IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1837 OF 2014
WITH
INCOME TAX APPEAL NO. 1865 OF 2014

The Commissioner of Income Tax-III
Pune .. Appellant
v/s.
M/s. Sanand Properties Pvt. Ltd. .. Respondent

Mr. Tejveer Singh for the appellant
Mr. J.D. Mistri, Senior Counsel a/w Mr. B.V. Jhaveri and Abhishek Tilak for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

DATED : 24th MARCH, 2017.

P.C.

1. Not on board. Upon mentioning, taken up for hearing at the request of both parties along with Income Tax Appeal No.1865 of 2014, which is on board.

2. Both the Appeals under Section 260-A of the Income Tax Act, 1961 (the Act) challenge the common order dated 21st March, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order is in respect of Assessment Years 2008-09 and 2009-10.

3. The Revenue urges the following common identical questions of law for our consideration :-

> *(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in holding that 35% share received by assessee company (SPPL) was not in nature of overriding title to the revenue generated by the AOP but only share of profit of SPPL in the AOP?*

4. The respondent assessee is a member of Association of Partners (AOP). This AOP being assessed to tax in the name and style of M/s. Fortaleza Developers (AOP). It consists of two members one being M/s. Raviraj Kothari and Co. and the other being the respondent assessee. For the subject assessment years, M/s. Fortaleza Developers (AOP) had offered to tax its income on the account of construction of a housing project and claimed benefit of deduction under Section 80IB(10) of the Act. However, the Revenue disputed the benefit of the deduction claimed under Section 80IB(10) of the Act to the extent of the profits paid to respondent assessee as not being its share of profits. In appeal, the Tribunal by order dated 13th September, 2013 allowed the appeal of M/s. Fortaleza Developers (AOP) for the subject assessment years. This was by following its order dated 12th October, 2012 on identical issue for A.Y. 2007-08 passed after consideration of clause 7 of the Agreement dated 29th April, 2003 constituting M/s. Fortaleza Developers (AOP). It held that the amount paid to the

respondent assessee was its profits in M/s. Fortaleza Developers (AOP).

5. Being aggrieved, the Revenue preferred appeals to this Court from the order of the Tribunal dated 13th September, 2013 passed in the case of M/s. Fortaleza Developers (AOP), being Income Tax Appeal Nos. 635 of 2014 and 641 of 2014 for the subject assessment years. This Court by an order dated 3rd October, 2016 dismissed both the Revenue's appeals for the subject assessment years being Income Tax Appeal Nos. 635 of 2014 and 641 of 2014 by following its earlier order dated 9th April, 2015 in Income Tax Appeal No.1041 of 2013 in respect of Assessment Year 2007-08.

6. In the meantime, pending the aforesaid proceedings, the respondent assessee had offered 35% of its profit received from M/s. Fortaleza Developers (AOP) as its share of profits for the subject Assessment Years. However, claimed no liability to tax in view of Section 86 r/w Section 67A of the Act. However, the Assessing Officer disallowed the same on the ground that the share of 35% received by the respondent assessee from M/s. Fortaleza Developers (AOP) was consideration for surrender / transfer of development rights in the plot of land and not its share of profits.

7. Being aggrieved, the respondent assessee carried the issue in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. The CIT(A) refused to interfere with the order of the Assessing Officer and dismissed the respondent assessee's appeal.

8. Being aggrieved, the respondent assessee carried the issue in second appeal to the Tribunal. By the impugned order, the Tribunal allowed the respondent assessee's appeal *inter alia* placing reliance upon its order dated 13th September, 2013 passed in respect of the subject assessment years in the case of M/s. Fortaleza Developers (AOP). In the above case, this very issue viz the nature / character of 35% share of gross sale proceeds received by the respondent assessee was held to be on account of profits made by M/s. Fortaleza Developers (AOP). As pointed out above, the Tribunal in the above order dated 13th September, 2013 in M/s. Fortaleza Developers (AOP) concluded that the appropriate interpretation of clause 7 of the Agreement dated 29th April, 2003 would be that the respondent assessee received 35% of the profit made by M/s. Fortaleza Developers (AOP). The Revenue's appeals from the above order of the Tribunal dated 13th September, 2013 in the case of M/s. Fortaleza Developers (AOP) for the subject assessment years being Income Tax Appeal Nos. 635 of 2014 and 641 of

2014 were dismissed by this Court on 3rd October, 2016. Following the finding of fact arrived at by the Tribunal in the case of M/s. Fortaleza Developers (AOP) for the subject assessment years that there was no surrender of development rights by the respondent assessee to it and that respondent assessee herein received only its share of profits would hold good even in the present appeal. This is so as the finding of fact and the interpretation of clause 7 of the Agreement dated 29th April, 2003 will not change depending upon the assessee concerned. In fact, the High Court in its order dated 3rd October, 2016 placed reliance upon its earlier order dated 9th April, 2015 in appeal filed by the Revenue from the order of the Tribunal for Assessment Year 2007-08 in respect of M/s. Fortaleza Developers (AOP), which was dismissed by this Court on 9th April, 2015.

9. Thus, in the above facts, the question as proposed being already decided in case of M/s. Fortaleza Developers (AOP) by this Court, does not give rise to any substantial question of law. Thus, not entertained.

10. Accordingly, both the appeals are dismissed. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**