IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.01.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE DR.JUSTICE ANITA SUMANTH

Tax Case Appeal No.1901 of 2008

The Commissioner of Income Tax
Tamil Nadu VIII, Madras .. Appellant

Vs.

M/s. Arun Excello
Bhattad Towers
18, West Cott Road
Royapettah
Chennai 600 014 .. Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal "A" Bench, Chennai, dated 06.5.2008 passed in ITA No.1874/Mds/2007.

For Appellant : Mr.T.Ravi Kumar
Senior Standing Counsel

For Respondent : Mr.R.Sivaraman

J U D G M E N T
(Delivered by **Dr.Vineet Kothari,J**)

The Revenue has filed this appeal under Section 260A of the Act by raising the following substantial questions of law, after the order of the

Income Tax Appellate Tribunal dated 06.5.2008 for the assessment year 2001-02 holding that the assessee was entitled to the benefit of deduction under Section 80IB(10) of the Act.

2. Section 80IB(10) allows a deduction of 100% to an undertaking developing and building housing projects approved before the 31st March 2007, provided such undertaking has commenced or commences development and construction of the housing project on or after 1st day of October 1998.

3. In the present case, the Commissioner of Income Tax (Appeals) as well as the Tribunal found that the assessee had undertaken the housing project known as "Jai Hind" and the sequences to the event of undertaking the said housing project has been re-produced in paragraph 8 of the order of the Commissioner of Income Tax (Appeals), wherein it is stated that the date of approval of the said project by the local authority was given on 30th September 1998, just one day prior to the cut off date given under Section 80IB(10) of the Act. The date of Joint Venture Agreement that the land owner entered into, was of course prior to the cut off date, namely on 11.7.1997. But, the project was said to be commenced on 05.10.1998, after the approval of the project was done on 30.9.1998.

4. The Tribunal in paragraph 6 of its order, has found that the

assessee had only incurred expenditure like making advances for the purchase of land, levelling of land, plan related expenditure, etc., prior to 01.10.1998, and therefore, no construction was possible prior to approval of the said plan by the competent public authority, namely CMDA, which was accorded only on 30th September 1998. Paragraph 6 of the Tribunal order is quoted below for ready reference.

> *"From the facts and material on record it appears that the assessee did not commence any construction activity before 1.10.98. It had only incurred expenditure like making advance for purchase of land, levelling of land, plan related expenditure etc. In our opinion, no construction was possible prior to the approval granted by the CMDA. This approval was accorded on 30.9.1998 only. Thereafter it was communicated to the assessee. The closing work-in-progress was Rs.1,27,50,868/- for the assessment year 1998-99 relating to the project called 'Arun'. In relation to 'Jai Hind' project assessee did pay only a sum of Rs.5,08,000/- towards advance for the land."*

5. The appeal was admitted by coordinate bench of this Court on 28.11.2008 on the following substantial questions of law:

> *"Whether on the facts and in the circumstances, the Income Tax Appellate Tribunal was right in law in allowing the deduction under Section 80IB of the Income Tax Act, even though the assessee commenced or commences development and constructions of the Housing Project prior to 01.10.1998?"*

6. The learned counsel for the Revenue, Mr.Ravikumar has urged before us that since some portion of expenditure for development of the said construction project was incurred by the assessee prior to the cut off date, the development work had started prior to the cut off date and therefore, the assessee was not entitled to the said benefit of deduction under Section 80IB(10) of the Act.

7. Per contra, the learned counsel for the assessee has submitted that the finding of facts arrived at by the Appellate Authorities that the project in question could not have been commenced without the due and proper sanction by the public authority, which was in fact given to the assessee only on 30th September 1998 and therefore, the project in question cannot be said to have been commenced prior to the cut off date of 01.10.1998. The expenditure incurred by the assessee prior to the said cut off date, namely making advance for purchase of land, levelling of land and construction of compound wall and gate to protect the land in question from encroachments etc. cannot be said to be the commencement of the project itself, which in fact has, as per the due sanction of the public authority, commenced only after the cut off date and therefore, the assessee has satisfied the conditions for the grant of deduction under Section 80IB(10) of the Act and the Revenue appeal before this Court has no merit and deserves to be dismissed.

8. In this regard, the learned counsel for the assessee relied upon the

decision of a Delhi High Court in ***Commissioner of Income Tax v. Ansal Housing & Construction Ltd [ITA Nos.480/2010 and connected appeals dated 24.09.2012]***. In the said case, a Division Bench of Delhi High Court affirmed the order of the Income Tax Appellate Tribunal and allowed the said deduction with the following observations:

> *"14. We are not persuaded to take a view different from the view taken by the Tribunal. A clear finding was recorded by the Tribunal that the assessee had filed the details and calculations about the built-up area of the residential units. It would be unreasonable to hold that the Assessing Officer ignored those details. Moreover the statutory auditors had clearly mentioned the dates of approval of the lay out plan of the residential colonies. The Assessing Officer was thus made aware of the dates on which the approvals were granted in respect of each of the four housing projects. The more important aspect was the applicability of clause (a) of Section 80IB(10). On this aspect the Tribunal held that any construction carried out before the receipt of necessary approvals would be unauthorized and could not be recognized. It was found by the Tribunal that in any case* ***there was only site development by filling of pits, levelling of land, construction of roads, wells, laying of sewerage and electricity lines etc****. Further there was no dispute regarding the date of commencement of construction with respect to the projects, namely, Golf Link-II and East End Loni. The Tribunal has found that both these projects commenced after 1st October, 1998. With regard to the other two projects, namely, Golf Link-I and Avantika Akruti, the Tribunal held that the date of commencement of construction had to be reckoned from the date when the construction of the building plan*

of each project was approved by the concerned authority. On examination of the details of the chronological events furnished by the assessee, it was held by the Tribunal that the building plans of each house submitted by the assessee were not sanctioned as such by the competent authority before 1st October, 1998. They were rejected and time and again modifications were proposed by the authority; finally the approvals of the building plans were issued after 1st October, 1998, except for 26 houses in Avantika Akruti Project. The Tribunal has also referred to certain orders of the Pune and Bombay Benches of the Tribunal where ***the date of approval by the competent authority was considered crucial to determine the date of commencement of development or construction****. This discussion of the Tribunal shows that the determination of the question as to when the undertaking commenced development and construction, in the absence of any statutory prescription,* ***has to be decided in a pragmatic and reasonable way****. It would have been an entirely different issue had there been a statutory prescription of what would be the date of commencement of construction or development. It is certainly a debatable issue on which more than one plausible view is reasonably possible and merely because the Assessing Officer has taken one plausible view, it cannot be said that the assessment is erroneous or prejudicial to the interest of the Revenue. This position stands well settled by the judgments of the Supreme Court cited supra. The Tribunal applied the tests laid down in these judgments to the case."*

9. We respectfully agree with the aforesaid view of the Delhi High Court. Taking a pragmatic and reasonable view of the matter, we are of the

opinion that the expenditure incurred by the assessee prior to the cut off date of 01.10.1998 is not in the nature of development and commencement of the housing project itself and that the expenditure incurred in levelling of the land and construction of the compound wall was to protect the land in question so that the project could be commenced and completed once it is approved by the concerned public authority. The approval in question was admittedly given on 30th September 1998 and therefore, the commencement of the project could only take place thereafter. There is no dispute that the project in question was completed before outer and cut off date, namely 31st March 2008. Therefore, the concurrent findings of the facts given by the two appellate authorities below that the commencement of the project was done within the statutory time frame and accordingly, deduction under Section 80IB(10) was allowable to assessee, do not deserve to be disturbed by us in the present appeal filed by the Revenue and therefore, the question of law deserves to be answered in favour of the assessee and against the Revenue.

The appeal of the Revenue is liable to be dismissed and accordingly, it is dismissed. No costs.

Index : Yes/No **(V.K.J.) (A.S.M.J.)**
Internet : Yes/No 08.01.2019

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To
The Income Tax Appellate Tribunal "A" Bench, Chennai

DR.VINEET KOTHARI,J,
and
DR.ANITA SUMANTH,J

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TCA No.1901 of 2008.

08.01.2019