

(2012) 02 KAR CK 0022

In the Karnataka High Court

Case No : Income Tax A. No. 355 of 2009

Commissioner of Income Tax and Another

APPELLANT

Vs

G.R. Developers

RESPONDENT

Date of Decision : 29-02-2012

Acts Referred:

Citation : (2013) 353 ITR 1

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : K.V. Aravind, for the Appellant; S.R. Anuradha, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—The assessee is carrying on the business in real estate, development construction and sale of apartments. The assessee obtained approval for building housing project in an area of 1 acre 14 guntas of land in Kanakapura Road. The approved housing project included construction of commercial building. The assessee has built 84 apartments. The commercial building was also constructed within the super built up area of 17,600 sq. ft. The approval of project was granted on June 14, 2002. The construction had to be completed on or before June 14, 2006. The assessee claimed 100 per cent. exemption from payment of income tax in respect of the residential flats. A survey u/s 133A of the income tax Act, 1961 (for short hereinafter referred to as "the Act") was carried out on November 24, 2005, to verify whether the assessee-firm satisfied all the conditions laid down under the provisions of section 80-IB(10) of the Act. In the course of survey. It was noticed that the construction of the residential flats at G.R. Grand Residency and the commercial complex in the said complex was undertaken with many deviations from the sanctioned plan and that the assessee-firm had contravened the provisions of section 80-IB(10) of the Act. The said deviations are set out. Further, it was noticed that the sanctioned plan provided for 84 units and a swimming pool was at the centre, open to sky but as per the actual construction, one of the units

was replaced by the swimming pool resulting in 83 units, as certified by the principal architect of the assessee, Shri K.V. Harsha Babu, on January 6, 2006. It was also noticed that the project called G.R. Grand Residency also contains some flats with pent houses on the third floor. In the said pent houses, a room was constructed on the terrace, which was called as head rooms. It was noticed that these head rooms were constructed in similar design with spiral staircases with the same type of materials, designs and colours. It was further found that these constructions were constructed with the help of the engineers of the assessee with the materials supplied by such purchasers and payments were made separately in addition to the costs of the flat as per the sale deed. The total built up area of many top floor flats with head rooms far exceeds the limit of 1,500 sq. ft. The said head rooms were the integral part of the housing project. The assessee contended that as the construction of the head rooms were made by the purchasers, the said construction cannot be taken into account to find out whether the each unit is within the limit of 1,500 sq. ft. Similarly, the space occupied by the balcony also should be excluded as per the National Building Code, as it does not fall within the definition of built up area. If these two things are excluded all the 84 flats would be within the 1,500 sq. ft., and, therefore, the assessee is entitled to the benefit u/s 80-IB. However, the assessee did not claim the benefit in respect of the commercial construction. The Assessing Officer held that as all these head rooms is so unique in style and design with spiral staircase and exactly the same material with the same colour, if the purchaser has constructed the same, such a similarity would not have been there. Therefore, he recorded a finding that the assessee has constructed these head rooms though in the registered sale deed it is not a part of it. The assessing authority held that there are considerable deviations and violations in the construction of the housing project compared to the sanctioned plan and several flats with the built up area far in excess of 1,500 sq. ft. and the housing project cannot strictly come within the purview of a housing project as envisaged in section 80-IB(10) and, therefore, the assessee is not entitled to the benefit of section 80-IB(10) of the Act. Aggrieved by the said order, the assessee preferred an appeal to the Appellate Commissioner, who upheld the said order. Aggrieved by the same, the assessee preferred an appeal before the Tribunal. The Tribunal by setting aside the aforesaid orders held that the material on record does not establish the fact that several flats were built up in an excess area of 1,500 sq. ft. to deny the legitimate claim of the assessee. The municipal authorities have not pointed out the alleged excess built up area of such flats while giving the occupancy certificate. Merely because these head rooms were identical, no inference could be drawn that the said construction is put up by the assessee. The purchasers of the said flats would have engaged the same masons and the engineer who were working with the assessee for the construction of the said flats. When once the occupation certificate is issued by the municipal authorities being satisfied with the construction put up and held that the same is in accordance with the sanctioned plan and, thereafter, if construction are put up by the owners of the building, the assessee cannot be held responsible. The provision of section 80-

IB(14)(a) cannot be interpreted with retrospective effect so as to deny the benefit of section 80-IB(10) to the assessee. It was further held that a housing project approved by a local authority may include a commercial building also and, therefore, the conditions prescribed u/s 80-IB(10) is satisfied and the assessee is entitled to the benefit and, therefore, the appeal was allowed granting benefit to the assessee. Aggrieved by the said order, the Revenue is in appeal. This appeal was admitted on December 14, 2010, to consider the following substantial questions of law:

(i) Whether the Tribunal was correct in holding that the Assessing Officer had failed to prove that the residential flats exceeded built up area of 1,500 sq. feet each and pent house flats and other flats which were specially built contrary to the sanctioned plan was built by the assessee or by the owners had not been proved by the Assessing Officer by shifting the burden when allowing the deduction u/s 80-IB(10) of the Act?

(ii) Whether the Tribunal was correct in holding that the definition of "built-up area" inserted by the Finance (No. 2) Act of 2004, with effect from April 1, 2005, to section 80-IB(14) of the Act cannot be applicable to the current assessment year as the same is not clarificatory and would have to be read prospectively?

(iii) Whether the Tribunal was correct in holding that the housing project over which deduction u/s 80-IB(10) of the Act was claimed was entitled to the same despite a commercial complex also been constructed and wrongly applying the Board Circular?

(iv) Whether the Tribunal was correct in allowing the deduction u/s 80-IB(10) of the Act when the same was to encourage infrastructure development of middle income housing projects recognizing the acute shortage of housing facilities in bigger cities and second tier cities so that the tax benefit should be passed on to the consumer when the assessee violated the norms prescribed in the section and the sanctioned plan by availing of the benefit not entitled of it?

First substantial question of law

2. From the aforesaid material, it is clear that the assessee obtained approval for building housing project on June 14, 2002, and has built 84 flats in an area, which is in excess of one acre of land. The construction is completed within the period stipulated. 84 flats, according to the assessee, is within the 1,500 sq. ft. The material on record discloses that a head-room is constructed. The head room is not included in the sale deed. The local authority, after construction of the building, inspected the same and has granted the occupancy certificate. Therefore, the construction put up by the assessee prima facie can be said to be as per the sanctioned plan. If after issue of the occupancy certificate and after sale of these residential flats, if the owners of these flats on the top floor decided to put up a head room and engaged the very same contractor and the engineer may have put up the identical structures, it cannot be said that the assessee has put up the said construction and, thus, contravened the requirement of section

80-IB. The material on record does not disclose that the assessee put up the said construction prior to the sale of those flats and excluded the said construction in the sale deed with an intention of getting the benefit of section 80-IB(10).

(a) In so far as balconies are concerned, prior to April 1, 2005, the area covered by them has to be excluded in calculating the built up area. As the housing project was approved on June 14, 2002, and in the said plan, all these balconies are shown and excluding those balconies, the construction put up is admittedly less than 1,500 sq. ft. After April 1, 2005, the authorities cannot add the balcony area to the built up area and deny the benefit to the assessee. Therefore, as the material on record discloses that all the 84 or 83 flats constructed are less than the 1,500 sq. ft., the assessee cannot be denied the benefit and taxed on the ground that it exceeds 1,500 sq. ft. Hence, this question of law is answered in favour of the assessee and against the Revenue.

Second substantial question of law

3. The question is whether the definition of "built up area" as inserted by the Finance (No. 2) Act of 2004 with effect from April 1, 2005, is prospective or retrospective in nature. The said provision reads as under:

80-IB(14). For the purpose of this section,--

(a) "built-up area" means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units.

4. Prior to the insertion of this definition in the aforesaid section, built-up area did not include projections and balconies as per the National Building Code, Building Industry Practice and also according to the Building bylaws. Probably taking advantage of this fact, the builders provided these balconies and projections which made these residential units bigger than 1,500 sq. ft. and thus, had the benefit of this provision on the one hand. Whereas the object with which this provision was made in reality was defeated as probably such residential units would be beyond the reach of the common man.

5. It is in this background, this amendment was brought to law by way of insertion making it clear that the said projection and balconies constitute common area shared with other residential units and they have to be included in the definition of built up area and then such premises should satisfy the requirement of 1,500 sq. ft. Therefore, notwithstanding the law governing the construction of the building for the purpose of getting a benefit under the Act, they have to bring the construction within the requirement prescribed under this Act. Then only, they would be entitled to the benefit of tax exemption u/s 80-IB. Normally, when an amendment is effected by way of insertion, the effect is that the earlier section which is substituted by this section is wiped out and in its place, this substituted section is inserted, as if the said section was in the statute

book from the day, the enactment was passed. Therefore, it is retrospective in nature. But it is not an invariable rule.

6. Except adding the said provision by way of insertion, the Legislature has not made the said provision retrospective by any express words. On the contrary, on the day this provision was inserted, they have also substituted the main provision by way of insertion. The said substituted provision of sub-section (10) of section 80-IB reads as under:

The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008, by a local authority shall be hundred per cent. of the profits derived in the previous year relevant to any assessment year from such housing project if,--

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998, and completes such construction,--

(i) in a case where a housing project has been approved by the local authority before the 1st day of April, 2004, on or before the 31st day of March, 2008;

(ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1st day of April, 2004, but not later than the 31st day of March, 2005, within four years from the end of the financial year in which the housing project is approved by the local authority;

(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five years from the end of the financial year in which the housing project is approved by the local authority.

Explanation.--For the purposes of this clause,--

(i) in a case where the approval in respect of the housing project is obtained more than one, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority;

(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority;

(b) the project is on the size of a plot of land which has a minimum area of one acre:

Provided that nothing contained in clause (a) or clause (b) shall apply to a housing project carried out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf;

(c) the residential unit has a maximum built-up area of one thousand square feet

where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place;

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed three per cent. of the aggregate built-up area of the housing project or five thousand square feet, whichever is higher;

(e) not more than one residential unit in the housing project is allotted to any person not being an individual, and

(f) in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely:--

(i) the individual or the spouse or the minor children of such individual,

(ii) the Hindu undivided family in which such individual is the karta,

(iii) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta.

Explanation.--For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State Government).

6(a). Whereas the section which was on the statute book earlier read as under:

(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005, by a local authority, shall be hundred per cent. of the profits derived in any previous year relevant to any assessment year from such housing project if,--

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998;

(b) The project is on the size of a plot of land which has a minimum area of one acre; and

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place.

7. From the aforesaid provision, it is clear that the first condition to be satisfied for application of this provision is that the housing project requires to be approved by a local authority. Before an approval is sought for, the assessee has to get the plan prepared. If the assessee wants to have the benefit of the aforesaid section, notwithstanding the law contained in the building bylaws, the said plan also should be in conformity with the aforesaid provision under the Act.

After preparing g the plan, obtaining approval, he has to commence the construction and complete it within the period stipulated in the said provision. In the substituted provision, the Legislature has consciously bifurcated such construction of housing project into three cases. The first case deals with the approval obtained by the local authority before the 1st day of April, 2004; in the second case, after the 1st day of April, 2004, and before the 31st day of March, 2005, and in the third case, approvals obtained after the 1st day of April 2005.

8. In respect of approvals obtained prior to April 1, 2005, if sub-section (14) (a) of section 80-IB is held to be applicable, then, the assessee has to necessarily seek for a modified plan. Otherwise, if he proceeds with the construction without obtaining the sanction of the modified plan, he would not be eligible for benefit of tax exemption u/s 80-IB(10). Similarly, if a valid approval is obtained and the building is constructed in all respects prior to April 1, 2005, and if the said substituted provision is held to be applicable retrospectively, the assessee would not be entitled to the benefit of tax exemption, if he effects sales subsequent to April 1, 2005. Such an interpretation not only would be absurd but have disastrous consequences so far as the assessee is concerned. Therefore, it cannot be said that, that was the intention of the Legislature while bringing in the substitution. So we should keep in mind the object behind enacting this provision, namely, to bring in investments and to encourage the infrastructure development of middle income housing projects. If the aforesaid provision is held to be retrospective in nature, it would negate the object of the said provision. It is settled law that the courts have to harmonize these provisions and interpret the same in a manner to achieve the object of the Legislature than to distress the said object. In that view of the matter, the definition of built up area, as inserted in sub-section (14)(a) of section 80-IB by the Finance (No. 2) Act of 2004, which came into effect from April 1, 2005, cannot be held to be retrospective. It applies only to such housing projects, which are approved subsequent to April 1, 2005. In that view of the matter, the assessee, in the instant case, is entitled to the benefit of the aforesaid provision and, hence, the said substantial question of law is answered in favour of the assessee and against the Revenue.

Third and fourth substantial questions of law

9. The question is whether a housing project includes a commercial complex. In other words, if in the housing projects approved by the local authority, a commercial complex is also constructed, does it cease to be a housing project so as to disentitle the assessee from the benefit of section 80-IB(10) of the Act.

10. The first condition to be satisfied for application of the said provision is that which applies to a case of an undertaking developing and building housing projects approved by a local authority. In the instant case, what is approved is a housing project. The said housing project consists of a building where 84 residential units are constructed and a commercial building measuring about 17,600 sq. ft. of built up area is constructed. The total area covered by these

constructions is about 1 acre 14 guntas. In other words, the residential building is constructed in an area comprised in one acre of land. As there is 14 guntas of land in excess of the prescribed limit, the assessee has utilised the said land for the purpose of constructing a commercial complex also. When a housing project is constructed; it is meant for families living there. Normally, these constructions are taken up either in the outskirts of the city or far away from the city. Naturally, these residents do need to purchase the basic requirements. If such a basic requirement are available where they reside probably they living in such residential apartments would be more meaningful. At the same time, such a commercial construction cannot be constructed within one acre of land, which is the minimum prescribed for attracting this provision at the cost of residential flats. If such an interpretation is placed, it would defeat the very object of the Act. But at the same time, probably experience has showed that under the guise of putting up a residential housing project and claiming benefits as in this case, a commercial building measuring about 17,600 sq. ft. is constructed which works out roughly to 9.3 per cent. of the total land. In that context, the Legislature wanted to clarify the position and prevent such abuses in future. Therefore, prior to April 1, 2005, there was no such prohibition. For the first time by way of amendment, they have introduced clause (d) of sub-section (10) of section 80-IB, which reads as under:

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed three per cent. of the aggregate built-up area of the housing project or five thousand square feet, whichever is higher.

11. This provision makes it clear that a housing project includes shops and commercial establishments also. But from the day, the said provision was inserted, they wanted to limit the built-up area of shops and establishment to 5 per cent. of the aggregate built-up area or 2,000 sq. ft., whichever is less. But the experience shows that the commercial space would not meet the requirements of the residents. Therefore, in the year 2010, it was further amended to the effect that it should not exceed 3 per cent. of the aggregate built-up area of the housing project or 5,000 sq. ft., whichever is higher. Therefore, from this definition, it is clear that the housing project contemplated under sub-section (10) of section 80-IB includes commercial establishments or shops also. Now, by way of an amendment, an attempt is made to restrict the size of the said shops or commercial establishments. Therefore, necessarily the said provision also has to be read prospectively and not retrospectively. As is clear from the amendment, this provision came into effect only from the day the provision was substituted. Therefore, it cannot be retrospective. In that view of the matter, the interpretation placed by the assessing authority as well as the Appellate Commissioner, that the approval is for a housing-cum-commercial complex and, therefore, the assessee is not entitled to the benefit of section 80-IB(10) is unwarranted. Therefore, the third and fourth substantial questions of law are answered in favour of the assessee and against the Revenue. For the aforesaid reasons, the substantial questions of law being answered in favour of

the assessee and against the Revenue, the appeal is dismissed.