIFDAR, J.)