
(2014) 11 BOM CK 0136

In the Bombay High Court

Case No : Income Tax Appeals Nos. 1627, 1628 of 2012 and 3, 62, 1603 and 1757 of 2013

Commissioner of Income Tax

APPELLANT

Vs

Hermes Developers

RESPONDENT

Date of Decision : 27-11-2014

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 147, 260A, 80-IB, 80-IB(10)

Citation : (2015) 274 CTR 113 : (2015) 370 ITR 38

Hon'ble Judges : S.C. Dharmadhikari, J;A.K. Menon, J

Bench : Division Bench

Advocate : P.C. Chhotaray, Advocates for the Appellant; Nishit Gandhi, instructed by Rajesh Shah and Co, Advocates for the Respondent

Judgement

A.K. Menon, J.—By this common judgment we dispose of the six appeals filed under section 260A of the Income-tax Act, 1961. For the sake of convenience, we will deal with the facts in Income Tax Appeal No. 3 of 2013. The common question of law that has been proposed in Income Tax Appeals Nos. 3 of 2013, 62 of 2013, 1627 of 2012 and 1628 of 2012 is as under:

"Whether, on the facts and in the circumstances of the case, the hon''ble Tribunal was right in law in holding that the assessee is eligible for deduction under section 80-IB(10) for the assessment year 2006-07 relying on the decision of the hon''ble Bombay High Court in the case of CIT v. Vandana Properties in ITA No. 3633 of 2009 and 4361 of 2010 dated March 28, 2012, since reported in Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) and the special leave petition has been filed before the hon''ble Supreme Court which is pending?"

In Income Tax Appeals Nos. 1603 of 2013 and 1757 of 2013 two identical questions of law are proposed, although as worded, they can be distinguished from the common question in Income Tax Appeals Nos. 3 of 2013, 62 of 2013, 1627 of 2012 and 1628 of 2013. The two questions are as under:

"(i) Whether, on the facts and in the circumstances of the case and in law, the hon"ble Tribunal is justified in holding that the assessee is entitled to the deduction under section 80-IB(10) when the area of plot on which the following project is constructed is less than 1 acre?

(ii) Whether, on the facts and in the circumstances of the case and in law, the hon"ble Tribunal is justified in holding that the assessee is entitled to the deduction under section 80-IB(10), when the area of the flat constructed is more than 1,500 sq. ft.?"

This judgment will deal with all the questions in all the above appeals.

2. Vide order under section 147, read with section 143(3), dated December 16, 2010, the Assessing Officer held that the assessee has furnished the particulars of income and, hence, his gross total income under section 143(3) is Rs. 1,33,12,423 and disallowed the deduction under section 80-IB(10) of the Income-tax Act. The Assessing Officer held that the claim for deduction under section 80-IB(10) pertains to residential units in the project, which the Assessing Officer found, was not satisfying the upper limit of 1,500 sq. ft. as the Assessing Officer found that one unit was with one kitchen, one entrance, one electric meter and single family ownership though it was the contention of the assessee"s representative that two units have been merged together to form a single unit at the request of purchasers.

3. The Commissioner of Income-tax (Appeals) found that the appellant had not fulfilled the condition of clause (b) of section 80-IB(10) and was not entitled for deduction under section 80-IB(10). According to the Commissioner of Income-tax (Appeals), the project is on the plot of land which has a minimum area of one acre. The assessee then preferred the appeal before the Income-tax Appellate Tribunal. By the order dated May 4, 2010, it allowed the appeals. The Tribunal concluded that the flat area is less than 1,500 sq. ft. and, therefore, the assessee was eligible for deduction under section 80-IB(10). The Tribunal negated the Departmental representative"s contention the agreement indicates super built-up area of more than 1,500 sq. ft. cannot be accepted as super built-up area includes common areas, stair cases and also balcony. The Tribunal concluded that the concept of super built-up area cannot be equated with the built-up area as per the regulations which refers to only to carpet area excluding the balcony and the terrace. Moreover, it is found by the Commissioner of Income-tax (Appeals) has held in favour of the assessee in the assessment years 2003-04 and 2004-05 on the same blocks and this was not disputed by the Revenue. Accordingly, it was held that there is no dispute with reference to the area of flats less than 1,500 sq. ft. in block E-5 and I. The "project" as whole was found to have been standing on more than one acre area and the apartments constructed therein are within 1,500 sq. ft. In this manner the appeal was allowed. Being aggrieved by the said decision the Department has preferred this appeal raising the aforesaid question/s.

4. Mr. Chhotaray, learned counsel for the appellant, submitted that the Tribunal should have remanded the matter for reconsideration instead of allowing the appeal. Mr. Chhotaray placed reliance on the judgment of this court in the case of CIT v. Vandana Properties in Income Tax Appeal Nos. 3633 of 2009 and 4621 of 2010 since reported in Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) and stated that the Tribunal's order was incorrect. In fact a special leave petition had been filed and is pending before the hon"ble Supreme Court. Mr. Chhotaray, therefore, submitted that the question be framed as aforesaid and the impugned order dated May 4, 2012, passed by the Tribunal be set aside. Mr. Gandhi, learned counsel for the respondent, submitted that he supported the order of the Tribunal stressing on the fact that in the case of assessment years 2003-04 and 2004-05 the Revenue had not raised any objection for deduction claimed under section 80-IB(10). Thus, on the factual aspects the Tribunal, as the last fact finding authority, has found that the project complied with the provisions of section 80-IB(10) and held that the project was compliant with clause (b) as well although the Assessing Officer had held otherwise.

5. Having considered the facts of the case, we find that the issue in these appeals relates only to section 80-IB(10)(b) and(c). Various amendments have been made to section 80-IB(10) by the Finance Act 2003-04 which are as follows:

"By the Finance Act, 2003, further amendments were made to section 80-IB(10) and they 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.""

As can be seen from the aforesaid provision, now the only changes that were brought about were that with effect from 1st April, 2002, (i) the housing project had to be approved before March 31, 2005, and (ii) there was no time limit prescribed for completion of the said project. Though these changes were brought about by the Finance Act, 2003, the Legislature thought it fit that these changes be deemed to have been brought into effect from April 1, 2002. All the remaining provisions of section 80-IB(10) remained unchanged.

6. Thereafter, by the Finance (No. 2) Act, 2004, with effect from April 1, 2005,

section 80-IB(10) was substituted and substantial changes were effected in the newly substituted sub-section (10) of section 80-IB. It reads thus:

"(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2007, 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, within four 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 once, 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 city 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; and

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

(emphasis supplied)

7. Furthermore, as the Tribunal has correctly observed the concept of 8 "super

built-up" area is used by builders to get higher price and the super built-up area includes common area of the stair-case and the balcony area. Since the super built-up area cannot be equated with built-up area it cannot be stated in the instant case that the area of the flat is more than 1,500 sq. ft.

8. There is no doubt that it is the housing project and it does not include any commercial premises. Built-up area is also defined in section 80-IB(14)(a) to read as follows:

""built-up area" means inner measurement of the residential units at the floor level, including the projections and balconies, increased by thickness of walls but not include the common area shared with other residential units."

9. The words "including projections and balconies" were inserted with effect from April 1, 2005, by the Finance Act of 2004. The question whether the definition of built-up area with effect from April 1, 2005, was prospective or retrospective in nature has been considered by this court in Income Tax Appeal No. 3315 of 2010 between CIT v. Tinnwala Industries which holds that this definition which has been brought on the statute book with effect from April 1, 2005, would not apply to such projects which are completed prior to April 1, 2005. There are no distinguishing features brought on record which calls for any interference. The Tribunal view is a well reasoned and cannot be said to be perverse. Mr. Chhotaray's submission that the matter should be sent back to the Tribunal has no merit. In the present set of facts, even if the definition of built-up area is considered it makes no difference to the assessee's case. In the circumstances we answer the question raised in the present batch of appeals in the affirmative that is in favour of the assessee and against the Revenue. As far as differently worded questions in Income Tax Appeal Nos. 1603 of 2013 and 1757 of 2013 are concerned, there is no doubt that the area of entire project is more than one acre and the area of flat is within limit of 1,500 sq. ft. as has been observed by the Tribunal which is last fact finding authority. In the circumstances those questions are also answered in favour of the assessee and against the Revenue.