IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 2 OF 2016

M/s. Models Construction Pvt. Ltd.
4th Floor, Joffre Residency,
Behind Goa College of Pharmacy,
Panaji – Goa. ... Appellant

Versus

Deputy Commissioner of Income Tax
Central Circle,
Panaji – Goa. ... Respondent

Mr. D. Pangam along with Mr. P. Sawant, Advocates for the Appellant.

Ms. Susan Linhares, Standing Counsel for the Respondent.

Coram:- **M. S. SONAK &**
DAMA SESHADRI NAIDU, JJ.

Date:- **26th November 2020**

JUDGMENT (Per M. S. Sonak, J.):

Heard Mr. D. Pangam along with Mr. P. Sawant for the appellants and Ms. Susan Linhares for the respondents.

2. The learned counsel for the parties state that they have no objection to this Bench taking up this matter.

3. This Appeal was admitted on 05.07.2016 on the following substantial questions of law:-

> *A. Whether, on the facts and in the circumstance of the case and in law, the ld. ITAT erred in unjustly disallowing the Appellant herein to claim deductions under Section 80 IB (10) for the A.Y. 2010-11, 2011-12 and 2012-13?*
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> *B. Whether, on the facts and in the circumstance of the case and in law, the ld. ITAT has erred in failing to recognise that Sub-Clause(e)to Section 80IB(10) of the I.T. Act, 1961 came into effect only on 1st April, 2010 and not 19th August 2009 as presumed?*

4. By Order dated 31.03.2014 the Assessing Officer (AO) disallowed deductions to the assessee in respect of its housing project "Models Legacy" *inter alia* on the ground of breach of the provisions of Section 80IB(10)(e) of the Income Tax Act, 1961 (said Act) in respect of 5 of the residential units in the said project, which otherwise comprised of a total of 352 residential units.

5. The assessee's appeal before the Commissioner (Appeals) was partly allowed by order dated 26.08.2015. The Commissioner (Appeals) held that the assessee was entitled to pro-rata deductions under Section 80IB(10) of the said Act. The Revenue appealed to the Income Tax Appellate Tribunal (ITAT) against the Commissioner (Appeals') order dated 26.08.2015. The assessee also filed cross-objections urging that deductions in respect of all the 352 residential units ought to have been granted.

6. The ITAT, by the impugned order dated 20.01.2016 has set aside the Commissioner (Appeals') order dated 26.08.2015 and restored the AO's order dated 31.03.2014. Hence the present appeal by the assessee on the aforesaid substantial questions of law.

7. Mr. Pangam, the learned counsel for the appellants submits that the substantial question of law at (B) is required to be answered in favour of the assessee and against the Revenue because of the decision of this Court in ***CIT v. Bramha Associates– (2019) 414 ITR 47 (BOM)***. He pointed out that the decision in ***Bramha Associates (supra)*** was followed by another Division Bench of this Court in Tax Appeal No.13/2014 concerning this very assessee, which was disposed of by Judgment and Order dated 20.03.2014.

8. Mr. Pangam submits that in any case, the pro-rata deduction, as was granted by the Commissioner (Appeals) by his order dated 26.08.2015 could not have been disturbed by the ITAT. He submits that the High Courts of Madras, Delhi, and Karnataka have held that such pro-rata deduction is required to be granted in the following decisions:

(i) ***Viswas Promoters Pvt. Ltd. v. Assistant CIT, Circle I, Madras – (2013) 29 TaxMan.Com 19 (Madras);***

(ii) ***CIT Chennai v. Arun Excello Foundations Pvt.Ltd. - (2013) 29 TaxMan.Com 149 (Madras);***

(iii) ***CIT v. S.G. Estates Pvt. Ltd. – (2015) ITMI 1302 (Delhi); and***

(iv) ***CIT & Anr. v. M/s. Brigade Enterprises Limited – ITA No.54 of 2012 decided on 22.09.2020 by the Karnataka High Court.***

9. Mr. Pangam, based on instructions, and without prejudice submits that in case the assessee is granted the benefit of pro-rata deductions, the assessee, will not press the contention that there is no breach whatsoever of Section 80IB(10) of the said Act, even though, the legal position is in favour of the assessee. He, however, submits that such not pressing ought not to come in the way of the assessee in raising such contention in any collateral proceedings i.e. proceedings for penalty, etc.

10. Ms. Linhares, the learned counsel for the Revenue defends the impugned order of the ITAT based on the reasoning reflected therein. She submits that the provisions of Section 80IB(10) of the said Act do not contemplate grant of any pro-rata deductions. She also submits that the provisions of Section 80IB(10)(e) of the said Act being procedural can be given retroactive effect and she relies upon the explanatory note of the Finance (2) Act, 2009 by which such provision was introduced in the said Act. She relies on the decisions of this Court in ***CIT v. Vandana Properties – (2013) 353 ITR 36 (BOM), Bramha Associates (supra) and Britannia Industries Ltd. v. CIT – (2005) 148 TaxMan.Com 468 SC*** in support of her contentions.

11. The rival contentions now fall for our determination.

12. The reasoning of the ITAT that the exclusion of the 5 residential units from out of the 352 residential units in the entire housing project might affect the condition about the size of the plot which is required to have a minimum area of 1 Acre deserves no acceptance. Even if the area proportionate to the 5 residential units is excluded, the size of the plot which admeasures 28,014 sq. meters. i.e. almost about 7 Acres or thereabouts, will, in no manner, stand reduced to below 1 Acre. Therefore, this could not have been a ground to deny pro-rata deduction as was granted by the Commissioner (Appeals) in his Order dated 26.08.2015.

13. Since, Mr. Pangam, the learned counsel for the assessee on instructions has made a statement that the assessee would be satisfied with pro-rata deductions, we frame the following additional substantial question of law, which, according to us, arises in this appeal:

> *"Whether, in the facts and circumstances of the present case and given the law laid down by various High Courts, the ITAT was justified in denying even pro-rata deductions to the assessee under Section* 80IB(10) of the said Act?"

14. It is necessary to note that in the appeal memo, grounds to the aforesaid effect were raised by the assessee as ground Nos. (M), (N) and (O). However, such a question was not framed at the time of

admission of this appeal. Such a question undoubtedly arises in this matter and therefore, taking into consideration the provisions in Section 260A(4) read with the provisions in Section 260A(7) of the said Act, we frame the aforesaid additional substantial question of law which is involved in this appeal.

15. This appeal was taken up along with connected Tax Appeal Nos.4 to 8 of 2016 and Tax Appeal Nos.49 and 52 of 2016, in which the issue of pro-rata deductions under Section 80IB(10) of the said Act was involved. In the said connected appeals as well, Ms. Linhares, relying upon the very same decisions had urged that Section 80IB(10) of the said Act does not contemplate grant of any pro-rata deduction.

16. Upon consideration of the rival contentions in the aforesaid connected tax appeals, we have held that pro-rata deductions can be granted under Section 80IB(10) of the said Act. In our decision in Tax Appeal Nos.4 to 8 of 2016 and Tax Appeal Nos.49 and 52 of 2016 decided on 26.11.2020, we answered the substantial question of law as to the allowability of pro-rata deduction in favour of the assessee and against the Revenue after distinguishing the decisions relied upon by Ms. Linhares in those appeals as well as in this appeal.

17. Accordingly, by adopting our reasoning in the Judgment and Order by which we disposed of the aforesaid connected appeals, we answer the additional substantial question of law in favour of the assessee and against the Revenue.

18. This appeal is therefore disposed of by making the following order:

(a) The appeal is partly allowed and the additional substantial question of law referred to in para 13 above, is answered in favour of the assessee and against the Revenue;

(b) As a consequence, the impugned Order dated 20.01.2016 made by the ITAT is set aside to the extent it denies the benefit of pro-rata deductions to the assessee and the order of the Commissioner (Appeals) dated 26.08.2015 to the extent it grants pro-rata deductions under Section 80IB(10) of the said Act to the assessee, is hereby restored;

(c) The other substantial questions of law involved in this appeal are not answered since, the same are not pressed by the assessee without prejudice to the right of the assessee to raise all such issues in any collateral proceedings i.e. penalty proceedings, etc.

19. This appeal is disposed of accordingly. There shall be no order as to costs.

DAMA SESHADRI NAIDU, J. ***M. S. SONAK, J.***

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