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

INCOME TAX APPEAL NO.1038 OF 2016

The Pr. Commissioner of Income Tax-III, Thane. … Appellant

V/s.

Shri Mukesh Kimtani … Respondent

Mr.Tejveer Singh for the Appellant.
Mr.Mihir Naniwadekar with Mr.Ruturaj Gurjar for the Respondent.

CORAM : AKIL KURESHI AND
B.P.COLABAWALLA, JJ.
DATE : JANUARY 08, 2019.

P.C.:-

1. Revenue has filed this appeal against the judgment of Income Tax Appellate Tribunal ("Tribunal" for short) dated 18th March, 2015, raising following questions for our consideration:

> "i) Whether on the facts and circumstances of the case and in law, the ITAT has erred in quashing the order u/s 263 of the Income Tax Act, 1961 when clear facts were brought on record and the same could not rebutted by the assessee at any state of the proceedings?
> ii) Whether on the facts and circumstances of the case and in law, the ITAT has erred in overlooking a crucial fact that the area of plot

> sanctioned for the project was less than one (1) Acre i.e. 4048 sq.meter, which is a strict requirement of Section 80IB (10(b))?"

2. Brief facts are as under:-

Respondent-assessee is an individual and was engaged in housing development project. For the assessment year 2005-06, the assessee had claimed deduction under Section 80IB(10) of the Income Tax Act, 1961 in relation to income arising out of such housing project. During the course of assessment one of the issues examined by the Assessing Officer was whether the assessee fulfilled all necessary conditions for claiming such deduction, in particular whether the plot of land on which the housing project was being developed had minimum area of 1 acre. The Assessing Officer issued a show cause notice to the assessee and asked for an explanation why the claim should not be rejected since the land revenue records suggested that the area of a land was less than 4050 sq. meters (i.e. approximately 1 acre). The assessee pointed out that there were errors in the revenue records which were later on rectified by virtue of which the land area was shown to be 4050 sq. meters. The

Assessing Officer however noticed that though the area of land was stated to be 4050 sq. meters, part of it would be occupied for road widening and similar such other purposes leaving only a net of 3192 sq. meters of land available for development. The assessee in this context had argued that even after the shrinkage in the plot size, the Floor Space Index ("FSI" for short) available for development remained the same. In other words, the total construction that the assessee could put up on the land in question, did not get reduced. The assessee therefore, argued that not the actual area of the land in question, but the area on the basis of which permission for construction and development permission could be applied and granted should be considered for the purpose of ascertaining whether the relevant condition of minimum plot area is satisfied or not.

3. The Assessing Officer framed assessment under Section 143(3) of the Act and granted the deduction under Section 80IB(10) of the Act as claimed by the assessee on the ground that the order of the assessment was erroneous and prejudicial to the interest of the revenue, the Commissioner took the order

in revision in exercise of powers under Section 263 of the Act. He was of the opinion that the Assessing Officer had not carried out proper inquiries and granted benefit of deduction without fulfillment of conditions. The assessee approached the Tribunal. Tribunal by the impugned judgment allowed the appeal and set aside the revisional order of the Commissioner. The Tribunal noted that the Assessing Officer had carried out the detailed inquiries about the satisfaction of the relevant condition. This was not a case where a claim was granted by the Assessing Officer without inquiry. The Tribunal noted that the stand of the assessee in this regard was supported by the decisions of the Tribunal on the same point. Inter alia on such grounds the appeal was allowed upon which the revenue has filed the present appeal.

4. The materials on record would clearly suggest that the Assessing Officer was conscious of the requirement of the area of the plot of land being not less than 1 acre. In this context, he had issued show cause notice to the assessee and called for his explanation. As noted, the assessee's explanation was two-fold.

Firstly, there was errors in the land documents which was corrected later on and second that the reduction in the area of land for road widening and such other public purposes should be ignored, in view of the fact that the assessee was allowed to utilize the full FSI. The assessing Officer accepted such explanations and granted the reduction. The view that the Assessing Officer adopted was at that time supported by the decisions of the Tribunal. The Assessing Officer having taken a plausible view, as is well settled to series of judgments of various High Courts and Supreme Court, the Commissioner could not have exercised Revisional power. While dismissing the appeal we however make it clear that we express no final opinion on the legal issue which the Commissioner desired to raise in the present case. Tax Appeal is dismissed accordingly.

(B.P.COLABAWALLA,J.) **(AKIL KURESHI,J.)**

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