IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2016

CORAM

THE HONBLE MR.JUSTICE V.RAMASUBRAMANIAN
and
THE HON'BLE MR.JUSTICE N.KIRUBAKARAN

Tax Case Appeal No.96 of 2008

Ravi Appasamy	..	Appellant

Vs.

The Assistant Commissioner of Income Tax Circle II 108, Uthamar Gandhi Salai Nungambakkam Chennai 600 034.	..	Respondent

-----

Appeal under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai Bench "C" dated 17.08.2007 in ITA No.3196/MDS/2004.

For Appellant	:	Mrs.Anita Sumanth
For Respondent	:	Mr.T.Ravi Kumar Standing Counsel

JUDGMENT

(Delivered by V.Ramasubramanian,J.)

The above tax case appeal was admitted on 05.02.2008, on the following substantial questions of law:

"(1) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal is right in law in holding that the appellant is not entitled to relief under section 80 IB of the Income Tax Act, in respect of the project in question and the income derived therefrom?

(2) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that the development and construction of the project has commenced prior to 01.10.1998 and consequently the claim under section 80 IB of the Act is not tenable?

(3) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal is right in law in coming to the aforesaid conclusion, without taking into account the various documents, evidence and submissions placed before the Tribunal?

(4) Whether on the facts and in the circumstances of the case, the order of the Income Tax Appellate Tribunal is not vitiated by an error apparent on the face of the record, in so far as it has, without applying its mind to the facts and assumption of erroneous facts, concluded that the development and construction have taken place prior to 01.10.1998?

(5) Whether on the facts and in the circumstances of the case the interpretation given by the Income Tax Appellate Tribunal to the expression 'development and construction' contained in section 80 IB of the Income Tax Act is correct and whether the Tribunal is right in law in concluding that the development and construction has taken place before 01.10.1998?"

2. Heard Dr.Anita Sumanth, learned counsel for the appellant and Mr.T.Ravi Kumar, learned Standing Counsel for the Revenue.

3. The assessee filed a return of income for the assessment year 2001-02 on 30.10.2001 admitting a particular amount of total income. The case was selected for scrutiny and a notice under Section 143(2) was issued on 28.10.2002.

4. It was found that while computing the income of the assessee from business, the assessee had claimed a deduction to the extent of Rs.7,27,37,876/-, but restricted the same to a lesser amount, under Section 80IB(10). The assesssee was called upon to substantiate the claim with necessary evidence.

4. After going through the agreement the assessee had entered into for the purchase of the land at No.20, Inner Ring Road, Koyambedu, on 25.9.1993, for the purpose of development, the Assessing Officer thought that the main issue that he was called upon to determine was whether the assessee had commenced development and construction of the housing project on or after 01.10.1998. The case of the assessee was that the development and construction work commenced on 15.10.1998.

5. The Assessing Officer passed an order dated 31.3.2004 holding that

even the pre-construction work which would fall within the definition of the term "development", should be taken to be part of the work of construction and that therefore, the assessee's claim for deduction under Section 80IB(10) should be disallowed.

6. Aggrieved by the order of assessment, the assessee filed a statutory appeal before the Commissioner of Income Tax (Appeals). The Commissioner, by an order dated 20.9.2004, allowed the appeal, after holding on facts that the assessee actually commenced construction only on 15.10.1998. In paragraph 5.6 of his order, the CIT (Appeals) recorded the timeline of events as follows:

"5.6. In the background of the above discussion, it is to be examined whether the appellant fulfills the conditions enumerated u/s.80IB(10) or not. For the sake of convenience the various events which have been taken place in chronological order are enumerated below:-

(i)	*Signing of agreement for purchase of land with owners*	*25.09.1993*
(ii)	*Digging of Borewell*	*19.10.1996*
(iii)	*Construction of compound wall*	*14.09.1996*
(iv)	*Appointment of Architect along with initial advance*	*07.01.1997*
(v)	*Submission of plans to statutory authorities for plan approval for construction of Ground +9 Floors and ....*	*22.07.1996*
(vi)	*Rejection of approval by statutory authorities*	*21.11.1996*
(vii)	*Filing of writ petition with Hon'ble High Court of Madras*	*November 1996*
(viii)	*Order received from the Hon'ble High Court of Madras directing the statutory*	

	authorities to reconsider their decision	*17.12.1997*
(ix)	*Submission of revised plan for construction of Ground +10 floors to statutory authorities for plan approval and payment of fees*	*24.12.1997*
(x)	*Clearance from various statutory authorities - Police Department*	*10.02.1998*
	Airport Authority	*12.03.1998*
(xi)	*Approval received from CMDA for Ground +10 floors*	*04.08.1998*
(xii)	*Commencement of construction at site*	*15.10.1998*
(xiii)	*Final approval from Chennai Corporation*	*05.07.1999*

Admittedly, the construction started only on 15.10.98 which is after 1.10.98. Therefore, the appellant fulfills this condition. The Assessing Officer had also not disputed this fact. Therefore, the only issue to be decided is whether or not the appellant commenced "development of the project" before 1.10.98. In case, the appellant commenced the "development of the project" before 1.10.98, the appellant would not be entitled for deduction u/s.80IB(10). In case, it is found that the appellant commenced the "development of the project" after 1.10.98, the appellant would be entitled for deduction u/s.80IB(10) since the appellant would then be fulfilling all the conditions. Therefore, essentially it boils down to finding out at what point of time, the appellant can be said to have commenced the "development of the project". As stated earlier, for "development" to take place, "the project" has to be in existence. Therefore, it is necessary to find out when "the Project"came into existence."

7. Aggrieved by the order of the CIT (Appeals), the Department filed a second appeal in ITA No.3196/Mds/2004 before the ITAT, Chennai. The ITAT

allowed the appeal of the Revenue, by an order dated 17.8.2007, holding that the assessee should be deemed to have commenced the work of development and construction, from the time even when the preliminary works started. Therefore, the assessee is on appeal before us.

8. Before we get into the rival contentions, it is necessary to take note of the relevant part of Sub-section (10) of Section 80IB. It reads as follows:

> *"(10) 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,-*
>
> *.... "*

9. Therefore, the pre-condition for the application of the benefit of deduction under Section 80IB(10) is that the assessee should have commenced or commences development and construction of the housing project on or after the 1st day of October 1998 and completed it before a particular date. The date of completion is not of relevance to the case on hand as the focus in this case is only on the date of commencement of development and construction of the housing project.

10. From paragraph 5.6 of the order of the CIT (Appeals), which we have extracted above, it is seen that the Commissioner (Appeals) recorded a finding of fact to the effect that the commencement of construction at site was on 15.10.1998. The CIT (Appeals) went one step further in paragraph 5.6 of his order pointing out that the Assessing Officer had not disputed the said fact. What was disputed by the Assessing Officer before the CIT (Appeals) was whether the assessee had commenced "development of the project before 01.10.1998" or not.

11. In other words, the Assessing Officer never disputed the date of commencement of construction of the housing project to be 15.10.1998. All that the Assessing Officer argued before the CIT (Appeals) was that the date on which the development of the project commenced, should be the date relevant for the purpose of application of the benefit under Section 80IB(10).

12. But, what the Tribunal did, after holding in paragraph 11 of its decision that the expression "development and construction at site" should be given the ordinary meaning without any extraneous aid, was that it took into account the definition of the expression "development" appearing in Section 2(13) of the Tamil Nadu Town and Country Planning Act, 1971. In other words, the Tribunal held that the very fact that the development of the project had commenced, was sufficient to hold that even the construction had commenced earlier.

13. But, we do not think that the said view of the Tribunal is legally correct. As rightly held in paragraph 11 of its order of the Tribunal, there is no need for any extraneous aid for construction when the language of the statute is plain. But, after having taken such a correct view on the scope of statutory interpretation, the Tribunal faulted by taking an extraneous aid for the definition of the expression "development" from the Tamil Nadu Town and Country Planning Act, 1971.

14. The second mistake committed by the Tribunal is that the requirement under Section 80IB(10) is a twin requirement. It speaks both about development and construction of the housing project. The conjunction between development and construction, by the use of the word "and", cannot be made a dead letter, by applying the definition of the expression "development" to the phrase "development and construction". Development cannot be the same as development and construction. This twin requirement under 80IB(10) has been omitted to be taken note of.

15. From the finding recorded by the Tribunal in paragraphs 8 to 10 of its order, it is clear that certain expenses incurred by the assessee in removing the hut dwellers, digging of bore well, getting electricity connection, putting up compound walls and security cabins, etc. have all been taken by the Tribunal to be part of construction activity. If the Tribunal was of the

concrete opinion that all these activities would constitute an activity of construction, the Tribunal ought to have first disallowed the findings recorded by CIT (Appeals) that the actual date of commencement of construction was 15.10.1998. But, unfortunately, the Tribunal agreed in paragraph 14 of its order that the actual date of commencement of construction was 15.10.1998. However, the Tribunal held that all pre-construction activities should be taken to be part of development, so as to pre-pone the date of development and construction. This, in our considered view, is not the correct interpretation to be offered to the composite expression "development and construction"of the housing project.

In view of the above, the appeal is allowed and the questions of law are answered in favour of the assessee. No costs. Consequently, M.P.No.1 of 2008 is closed.

Index : Yes/No (V.R.S.J.) (N.K.K.J.)
Internet : Yes/No 01.02.2016

kpl

V.RAMASUBRAMANIAN,J,
and
N.KIRUBAKARAN,J.

kpl

TCA No.96 of 2008.

01.02.2016.