

IN THE HIGH COURT OF BOMBAY AT GOA

**TAX APPEAL NOS. 4 OF 2016, 5 OF 2016, 6 OF 2016, 7 OF 2016,
8 OF 2016, 52 OF 2016 AND 49 OF 2016**

TAX APPEAL NOS. 4, 5, 6, 7 & 8 OF 2016

Devashri Nirman LLP.

Dempo House, Campal,

Panaji Goa.

PAN: AABFD2012N

... Appellant

Versus

1. The Assistant Commissioner of Income-Tax,
having his office at
Aayakar Bhavan,
Patto-Plaza,
Panaji Goa.

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

... Respondents

WITH

TAX APPEAL NOS. 52 & 49 OF 2016

The Principal Commissioner of Income Tax,

Aaykar Bhavan, Patto,

Panaji Goa.

... Appellant

Versus

Devashri Nirman Ltd.

2nd Floor, Dempo House,

D. B. Bandodkar Marg. Campal,

Panaji Goa.

PAN No.AABFD2012N

... Respondent

Mr. Mihir Naniwadekar with Ms. Vinita V. Palyekar, Advocates for the Appellants in Tax Appeal Nos. 4, 5, 6, 7, 8 of 2016 and for the Respondent in Tax Appeal Nos.52 of 2016 and 49 of 2016.

Ms. Susan Linhares, Standing Counsel for the Respondents in Tax Appeal Nos.4, 5, 6, 7, 8 of 2016 and for the Appellant in Tax Appeal Nos.52 of 2016 and 49 of 2016.

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

Date :- 26th November 2020.

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

Heard Mr. Mihir Naniwadekar, learned counsel for the Assessee, and Ms. S. Linhares, learned Standing Counsel for the Revenue.

2. The learned counsel for the parties submit that the issue involved in all these appeals is common though the appeals may relate to different Assessment Years. They, therefore, agree that all these appeals can be disposed of by a common judgment and order. They submit that the Tax Appeal No. 5 of 2016 which relates to the Assessment Year 2008-2009 may be taken as the lead matter.

3. The challenge in this appeal is to the judgment and order dated 14.07.2015 made by the Income Tax Appellate Tribunal (ITAT) in ITA Nos. 19 to 23/PNJ/2015 relating to the Assessment Years 2007-2008, 2008-2009, 2009-2010, 2010-2011 and 2011-2012.

4. Since, the assessee was partly aggrieved by the impugned order dated 14.07.2015, the assessee has instituted the Tax Appeal Nos.4

of 2016 to 8 of 2016 in respect of the aforesaid five Assessment Years. Further, since the Revenue was also aggrieved by the impugned order dated 14.07.2015, even the Revenue had instituted five Tax Appeals challenging the same. However, three of the Tax Appeals instituted by the Revenue were withdrawn by the Revenue on account of the tax effect being less than one crore. This is evident from the order dated 23.09.2019 in Tax Appeal Nos. 33 of 2016, 50 of 2016, and 51 of 2016. Therefore, only Tax Appeal Nos. 52 of 2016 and 49 of 2016 instituted by the Revenue, survive.

5. In Tax Appeal No.5 of 2016 was admitted on 23.03.2016 on the following substantial question of law.

“Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in not holding that all the units of the Appellant -assessee's housing project were compliant with Section 80IB(10), particularly in view of the fact that prior to 1/4/2010, there was no bar on adjacent units being sold to members of the same family?”

6. Similarly, Tax Appeal No.52 of 2016 instituted by the Revenue was admitted on 18.07.2016 on the following substantial question of law.

“Whether the Income Tax Appellate Tribunal was justified to come to the conclusion that the Assessee was further entitled for exemption under Section 80IB(10) of the Income Tax Act on proportionate basis ?”

7. The assessee in the present matters has put up two housing

projects “*Devashri Garden*” comprising of 105 residential units and “*Vasant Vihar*” comprising of 90 residential units. The assessee was denied the deduction under Section 80IB of the Income Tax Act (IT Act) by the Assessing Officer (AO) vide order dated 21.12.2010 on the ground that the area of five residential units in “*Devashri Garden*” and three residential units in “*Vasant Vihar*” exceeded 1500 square feet and this was in breach of conditions contained in sub-clause (c) of Clause 10 of Section 80IB of the IT Act. In denying this deduction under Section 80IB, the AO in his order dated 21.12.2010 relied on the judgment of ITAT (Chennai) in ***CIT Vs Vishwas Promoters (P) Ltd.*** (2010) 126 ITD 263 (Chennai), which had taken the view that there was no provision for grant of any proportionate deduction.

8. The assessee appealed to the Commissioner (Appeals) who, vide order dated 05.11.2014 partly allowed the appeal of the assessee and directed the AO to allow deduction under Section 80IB(10) to the assessee on a proportionate basis. The Commissioner (Appeals), *inter alia*, relied upon the decision of Madras High Court in the case of ***M/s. Viswas Promoters (P) Ltd. Vs ACIT, (2013) 29 Taxman. com 19 (Madras)*** which had reversed the decision of ITAT (Chennai) upon which reliance had been placed by the AO in his order dated 21.12.2010.

9. The assessee as well as the Revenue appealed to the ITAT, being aggrieved by the orders of the Commissioner (Appeals). The assessee was aggrieved because it was the case of the assessee that there

was no breach even in respect of 8 out of a total of 195 residential units in the two housing projects. The Revenue was aggrieved on account of direction to grant proportionate deduction to the housing project.

10. The ITAT, by the impugned order dated 14.07.2015 dismissed the appeals instituted by the assessee as well as the Revenue. Hence, these two sets of appeals by the assessee and the Revenue.

11. Mr. Naniwadekar, learned counsel for the assessee submits that in this case the approvals were obtained by the assessee from the Local Authorities and the planning Authorities for putting up a housing project having residential units of less than 1500 square feet. He submits that if thereafter the allottees combined two residential units, the deduction under Section 80IB(10) can never be denied to the assessee. He submits that this contention of the assessee which was backed by documentary evidence which was not even considered by the ITAT. Hence, the appeals by the assessee. Mr. Naniwadekar relied upon several decisions in support of his contention.

12. Ms. Linhares, learned counsel for the Revenue submitted that there is no error in the findings of fact concurrently recorded by three Authorities that 8 out of 195 residential units in two projects admeasured more than 1500 square feet and consequently, there was a breach of conditions contained in Section 80IB(10)(c) of the IT Act. She, therefore, submits that the appeals instituted by the assessee deserve to be dismissed.

13. Ms. Linhares submits that there is no provision under the IT Act for extension of any proportionate deduction. She submits that the view taken by the Commissioner (Appeals) and the ITAT on the issue of the proportionate deduction is contrary to the law laid down by this Court in ***CIT Vs Brahma Associates*** (2019) 414 ITR 47 (Bom), ***CIT Vs Vandana Properties*** (2013) 353 ITR 36 (Bom.) and rulings of the Hon'ble Supreme Court in ***Britannia Industries Ltd. Vs Commissioner of Income Tax*** (2005) 148 Taxman 468 (SC). She, therefore, submits that the appeals instituted by the Revenue are liable to be allowed.

14. Mr. Naniwadekar, learned counsel for the assessee submits that in the undermentioned decisions, various High Courts have taken the view that the proportionate deductions can be granted under Section 80IB(10) of the IT Act:-

- (i) ***Viswas Promoters (P) Ltd. Vs Assistant Commissioner of Income Tax, Circle 1***, (2013) 29 Taxman. Com 19;
- (ii) ***CIT Chennai Vs Arun Excello Foundations (P) Ltd.*** (2013) 29 Taxman. com 149 (Madras);
- (iii) ***CIT Vs S. G. Estates Ltd.***, 2015 (7) TMI 1302 (Delhi);
- (iv) ***CIT Vs M/s Brigade Enterprises Ltd.***, ITA No. 54 of 2012 decided on 22.09.2020 by Karnataka High Court.

15. Mr. Naniwadekar further pointed out that even the decisions in ***Brahma Associates*** (supra) and ***Vandana properties*** (supra) assist the case of the assessee and not of the Revenue. He points out that in

Commissioner of Income Tax-21 Vs Aakash Nidhi Builders and Developers (2016) 76 Taxman. com 73 (Bombay) the Revenue conceded that the proportionate deduction can be granted because of the decision in *Vandana properties* (supra).

16. Mr. Naniwadekar relied upon some other decisions as well to submit that the proportionate deduction can always be granted under Section 80IB(10) of the IT Act, even assuming that the area of some of the residential units was more than the ceiling prescribed in clause (c) of Section 80IB(10) of the IT Act. He, therefore, submitted that the appeals of the Revenue be dismissed.

17. Mr. Naniwadekar based on instructions made a statement that in case the appeals of the Revenue are dismissed, then, the assesseees will not press for any reliefs in the appeals instituted by them as the assesseees would be satisfied with the relief of proportionate deduction. He, however, submitted that all contentions of the assesseees may be kept open particularly since the assesseees were contesting the collateral proceedings i.e. penalty, etc., and would not want to be prejudiced on account of this concession which was being made without prejudice.

18. The rival contentions now fall for our determination.

19. On the issue of proportionate deduction under Section 80IB(10) of the IT Act, we are satisfied that the view taken by the Commissioner (Appeals) as well as the ITAT calls for no interference.

20. The view taken by the Commissioner (Appeals) and the ITAT is quite consistent with the view taken by the High Courts of Madras, Delhi, and Karnataka. It was pointed out that even the Special Leave Petition against the Madras High Court's decision was dismissed by the Hon'ble Supreme Court. Accordingly, there is no good ground to interfere with the view taken by the Commissioner (Appeals) and the ITAT on the issue of proportionate deduction, at the instance of the Revenue, in these matters.

21. The Karnataka High Court in *Brigade Enterprises Ltd.* (supra) has held that the legislature has used the expression “ *the residential unit*” in clause (c) of Section 80IB(10) of the IT Act and omitted to use the expression “*each residential unit*”. This omission is deliberate because in several sections like Section 5A, 6(5), 10(10), 35D(1), 44AD(3), 80HHB, 80I(5), 153C, 153D, 158DA, 293A(3), 296 and 298(4) of the IT Act as well as under Rules 2BA, 20(4), 22(3), 62(3), 74(2), 74(6) and 104, the legislature has expressly used the word “*each*”. The Karnataka High Court has reasoned that it is well settled that when a situation has been expressed differently, the legislature must be taken to have been tended to express a different intention {See: *Commissioner of Income Tax – Delhi Vs East West Import and Export (P) Ltd.* 1989 (1) SCC 760.} Therefore, on a plain reading of clause (c) of Section 80IB(10) of the IT Act, it is evident that the same does not exclude the principle of proportionality in any manner.

22. *Brahma Associates* (supra) relied upon by Ms. Linhares does not support the contention now advanced by her. In that case, the issue

involved was whether a housing project, in which, a portion of the premises was permitted to be used for commercial purposes, was entitled to deduction under Section 80IB(10) of the IT Act. In that context, this Court held that where the commercial user was allowed under the Development Control Rules, the assessee was entitled to deduction under Section 80IB(10) on the entire project approved by the Local Authorities and there was no question of only some proportionate deduction. Some of the observations in *Brahma Associates* (supra) therefore, cannot be torn out of the context to urge that no proportionate deduction was contemplated under Section 80IB(10) of the IT Act.

23. Similarly, in *Vandana properties* (supra), the issue involved was whether an assessee was entitled to claim deduction under Section 80IB(10) of the IT Act where the assessee failed to fulfill primary conditions laid down under Section 80IB(10) of the IT Act, such as the condition that the area of plot being at least one-acre or the area of the residential units being less than 1000 square feet, at the time of commencement of the project. This Court agreed with the Tribunal that in fact, there was no merger of two flats and consequently, there was no breach of condition that required the area of the residential units to not exceed 1000 square feet. *Vandana properties* (supra) is, therefore, of no assistance to the Revenue in this matter.

24. Similarly, the issue involved in *Britannia Industries Ltd* (supra) was entirely different, and in the present matters, it is not even the case of the Revenue that two projects put up by the assessee were not

housing projects. Accordingly, even *Britannia Industries Ltd.* (supra) can be of no assistance to the Revenue in these matters.

25. In *Aakash Nidhi Builders and Developers* (supra) the Revenue conceded that the issue of proportionate deduction was decided by the ITAT in favour of the assessee by following *Vandana properties* (supra) and this appeal had been filed only because the Revenue had challenged the decision in *Vandana properties* (supra) in the Apex Court. Although we do not propose to go by the concession made on behalf of the Revenue, we think that the rulings relied upon by Ms. Linhares do not in any manner detract from the views taken by the High Courts of Madras, Delhi, and Karnataka on the issue of proportionate deduction under Section 80IB(10) of the IT Act and therefore, there is no case made out to interfere with the view of Commissioner (Appeals) and the ITAT, which view is quite consistent with the views taken by these High Courts.

26. Now that we are dismissing the appeals instituted by the Revenue, we accept the statement made by Mr. Naniwadekar on behalf of the assessee that they would not press the Tax Appeal Nos. 4 of 2016, 5 of 2016, 6 of 2016, 7 of 2016 and 8 of 2016 instituted by them, without prejudice to their rights to raise all permissible contentions in collateral proceedings.

27. Accordingly, we dispose of all these appeals by making the following order:-

(A) Tax Appeal Nos.49 of 2016 and 52 of 2016 are hereby

dismissed by answering the substantial question of law framed therein against the Revenue and in favour of the assessee;

(B) Tax Appeal Nos. 4 of 2016, 5 of 2016, 6 of 2016, 7 of 2016, and 8 of 2016 are dismissed as not pressed, without answering the substantial question of law framed therein. However, it is clarified that such disposal shall not prevent the assessee from raising all permissible contentions, particularly in the collateral proceedings i.e. penalty proceedings, etc.

(C) There shall be no order as to costs.

DAMA SESHADRI NAIDU, J.

M. S. SONAK, J.

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