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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.462 OF 2013

The Commissioner of Income Tax—II, Pune ..Appellant.
V/s.
M/s. Baba Promoters & Developers ..Respondent.

Mr.Vimal Gupta, Senior Advocate with Mr.Sham Walve i/b. Mr.Vipal A. Bajpayee for the appellant.
Mr.Mihir Naniwadekar for the respondent.

CORAM : S.C.DHARMADHIKARI AND A.K. MENON, JJ.

DATED : 17TH MARCH, 2015

P.C. :-

1. This appeal of the revenue challenges the order passed by the Income Tax Appellate Tribunal Bench at Pune dated 29th February, 2012 (Annexure-E).

2. The assessment year in question is 2004-05. The assessee, a partnership firm working as a developer filed return of income on 31st October, 2004 declaring Nil income. The assessee had undertaken development and construction of residential project at Pune. The assessment was completed under section 143(3) of the Income Tax Act, 1961 on 14th November, 2006, after allowing deduction claimed under section 80IB(10) of the I.T. Act of ₹47,95,506/-.

3. The Commissioner of Income Tax-II, Pune, upon perusal of this order was of the view that the same is erroneous and prejudicial to the interest of the revenue. He, therefore, passed an order under section 263 of the I.T. Act on 27th February, 2009. The assessing officer gave effect to the directions of the Commissioner and disallowed the deduction under section 80IB(10) of the Act to the extent of ₹47,95,506/-. That order of the assessing officer is dated 29th December, 2009.

4. Thus, aggrieved by the aforesaid order, appeal was preferred by the assessee which came to be allowed.

5. Mr.Vimal Gupta, learned senior counsel appearing for the revenue in support of the appeal submits that the Tribunal's order in setting aside the order of the Commissioner is erroneous. The Commissioner was properly satisfied that the order passed by the assessing officer is erroneous and prejudicial to the interest of revenue. The Commissioner has elaborated as to how the assessing officer has not applied his mind to a very crucial issue. In that regard, our attention is invited to para 1.2 of the Commissioner's order. The

Commissioner found that it was urged before the assessing officer that though the area of the plot was shown at 3995.34 sq. mtrs., the area of an internal approach road was not included. A separate agreement dated 20th February, 2004 was made with the same landlords for an area of 5 Are so as to have a right of approach road for the project. This right was given to the assessee without any consideration and the same was also not registered. Even the location of 5 Are of land is not identified in the said agreement. In such circumstances. He rightly concluded that the assessing officer was in complete error in relying upon this agreement. If the agreement is kept out of consideration, then, all the requirements of the section and particularly the deduction or claim is not satisfied. Thus, it was a case of incorrect application of law by the assessing officer and that is how the Commissioner proceeded to exercise his powers. Mr.Gupta also invited our attention to the findings recorded by the Commissioner particularly in paragraphs 5.1, 5.2 and 6. He, therefore, submits that the law laid down in the case of **Malabar Industrial Co. Ltd. V/s. Commissioner of Income Tax** reported in (**2000) 243 ITR 83,** does not apply.

6. On the other hand, Mr.Naniwadekar in support of

the order of the Tribunal submits that in the subsequent decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax V/s. Max India Ltd.** reported in **[2007] 295 ITR (SC) 282** wherein it has been clarified how if two views are possible, an order under section 263 of the I.T. Act cannot be sustained. Mr.Naniwadekar relied upon paragraphs 11 and 12 of the order of the Tribunal in this regard. Mr.Naniwadekar, therefore, submits that the appeal does not raise any substantial question of law and it should be dismissed.

7. With the assistance of Mr.Gupta and Mr.Naniwadekar, we have perused the relevant part of the order of the Commissioner and the Tribunal. We have also perused both the judgments of the Hon'ble Supreme Court. We have also perused section 263 of the I.T. Act.

8. The Tribunal has concluded that the assessing officer before the final assessment and allowing the deductions had verified the correctness of the claim of the assessee, which also included his personal visit to the site. The Commissioner could not have termed this order as erroneous and prejudicial to the interest of the revenue. It is

not a case of mis-application of law or non application of mind. The Tribunal has concluded that the assessee had offered an explanation that the plan was approved by the Pune Municipal Corporation on the condition of making available an approach road. There was a separate agreement dated 20th March, 2004 under which 5 Are of land was acquired for the road and it is the only road available for ingress and outgress to the land. In the circumstances and with this stand that the assessee was supported by the Tribunal's order, then, we do not see as to how the Commissioner could have exercised powers under section 263 of the I.T. Act. It was not open to the Commissioner then to have taken into consideration the same documents and to arrive at a different conclusion. The Tribunal has explained in paragraphs 11 & 12 of the impugned order that the view of the Tribunal in the case of Radhe Developers & Ors V/s. ITO (Ahmedabad Bench) and that of the Chennai Bench would denote as to how the issue raised before the Commissioner and prior thereto before the assessing officer is debatable. If there was a view on the issue taken by the Tribunal itself, then, the Commissioner cannot invoke powers under section 263 of the I.T. Act only to record a different view.

9. We are of the opinion that such finding of the Tribunal and being consistent is not required to be gone into under section 260A of the I.T. Act as it is clear that the orders of the assessing officer and the Commissioner, do not raise any substantial question of law. The Tribunal had before it the view and opinion of the assessing officer and that of the Commissioner. The Tribunal has applied its mind to the entire issue and found that the assessee had placed necessary and requisite material before the assessing officer. The assessing officer took a view on the basis of these materials and that view cannot be questioned in an exercise under section 263 of the I.T. Act only because the Commissioner does not agree with the same. We are of the opinion that neither is there any perversity in the order of the Tribunal on this issue nor its conclusion can said to be vitiated by any error of law apparent on the face of the record. In the circumstances and by applying the ratio of the different decisions of the Supreme Court, we proceed to dismiss this appeal. There will be no order as to costs.

(A.K. MENON, J.) **(S.C.DHARMADHIKARI, J.)**