

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.01.2015

Coram

The Honourable Mr.JUSTICE R.SUDHAKAR
and
The Honourable Mr.JUSTICE R.KARUPPIAH

Tax Case (Appeal) No.139 of 2009

The Commissioner of Income Tax
Chennai.

..... Appellant

Vs.

Shri.Subba Reddy (HUF)
"Sukriti"19/1, 3rd Cross Street,
R.A.Puram, Chennai - 600 028.

..... Respondent

APPEAL under Section 260-A of the Income Tax Act against the order dated 28.03.2008 made in I.T.A.No.1230/Mds/2007 on the file of the Income Tax Appellate Tribunal, 'A' Bench for the assessment year 2004-05 and against the order dated 22.02.2007 made in ITA No.113/06-07 on the file of the Commissioner of Income Tax appeals-I, Chennai 34, and against the order dt. 18.12.2006 made in 203-S/AACHC 2523G on the file of the Assistant Commissioner of I.T Central Circle IV(3), 108, MG Road, Chennai-34.

For Appellant : Mr.T.Ravikumar
Standing Counsel for Income Tax

For Respondent : Mr.S.Sridhar

J U D G M E N T

(Judgment of the Court was delivered by R.SUDHAKAR,J.)

This Tax Case (Appeal) has been filed by the Revenue as against the order of the Income Tax Appellate Tribunal relating to the assessment year 2004-05. At the time of admission, the following substantial questions of law were admitted by this Court for consideration:

"1. Whether on the facts and circumstances of the case, the Tribunal was right in holding that as the provision is violated only on the 7th floor of the building, proportionate deduction under Section 80-IB (10) is to be allowed?

2. Whether on the facts and circumstances of the case, the Tribunal was right in granting partial exemption where one of the conditions of granting exemption is that the residential units should be less than 1500 sq.ft.?"

2. In the course of the hearing before this Court, learned Standing Counsel appearing for the Revenue sought permission to reframe the questions of law, since the questions admitted by this Court did not project the issues fully. Hence, after hearing the learned counsel appearing for the assessee, who had no serious objection for re-framing the questions, the following substantial questions of law, as reframed, arise for consideration:

"1. Whether on the facts and circumstances of the case, the Tribunal was right in allowing the benefit of claim under Section 80IB(10) when the assessee is not a developer, but only a builder, when the eligibility to deduction under Section 80IB(10) is conferred for developing and building housing projects?

2. Whether on the facts and circumstances of the case, the Tribunal was right in holding that car park area could not be taken as built up area of the residential unit for the purpose of computing deduction under Section 80IB(10)?"

3. The assessee, who is a promoter, has claimed deduction under Section 80IB(10) of the Income Tax Act on the housing project, which was denied by the Assessing Officer on two counts, viz., (i) the assessee had not developed the flats and (ii) out of 66 flats constructed, the 'built-up area' of 25 flats exceeded the prescribed maximum limit of 1500 sq.ft., if we include the car park area of 220 sq.ft. sold to these 25 flat owners. The reasoning of the Assessing Officer reads as follows:

"It is obvious that the ground floor has been exclusively constructed to accommodate the cars. The car park is allotted to the buyer of flat with a clear demarcation of the location and a specification of dimension. The value of the car park is fixed for each flat and is paid for. The right to car parks has been conveyed through proper deeds. The use of car park is for the exclusive purposes of the buyer of flat. The car park is not meant for others use. The car park is covered on the top and on one or two of its sides. For these reasons the car parks of this project are taken as built up area. Since builtup area of half of the flats have exceeded the stipulated extent of 1500 sq.ft., the assessee loses his eligibility to claim deduction u/s 80IB(10) on this score also. The spirit of the section is to encourage housing projects for the low and middle income group of the

population. The section has specified the builtup area as one of the scales to judge the eligibility of the project for the deduction. When the assessee fails the test the whole of the project loses its eligibility. There is no scope for proportionate allowance of deduction."

4. On appeal by the assessee, the Commissioner of Income Tax (Appeals) following the earlier order dated 21.2.2007 in ITA No.115/06-07 allowed deduction under Section 80IB(10) holding that provisions of Section 80IB(10) do not warrant the ownership of land. With regard to the issue on car park area, the Commissioner of Income Tax (Appeals) held that there is no definition for the term 'common area' in the Income Tax Act. Further, relying on the definition found in TN Apartment Ownership Act, which states that 'car park area' has to be treated as common area, the Commissioner of Income Tax (Appeals) held that car park area should not be held as private area. Accordingly, the Commissioner of Income Tax (Appeals) held that the assessee had not come under any of the disqualification prescribed under Section 80IB(10) of the Income Tax Act and allowed deduction under Section 80IB(10) of the Income Tax Act.

5. On the appeal filed by the Revenue before the Tribunal, the Tribunal confirmed the findings of the Commissioner of Income Tax (Appeals). Aggrieved by the same, the Revenue is before this Court.

6. As far as the first substantial question of law is concerned, both the learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee submitted that first question of law is covered by a decision of this Court dated 02.11.2012 in T.C.(A)Nos.137 and 138 of 2009, wherein, the Division Bench of this Court following the earlier decision of this Court dated 19.10.2012 in T.C.Nos.581 and 1186 of 2008 and 136 of 2009 held that for the purpose of claiming deduction, it is not necessary that the assessee, who is engaged in the business of developing and construction of housing project, should be the owner of the land.

7. Accordingly, following the above-said decision, the first substantial question of law is answered against the Revenue and in favour of the assessee.

8. With regard to the second substantial question of law that whether the built-up area of the residential unit is inclusive of car park area, learned Standing Counsel appearing for the Revenue submitted that the assessee had allotted the car park to the buyer of flat with a clear demarcation of the location and a specification of dimension. He further submitted that the use of car park is the exclusive purposes of the buyer of the flat and hence, the car park should not be treated as common area. As per Section 80IB(10) of the Income Tax Act, when the residential unit has exceeded the maximum built-up area of 1500 sq.ft., then the entire project will not be

eligible for exemption under Section 80IB(10). In the present case, the built-up area exceeds 1500 sq.ft. as per the specification given by the assessee. He also submitted that for the assessment year in question, 2004-05, there is no definition for 'built-up area'. Only with effect from 01.04.2005, the definition for the term 'built-up' area was inserted under Section 80IB(14)(a) of the Income Tax Act. Hence, the Tribunal is not justified in allowing deduction relying on the definition under Section 80IB(14)(a), which is applicable from the assessment year 2005-06.

9. Learned counsel appearing for the assessee submitted that when there is no definition for the term 'built-up area' for the assessment year in question, the Commissioner of Income Tax (Appeals) relied on the definition for the term 'common area and facilities' defined in the Tamil Nadu Apartment Ownership Act, 1994. The said Act was notified in the Tamil Nadu Government Gazette (Extraordinary) dated 24th April, 1995. He further submitted that even though Section 80IB(14)(a) of the Income Tax Act defining the term 'built-up area' is not available for the assessment year in question, when at the time of deciding the issue the definition is available, the Tribunal is justified in relying on the definition of the term 'built-up area' provided under Section 80IB(14)(a) of the Income Tax Act.

10. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

11. Before going into the merits of the case, it is necessary to look into the relevant provisions, viz., 80IB(10) and the definition for the term 'built - up area' under Section 80IB(14)(a) of the Income Tax Act, which read as follows:

"Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.

80-IB (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.

.....
.....

80 IB (14) For the purposes 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"

12. It is seen that car park has been separately shown in the agreement and according to the assessee, the same does not form part of the residential unit for the purpose of determining the maximum built-up area, in view of the definition for the term 'built-up area' came into effect from 01.04.2005. The Commissioner of Income Tax (Appeals) relied upon the provisions of the Tamil Nadu Apartment Ownership Act, 1994, wherein Section 3(h) defines the term 'common areas and facilities' in which clause 3 states that the basements, cellars, yards, gardens, parking areas and storage spaces are common

areas. Hence, following the said provision, the Commissioner of Income Tax (Appeals) allowed deduction.

13. In the absence of any specific definition for the term 'built-up area' during the relevant period, the reasoning of the Commissioner of Income Tax (Appeals), which was confirmed by the Tribunal is justified. Nevertheless, we find that Section 80IB(10) of the Income Tax Act speaks about the residential unit having a maximum built-up area of 1500 sq.ft. to claim deduction. Even in the definition under Section 80IB(14)(a), which came into effect from 01.04.2005, "built-up area" was defined as inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls, meaning thereby, the actual residential portion of the property. It, however, clearly states that it will not include common area shared with other residential units. Hence, the definition under Section 80IB(14)(a), could, at best, throw some light as to how the built-up area of the residential unit should be computed for the purpose of determining deduction under Section 80IB(10) of the Income Tax Act.

14. From a reading of the above-said provisions, we find that there is no justification in including the car park in the definition of the built-up area of the residential unit for the purpose of determining the maximum built-up area. In such view of the matter, we are inclined to accept the reasoning of the Commissioner of Income Tax (Appeals) drawing support from the Tamil Nadu Apartment Ownership Act, 1994, which was confirmed by the Tribunal. Accordingly, the second substantial question of law is answered against the Revenue and in favour of the assessee.

15. In the light of the above-said discussion, we reject the Revenue's appeal on all the grounds and hold that the Tribunal had rightly granted the relief to the assessee.

In the result, this Tax Case (Appeal) stands dismissed. No costs.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

To

1. The Income Tax Appellate Tribunal, 'A' Bench.

2. The Commissioner of Income Tax (Appeals) I, Chennai- 600 034.

3. The Assistant Commissioner of Income Tax,
Central Circle IV(3), Chennai - 34.

4. The Commissioner of Income Tax, Chennai.

+ 1 cc to Mr.S. Sridhar, Advocate SR.4024

+ 1 cc to Mr.T. Ravikumar, Advocate Sr.3855

T.C.(A) No.139 of 2009

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