

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.01.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Tax Case Appeal No.177 of 2018
and

C.M.P.Nos.2376 and 2377 of 2018

M/s.Bashyam Constructions P Ltd.,
11, Gopalakrishnan Street,
T.Nagar, Chennai-600 017.
PAN: AACCB 4376P

... Appellant

-vs-

The Deputy Commissioner of Income Tax,
Corporate Circle-1(2),
Chennai-600 034.

... Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income-tax Appellate Tribunal, 'B' Bench, Chennai, in I.T.A.No.1646/Mds./2015, dated 12.06.2017, for the assessment year 2010-11.

Against the order made in I.T.A.No.282/13-14/A-1 New No.ITA25CIT(A)-1/2013-14 dated 24.03.2015 on the file of the Commissioner of Income Tax (Appeals)-1 for the Assessment Year 2010-11.

Against the order made in GIR/PAN-AACCB4376P dated 28.03.2013 on the file of the Assistant Commissioner of Income Tax Company Circle-1(2), Chennai for the Assessment Year 2010-11.

For Appellant : Mr.A.S.Sriraman

For Respondent : Mrs.R.Hemalatha,
Senior Standing Counsel

JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal, by the assessee filed under Section 260-A of

the Income Tax Act, 1961 (hereinafter referred to as "the Act") is directed against the order of the Income-tax Appellate Tribunal, 'B' Bench, Chennai, (for brevity "the Tribunal") in I.T.A.No.1646/Mds./2015, dated 12.06.2017, for the assessment year 2010-11.

2.This appeal has been admitted, on 13.03.2018, on the following substantial questions of law:-

"i. Whether the claim of an assessee incorporated for the purpose of real estate development for deduction under Section 80IB (10) of the Income Tax Act, 1961, based on the benefit of tax holiday for those engaged in real estate development, can be disallowed on the ground that the assessee had entrusted the development to another company by execution of a Joint Development Agreement?

ii. Alternately, whether the execution of a Joint Development Agreement, in terms whereof an assessee incorporated for the purpose of developing real estate makes over possession of land to the Contractee for development, by execution of purchase deeds in return for completed flats in the buildings to be constructed, disentitles himself to the benefit of tax holiday under Section 80IB (10) of the Income Tax Act, 1961?

iii. Whether a Bench of the Tribunal can disregard a prior decision of a Bench of the Tribunal of co-ordinate strength?"

3.The facts, which are necessary for taking a decision in this appeal, are as follows:

3.1.The assessee is a Company engaged in the business of real estate and for the assessment year under consideration (2010-11), return of income was filed on 30.09.2010, declaring the assessable income as 'Nil', after claiming deduction under Section 80IB(10) of the Act at Rs.27,76,97,278/-. In the said return of income, the assessee computed book profits under Section 115JB of the Act at Rs.27,79,97,773/-. The said return was initially accepted under Section 143(1) of the Act and subsequently, selected for scrutiny and the assessment was framed under Section 143(3) of the Act, by order dated 28.03.2013. The Assessing Officer determined the total taxable income at Rs.27,69,75,954/- while accepting the computation of adjusted book profit under Section 115JB of the Act at Rs.27,79,97,773/-. The Assessing Officer while completing the assessment, disallowed the claim of deduction under Section 80IB

(10) of the Act on the ground that the assessee had not executed/developed a housing project, inasmuch as by contributing 2/3rd of its land holding to M/s.ETA Properties & Investments P Ltd. ("M/s ETA") in exchange for 73 flats. The Assessing Officer concluded that the assessee has not taken any investment risk. Further, the Assessing Officer had noticed the sale of two flats exceeding 1500 sq.ft., and in any event, eligibility for such deduction in relation thereto was not complied with.

3.2.The assessee filed an appeal before the Commissioner of Income-tax (Appeals)-I, Chennai (for brevity "the CIT(A)). The CIT(A), by order dated 24.03.2015, allowed the appeal and directed the Assessing Officer to re-work the eligibility of deduction under Section 80IB(10) of the Act. With regard to the violation of build up area for two flats, which exceeded the prescribed limit of 1500 Sq.ft., the CIT(A) upheld the decision of the Assessing Officer. The Revenue filed an appeal challenging the order passed by the CIT(A) before the Tribunal. The appeal was allowed by the impugned order dated 12.06.2017. This is how the assessee is before us by way of this tax case appeal by raising the substantial questions of law as mentioned above.

4.We have heard Mr.A.S.Sriraman, learned counsel for the appellant/assessee; and Mrs.R.Hemalatha, learned Senior Standing Counsel for the respondent/Revenue.

5.The reason assigned by the Tribunal for reversing the order passed by the CIT(A) is on the ground that the assessee cannot be considered as a developer of the housing project, as joint venture happens only when the owner, that is, the assessee treats the lands as stock-in-trade in the books of accounts of the assessee. Further, the Tribunal held that the CIT(A) committed an error in granting deduction under Section 80IB (10) of the Act, solely on the reason that the assessee is the owner of the land and the project plan was in the name of the assessee. The Tribunal opined that the Joint Development Agreement cannot be constituted as a Joint Venture so as to grant deduction under Section 80IB (10) of the Act and even if it is presumed that it is a joint venture, the deduction under Section 80IB(10) of the Act can be granted to the joint venture, which is the association of person consisting the assessee and M/s.ETA and not to the present assessee. Further, the Tribunal pointed out that the assessee was not engaged in construction of housing project and have not incurred any expenditure for construction of housing flats and the development of projects.

6.We are to test the correctness of the reasons assigned by the Tribunal while reversing the order passed by the CIT(A).

We need not labour much to decide the issue, as there are several decisions of the Division Bench of this High Court and other High Courts, which have considered a similar issue. First of such decisions being that of the High Court of Karnataka in the case of CIT vs. Shravanee Constructions, [2012] 22 taxmann.com 250 (Kar.). We refer to this decision at the first instant because, the facts are identical. The substantial question of law, which was framed for consideration, was whether the Tribunal was correct in holding that the assessee therein is entitled to deduction under Section 80IB(10) of the Act, admittedly when the assessee has not carried out activity of developing and building house project and has merely assisted the developer/promoter in the project. This question was answered in favour of the assessee, after noting the factual position as to the activities undertaken by the assessee. At this juncture, it would be beneficial to refer to paragraph 8 of the said judgment, which reads as follows:-

"8. In terms of the agreement, which are not in dispute, the assessee not only undertook the aforesaid development activities on the land in question, but in fact, he entered into an agreement of sale with the owners of the land, paid the entire consideration but he did not take a registered sale deed in his name. On the contrary, the procedure adopted is he in turn entered into a joint development agreement with the builder and the owner of the land was made a party to the said proceedings. Thus, the assessee contributed the land, undertook the aforesaid developmental activities in the said land and thus, complied with all other conditions, which have to be fulfilled before claiming benefit under Section 80IB (10) of the Act. The builder has invested the money in the construction. It is after completion of the building in terms of the agreement, the assessee was given 22% share of the building area. It is after sale of the built area, in terms of Section 80IB (10), the assessee is claiming deduction. As is clear from the joint development agreement, the undertaking of developing and building housing project was jointly undertaken by the assessee and the builder. Therefore, in respect of the residential units numbering 211 in all, the persons who undertook this undertaking are entitled to the benefit of Section 80IB (10) of the Act in proportion to the share to which they are entitled to in the built up area."

7.As noted in the decision cited above, in the instant

case also, the assessee entered into a Joint Venture Agreement with M/s.ETA dated 16.07.2006. We have perused the terms and conditions of the joint development agreement, which has been placed in the paper book. In terms of the said agreement, the assessee, who was the owner of the site, was desirous of developing the property by putting up residential and commercial complex consisting of flats and apartments. M/s.ETA, which has been described as a builder of the joint development agreement offered to develop the property by putting up multistoreyed building complex at their own cost and to allot 33.33% of total built up area to the owners and take for themselves 66.67% built up area in lieu of the value of the land provided by the assessee. Further, the agreement stated that the assessee in consideration of the builder agreeing to allot 33.33% of the total built up area to be constructed on the property, have agreed to convey 66.67% of undivided interest of land to the builder or to their nominee/nominees and accordingly, mutually agreed to the terms and conditions set down in the agreement. Further, the agreement stated that the assessee shall get necessary orders from Chennai Metropolitan Development Authority (CMDA) for reclassifying the project land for enabling construction of residential complex with minimum FSI of 1.5 and both parties will endeavour to achieve the maximum FSI of 2.5. All expenses in respect of obtaining reclassification shall be borne by the assessee and all expenses for preparation of plan, fees, including any security deposit in respect of building sanction etc., shall be borne by M/s.ETA.

8.As noticed by the Court in the case of Shravanee Constructions (supra), the assessee contributed land, undertook development activity in the land and has complied with all the conditions, thereby being entitled to the benefit under Section 80IB(10) of the Act. The assessee in his explanation to his Assessing Officer, vide letter dated 20.03.2013, stated that the company has incurred initial expenses towards the housing project like architect fee, plan reclassification charges, construction expenses, project administrative expenses etc. The Tribunal states that the expenses are not reflected in the P & L account. However, this aspect was considered by the CIT(A) and by referring to the P & L account, stated that the assessee has not taken the cost of the land into consideration thereby claiming more surplus income for the purpose of 80IB(10) benefit. Further, the CIT(A) noted that the assessee has shown only increase in work-in-progress of Rs.2.22 crores along with some minimal expenses in its P & L Account, but this has nothing to do with the cost of the land alone. This aspect of the matter has not been dealt with by the Tribunal, but the Tribunal made a sweeping observation that the expenses are not reflected in the said account. Therefore, we do not agree with the reasoning given by the Tribunal in this regard.

9.A Division Bench of this Court in the case of CIT vs. Sanghvi and Doshi Enterprise, [2013] 29 taxmann.com 386 (Madras), examined a similar question raised by a developer/promoter. The question of law framed for consideration was whether the assessee therein, who was a builder/promoter was eligible for deduction under Section 80IB (10) of the Act. The Division Bench after considering the facts of the case and the terms of the joint development agreement, as in the instant case, decided the question in favour of the said assessee in the following terms:-

"30.....Thus, seen in the background of the data available as regards the date of sale, the clause in the agreement between the owner of the land and the assessee and the sale agreement with the prospective purchasers, it is evident that what the assessee had undertaken is not a mere construction, but developing and construction of a project, which qualifies for a deduction under Section 80IB of the Income Tax Act. As rightly pointed out by learned Senior Counsel appearing for the assessee, a bare reading of Section 80IB of the Income Tax Act shows that the deduction contemplated therein is oriented towards the project and not with reference to an assessee. It is no doubt true that the project has to be done by the assessee, but then, when the deduction is specific enough as regards the particular activity, we fail to see how one should assume any significance in the matter of considering a deduction."

The above decision was followed by another Division Bench in Income tax Officer vs. Doshi Enterprise, [2013] 55 taxmann.com 500 (Mad.).

10. Similar decision was taken by a Division Bench in the case of CIT vs. Ceebros Property Development (P.) Ltd., [2014] 41 taxmann.com 263 (Madras).

11. In CIT vs. Radhe Developers, [2012] 17 taxmann.com 156 (Gujarat), the substantial question of law, which was framed for consideration was whether the Tribunal was right in law in allowing deduction under Section 80IB(10) read with Section 80IB (1) to the assessee, when the approval by the local authority as well as completion certificate was not granted to the assessee, but to the landowner and the rights and the obligations under the said approval were not transferable, and when the transfer of dwelling units in favour of the end-users was made by the landowner and not by the assessee. The question was decided in the favour of the assessee therein, in the following terms:-

"30. The essence of sub-section (10) of

Section 80IB, therefore, requires involvement of an undertaking in developing and building housing projects approved by the local authority. Apparently, such provision would be aimed at giving encouragement for providing units in the urban and semi-urban areas, where there is perennial and acute shortage of housing, particularly, for the middle income group citizens. To ensure that the benefit reaches the people, certain conditions were provided in sub-Section (10) such as specifying date by which the undertaking must commence the developing and construction work as also providing for the minimum area of plot of land on which such project would be put up as well as maximum built up area of each of the residential units to be located thereon. The provisions nowhere required that only those developers who themselves own the land would receive the deduction under Section 80IB (10) of the Act."

12.The said decision in Radhe Developers (supra) was followed by the High Court of Gujarat in CIT vs. Moon Star Developers, (2014) 88 CCH 0211 GujHC; and in the case of CIT vs. Prathama Developers, [2013] 32 taxmann.com 336 (Gujarat).

13.The High Court of Bombay in CIT vs. Cajetano Mario Pereira, (2014) 88 CCH 0152 MumHC, held that Section 80IB(10) does not require that the ownership of land must vest in the developer to be able to qualify for such deduction. The Revenue preferred appeal against all such cases, which were clubbed as a batch before the Hon'ble Supreme Court and all the decisions were affirmed by the Hon'ble Supreme Court in the case of CIT vs. Veena Developers, (2015) 93 CCH 0184 ISCC.

14.It is interesting to note that in all these decisions, the Revenue placed reliance on the aspect of ownership as a criteria for grant of deduction under Section 80IB of the Act and submitted that Section 80IB(10) contemplates grant of deduction and it being a deduction provision, the same has to be complied in absolute terms by the assessee. The Courts have held that in a case of development, the developer is also entitled to claim deduction and ownership is not the criteria. Unfortunately, in the instant case, the Revenue took a reverse stand contrary to the consistent stand taken by them before this Court and other High Courts, which was rejected by the High courts and affirmed by the Hon'ble Supreme Court.

15.We may point out that the decision of the Division Bench in the case of Sanghvi and Doshi Enterprise (supra) was

affirmed by the Hon'ble Supreme Court as reported in (2017) 84 taxmann.com 241 (SC).

16. Mrs. R. Hemalatha, learned Senior Standing Counsel referred to the decision in the case of Mangalore Ganesh Beedi Works vs. CIT, (2015) 378 ITR 0640 (SC) in support of her contention that the High Court will not be justified in upsetting the finding of fact arrived at by the Tribunal, particularly, in the absence of substantial questions of law being framed in this regard.

17. We are of the view that this decision will not render any assistance to the case of the Revenue, since the Tribunal had not recorded any reason for reversing the finding of the CIT (A), which had gone into the facts of the case and appreciated the terms of the agreement and as to how the assessee would qualify for deduction under Section 80IB (10). Therefore, to state that no substantial question of law arises for consideration is an argument to be rejected.

18. Reliance was placed on the decision of the Hon'ble High Court of MP in the case of Navratan Techbuild Private Ltd. vs. CIT, (2014) 88 CCH 0264 MPHC, wherein, the Court while considering the claim for deduction under Section 80IB(10) of the Act, held that there was no substantial question of law involved in the said appeal.

19. We have noted the facts in the said case and hold that the assessee having not constructed residential flats and barely raising infrastructural facility would not raise any substantial question of law requiring adjudication. In the light of the factual position involved in the said case, the said decision can have no application to the case on hand.

20. Mrs. R. Hemalatha, learned Senior Standing Counsel reiterated that the Tribunal has recorded that there is no expenditure incurred by the assessee as could be seen from the P & L Account. As pointed out earlier, this aspect was specifically considered by the CIT(A) in the following terms in paragraph 4.2.1 of the order dated 24.03.2015, which is as follows:-

4.2.1. As seen from the facts of the case, the appellant cannot be denied deduction u/s 80IB (10) as it otherwise fulfills all the conditions.

However, as seen from the P & L the appellant has not taken the cost of the land into consideration thereby claiming more surplus income for the purpose of 80IB(10) benefit. The appellant has shown only increase in work-in-progress of Rs.2.22 crores along with some minimal expenses in its P & L but this has nothing to do with the cost of the land alone. From the details submitted, the cost of the land was as under -

Financial Year	Amount
2004-05	1,53,94,024
2005-06	43,69,000
Total	1.97,63,024

21.The correctness of the above finding was not considered by the Tribunal and the Tribunal merely stated that no expenses were recorded in the P & L account. Therefore, the contention advanced by the Revenue in this regard is not tenable. That apart, a plain reading of Section 80IB(10) of the Act evidently makes it clear that deduction is available in a case where an undertaking develops and builds a housing project. The Section clearly draws the distinction between 'developing' and 'building'. In the preceding paragraphs, we have noted the factual position as could be culled out from the joint venture agreement, which clearly shows that the assessee is the developer and M/s.ETA is the builder and mutual rights and obligations are inextricably linked with each other and undoubtedly, the project is a housing project thereby, the assessee would be entitled to claim deduction under Section 80IB (10) of the Act.

22.Thus, for the above reasons, we hold that the Tribunal erred in reversing the order passed by the CIT(A).

23.Mrs.R.Hemalatha, learned Senior Standing Counsel submitted that the builder, M/s.ETA has also claimed deduction and it would amount to double deduction. We find that the authorised representative, who appeared on behalf of the assessee has specifically stated that there is no case of double deduction and it is only proportionate to their respective shares. We find that the Tribunal has not given any finding as to any double deduction and therefore, such a plea cannot be canvassed before us in this appeal.

24.In the result, the appeal filed by the assessee is allowed; the order passed by the Tribunal, dated 12.06.2017, is set aside; the order passed by the CIT(A) dated 24.03.2015, is restored; and the substantial questions of law are answered in favour of the assessee. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1.The Income-tax Appellate Tribunal, 'B' Bench,
Chennai.

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

3.The Assistant Commissioner of Income Tax,
Company Circle-1(2), Chennai.

+1 cc to Mr.S.Sridhar, Advocate Sr.No.7468

+1 cc to R.Hemalatha, Advocate Sr.No.7899

T.C.A.No.177 of 2018

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