IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1699 OF 2017

Pr. Commissioner of Income Tax-24 ….Appellant

V/s.

Neeta Enterprises …Respondent

Mr. Suresh Kumar for Appellant
Ms Aasifa Khanam Khan i/b Mr. Niraj Punmiya for Respondent

WITH
INCOME TAX APPEAL NO.1672 OF 2017
WITH
INCOME TAX APPEAL NO.1673 OF 2017
WITH
INCOME TAX APPEAL NO.966 OF 2018
WITH
INCOME TAX APPEAL NO.951 OF 2018
WITH
INCOME TAX APPEAL NO.940 OF 2018

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ
DATED : 23rd NOVEMBER 2021

P.C. :

1 Respondent filed Rs. Nil return of income for A.Y.-2007-2008 on 31st October 2007. The assessment order under Section 143(3) of Income Tax Act (the Act) was passed on 17th December 2009 assessing the total income of respondent at Rs.13,50,93,090/-. In the assessment order, respondent's claim of deduction under Section 80IB(10) (*Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings*) of the Act of Rs.13,50,93,090/- was disallowed holding that development and construction of the housing project

commenced from a date prior to 1st October 1998, thereby violating clause (a) of Section 80IB(10), hence respondent was ineligible to claim the deduction. According to Assessing Officer, it was found that BMC had issued commencement certificate to assessee's project Gundecha Gardens on 28th November 1992 to one Bombay Gas Co. Ltd. for development of the proposed residential building and club house. This had been revalidated up to 27th November 2003 and the same was being extended for further period as evidenced in the notings in the commencement certificate dated 28th November 1992. The part occupation certificate, on the basis of which deduction under Section 80IB(10) of the Act was claimed in respect of completion of Wing A, B & C was also issued in favour of Bombay Gas Co. Ltd. on 18th February 2006 by BMC. The Assessing Officer also found that a sum of Rs.1,80,46,496/- was incurred before 1st October 1998 on the development of the project by one Bombay Gas Developers in which Bombay Gas Co. Ltd. was a partner. Subsequently assessee purchased the development right of the project from Bombay Gas Developers vide development agreement dated 10th July 2003. The Assessing Officer held that the assessee, therefore, had stepped into the shoes of Bombay Gas Co. Ltd and continued the project was first approved by the local authority on 28th November 1992. As the housing project that was first approved by the local authority on 28th November 1992 and thereafter the sum of Rs.1,80,46,496/- was also incurred on the development of the project before 1st October 1998, the Assessing Officer concluded that the assessee did not satisfy the condition of commencing the housing project on or after 1st October 1998 and disallowed the deduction claimed by respondent under Section 80IB(10) of the Act. We have to note that the Commissioner of Income Tax-24 (CIT) Mumbai had invoked his revisionary jurisdiction of Section 263 of the Act and set aside the assessment order under Section 143(3) dated 17th December 2009 by holding the same to be erroneous and prejudicial to the interest of revenue. CIT observed that while rejecting the claim for deduction under Section 80IB(10) the Assessing Officer had only focused on commencement date of the project but had not enquired or verified about respondent complying with every condition of completion of project on or before 31st March 2008. Against that order of CIT under Section 263 of the Act, an appeal was preferred by respondent before Income Tax Appellate Tribunal (ITAT) and the appeal came to be dismissed. Respondent has preferred an appeal in this court being Income Tax Appeal No.1517 of 2013 and the same has been admitted on 7th May 2015 and is still pending.

2 Based on the revisionary orders passed by the CIT, an assessment order under Section 143(3) read with Section 263 of the Act was passed on 22nd March 2013 assessing total income of the assessee at the same figure of Rs.13,50,93,090/-. The assessee's claim of deduction under Section 80IB(10) of Rs.13,50,93,090/- was disallowed for violation of both conditions prescribed under Section 80IB(10) regarding commencement as well as completion of the project. The Assessing Officer concluded that the

commencement date was prior to 1st October 1998 for the same reasons as noted earlier and also that the project also was not completed before 31st March 2008 as the assessee had not obtained completion certificate from local authority on or before 31st March 2008 and had only obtained part occupation certificate.

3 Aggrieved by this order, respondent preferred an appeal before CIT(Appeals), who by order dated 21st May 2014 allowed the appeal and held that respondent was entitled to the deduction under Section 80IB(10) of the Act. Revenue challenged this order before the ITAT and ITAT upheld the finding of the CIT(Appeals). Against that order of ITAT passed on 21st October 2016, this appeal has been preferred by Revenue.

4 Appellant has proposed the following substantial questions of law:

> *"(i) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal erred in allowing deduction u/s 80IB(10) of the Income Tax Act 1961, without appreciating the fact that the commencement certificate of the local authority for the housing project was obtained on 28th November 1992, i.e., much before 1st October 1998, the date on or after which the development and construction of the housing project should have commenced to be eligible for deduction u/s 80IB(10) of the Income Tax Act 1961.*
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> *(ii)Whether on the facts and in the circumstances of the case and in law, the Hon'ble Income Tax Appellate Tribunal erred in allowing deduction u/s 80IB(10) of the Income Tax Act 1961, without appreciating the fact that the completion certificate of the local authority for the housing project was not obtained upto 31st March 2008, the date on or before which the construction of the housing project should have been completed, to be eligible for deduction u/s 80IB(10) of the Income Tax Act 1961."*

5 As regards second question proposed, Mr. Suresh Kumar submitted that in view of the finding of this court in its order dated 16th January 2019

in Income Tax Appeal No.1027 of 2016, this question has been answered.

6 As regards first question, CIT(Appeals) as well as ITAT has come to a conclusion on facts that though permission was obtained by Bombay Gas Co. Ltd. in 1992, Bombay Gas Co. Ltd. had not incurred any expenditure on the development and construction of the aforesaid housing project before 1st October 1998. It has also been held on facts, after considering all documents filed, that even the expenses which were incurred by Bombay Gas Co. Ltd. was only for strengthening the boundary wall and not for any development or construction of the housing project.

7 On the plan approved by local authority on 28th November 1992 it has been concluded and held on facts that the plan based on which the assessee commenced development and construction, was totally different from the plan which was approved on 28th November 1992 and the revised plan based on which the assessee commenced the development and construction, was entirely different from the original plan and that plan has been approved by the local authority only in 2003. It has been factually held that as per the original plan approved on 28th November 1992, two buildings were to be constructed on the aforesaid plot of land. As per the revised building plan approved by the local authority in 2003, seven buildings were to be constructed on the said plot of land. It is also not disputed that assessee is a different entity from Bombay Gas Co. Ltd. which had got original plan approved in 1992 and the assessee had taken possession of the plot of land only in the year 2003 and thereafter got the revised plan

approved.

8 In our view, the ITAT has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

9 The appeal is devoid of merit and is dismissed with no order as to costs.

10 Mr. Suresh Kumar states that this order will apply to all the appeals which are listed today namely; ITXA No.1672 of 2017, ITXA No.1673 of 2017, ITXA No.966 of 2018, ITXA No.951 of 2018 and ITXA No.940 of 2018. These appeals are also accordingly dismissed.

11 In view of the above order, Ms Khan seeks leave to withdraw ITXA No.1517 of 2013. Leave granted. ITXA No.1517 of 2013 dismissed as withdrawn.

12 Ms Khan in view of the above order states ITXA(L) No.1968 of 2014 filed by appellant will also not survive. This appeal be listed for directions on 29th November 2021.

(AMIT B. BORKAR, J) **(K.R. SHRIRAM, J.)**

Meera Jadhav:- This order has been corrected pursuant to the speaking to the minutes of order dated 16/12/2021