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TXA NO.47-2016
IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 47 OF 2016

M/s. Kamat Constructions Pvt. Ltd.
Through its Managing Director
Mr. Dattaprasad A. Kamat
Office at F-1, F-2, Indira Apts.
Opp. Hotel Delmon, Caetanao
Albuquerque Road,
Panaji – Goa.

PAN: AAACK8135H

... Appellant

Versus

1. Assistant Commissioner of Income Tax
Central Circle,
Panaji – Goa.

2. Union of India,
Through the Secretary (Revenue),
Ministry of Finance,
North Block, New Delhi.

... Respondents

Ms. Arti Sathe along with Mr. P. Karpe, Advocates for the Appellant.

Ms. Susan Linhares, Standing Counsel for the Respondents.

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

Reserved on:- 26th November 2020

Pronounced on:- 1st December 2020

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

Heard Ms. Arti Sathe along with Mr. P. Karpe for the Appellant and Ms. Susan Linhares for the respondents.

2. This Appeal was admitted on 01.08.2016 on the following substantial questions of law:-

I. Whether on the facts and in the circumstances of the case, the ITAT was justified in disallowing the deductions claimed under s. 80IB(10) of the Income Tax Act on the basis that certain flats of the project were sold to the same person/family, without appreciating that there was no such bar in law as on the date of the commencement of the project as also on the date of relevant transactions?

II. Whether on the facts and in the circumstances of the case, and without prejudice to the claim of the assessee that the entire profits were entitled to deduction u/s 80IB(10), the ITAT was justified in refusing the assessee's alternative claim of pro-rata/proportionate deduction?

3. In this case the Assessing Officer (AO) vide Order dated 31.01.2014 disallowed deductions to the assessee under Section 80IB(10) of the Income Tax Act, 1961 (said Act) in respect of its housing project "Kamat Riviera" *inter alia* on the ground that 4 out of the 60 residential units in the said project, did not comply with the condition prescribed in Section 80IB(10)(f) of the said Act. This is because Flat Nos.401 and 402 were allotted to the same individual namely Mr. Suraj Kamble vide agreements dated 13.03.2009 and

29.06.2009 and Flat Nos.104 and 103 were allotted to Ms. Sangita V. N. Panvelcar vide agreement dated 26.06.2009 and to her husband, Mr. Vivek V. N. Panvelcar vide agreement dated 10.10.2009. The assessee appealed to the Commissioner (Appeals), who, vide order dated 28.08.2015, partly allowed the appeal and directed the AO to grant the pro-rata deductions under Section 80IB(10) of the said Act to the assessee.

4. The Revenue appealed to the Income Tax Appellate Tribunal (ITAT) against the Commissioner (Appeals') order dated 28.08.2015 for the relevant Assessment Year 2012-13. The assessee filed cross-objections claiming that the entire deduction and not merely pro-rata deduction under Section 80IB (10) ought to have been allowed.

5. The ITAT, vide impugned order dated 01.03.2016 has allowed the Revenue's appeal and dismissed the assessee's cross-objections. Hence the present appeal by the assessee on the aforesaid substantial questions of law.

6. Ms. Sathe, the learned counsel for the appellants submits that the amendment by which clause (f) came to be introduced in Section 80IB (10) in its present form entered into effect only on 19.08.2009. She, therefore, submitted that the said provisions cannot apply retrospectively to housing projects which were approved much before 19.08.2009. She points out that the housing project "Kamat Riviera"

was approved sometime on 26.03.2007. She relies on *The Principal CIT v. Bramha Associates – (2019) 414 ITR 47 (BOM)* in support of her contention.

7. Ms. Sathe submits that in any case, the ITAT was not at all justified in upsetting the pro-rata deduction granted by the Commissioner (Appeals) in his order dated 28.08.2015. She submits, without prejudice, that even the Commissioner (Appeals) could have at the highest, denied a deduction in respect of Flat No.103 which was allotted on 10.10.2009. She submits that even here, there was no breach as such of the condition in Section 80IB(10)(f) since the residential units were allotted at different points of time to the wife and the husband. She relies on the following decisions in support of her contention based on pro-rata deduction:

- (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.*

8. Ms. Sathe further points out that the findings and reasoning of the ITAT on the issue of the area of the plot on which the housing

project has been put up are perverse. She submits that even if the area proportionate to the 4 residential units is excluded from consideration, the plot area which remains for consideration is about 4500 sq. meters. which is above 1 Acre i.e. 4000 sq. meters. She demonstrated this error by pointing out the admitted documents on record.

9. 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)(f) 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.

10. The rival contentions now fall for our determination.

11. There is no dispute that the provisions of Section 80IB(10) (f) entered into force on 19.08.2009. Therefore, the allotment of Flat Nos.401 and 402 to Mr. Suraj Kamble on 13.03.2009 and 29.06.2009 would not constitute a breach of the condition in Section 80IB(10)(f) of the said Act. The same is the position about allotment of flat no.

104 to Ms. Sangita Panvelcar. At the highest, there may be some issue about the allotment of Flat No.103 on 10.10.2009. This is because clause (f) to Section 80IB(10) entered into force on 19.08.2009, in terms of which, there was a prohibition for allotment in favour of a spouse. Therefore, deduction proportionate to the amount involved for allotment of Flat No.104 could have been denied to the assessee but certainly not the deduction in respect of the entire housing project comprising of 60 residential units.

12. The reasoning of the ITAT in the context of the area of the plot on which the housing project was put up is vitiated by perversity. Even if the area proportionate to the 4 residential units were to be excluded from consideration, still, the available area exceeded 4000 sq. meters or 1 Acre. In any case, now that only one of the residential units can be excluded, the area exceeds 1 Acre and there is no breach whatsoever on this count.

13. On the issue of pro-rata deduction, in the connected Tax Appeal Nos.4 to 8 of 2016 and Tax Appeal Nos.49 and 52 of 2016, we have already held that such pro-rata deductions can be granted under Section 80IB(10) of the said Act. This is after considering the very same contentions of Ms. Linhares as have been raised in the present matter. We have considered and distinguished the rulings relied upon by Ms. Linhares in this appeal, since, the very same rulings were relied upon in the connected appeals.

14. Therefore, by adopting our reasoning in our Judgment and Order dated 26.11.2020 disposing of the aforesaid connected appeals, we answer the second substantial question of law in favour of the assessee and against the Revenue.

15. Similarly, we also partly answer the first substantial question of law in favour of the assessee and against the Revenue. This means that the Revenue will be entitled to withhold deductions on a pro-rata basis, in respect of Flat No.103 allotted to Mr. Vivek Panvelcar on 10.10.2009 but not withhold deductions in respect of the entire housing project save and except Flat No.103 therein.

16. Accordingly, we dispose of this appeal by making the following order:

(a) The first substantial question of law is answered partly in favour of the assessee and against the Revenue and it is held that there was no justification in disallowing deductions under Section 80IB (10) of the said Act in respect of the assessee's housing project "Kamat Riviera" except on pro-rata basis in respect of Flat No.103 therein;

(b) The second substantial question of law is answered in favour of the assessee and against the Revenue and it is held that the assessee is entitled to pro-rata deduction in respect of the entire housing project "Kamat Riviera", including in respect of

Flat Nos.401, 402 and 104 therein but not in respect of Flat No.103 which was allotted only on 10.10.2009.

(c) As a consequence, the impugned Order dated 01.03.2016 is set aside and the Revenue is directed to allow a deduction to the assessee in respect of its housing project “Kamat Riviera” except, on pro-rata basis in respect of Flat No.103 therein.

17. The appeal is partly allowed in the aforesaid terms. There shall be no order as to costs.

DAMA SESHADRI NAIDU, J.

M. S. SONAK, J.

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