

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 22.04.2021

CORAM:

THE HON'BLE MR.JUSTICE M. DURAISWAMY
AND
THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

T.C.A.No.209 of 2015

The Commissioner of Income Tax,
Chennai. ... Appellant /Appellant
vs.

Shri S. Muthu Palaniappan,
Chettinadu Housing No.1,
9th Avenue, Ashok Nagar,
Chennai - 600 083.
PAN : AAQPP 7494 P ... Respondent /Respondent

Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai, "B" Bench, dated 12.11.2013 in I.T.A.No.1650/Mds/2012 for the Assessment Year 2009-2010.

Order passed by the Commissioner of Income Tax Appeals - VIII, Chennai in ITA.119/11-12(A)- VIII dated 22.05.2012 against the Assistant Commissioner of Income Tax Business Circle IV, Chennai - 34 in PAN AAQPP746P dated 28/12/2011.

For Appellant : Mr. M. Swaminathan
Senior Standing Counsel

For Respondent : Mr. G. Baskar
JUDGMENT

(Judgment was delivered by M. DURAISWAMY, J.)

Challenging the order passed in I.T.A.No.1650/Mds/2012 in respect of the Assessment Year 2009-2010 on the file of the Income Tax Appellate Tribunal, Chennai, "B" Bench (for brevity, the Tribunal), the Revenue has filed the above appeal.

2. The above appeal was admitted on the following substantial questions of law:

" (i) Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was legally justified in holding that open terrace area which can be accessed only through the private balcony of the individual purchaser should not be included while computing the built up area for purpose of claiming deduction u/s 801B(10)?

(ii) Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the time limit for completion of the eligible project should not be computed from the day on which the layout was approved, viz., 22.9.2003, but the time limit was to be reckoned from the date on which the building plan approval was obtained for the last time i.e. 29.3.2007?

(iii) Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was accepting the completion certificate issued by the Pallikaranai Panchayat Union without insisting on the completion certificate of the Chennai Metropolitan Development Authority, who had originally sanctioned the layout plans?

(iv) Is not the finding of the Tribunal wrong by holding that the open terrace area which cannot be accessed by anybody except the owner of the unit that the private balcony is not to be taken into account while computing the built up area for the purpose of claiming u/s 801B(10)?"

3. When the appeal is taken up for hearing, Mr. M. Swaminathan, learned Senior Standing Counsel appearing for the appellant fairly submitted that the questions of law that are raised in the above appeal were already decided against the Revenue in the respondent- assessee's own case in respect of the Assessment Year 2009-2010 in I.T.A.No.16650/Mds/2012, dated 12.11.2013 vide para Nos. 21 to 25 of the Judgement, which reads as follows:-

" 20. The first point for our consideration is whether the building project of the assessee is an housing project or not for the purpose of section 801B(10) of the Act. The word 'housing project' is neither defined in section 2 of the Income Tax Act nor in section 801B(10) of the said Act. It has to be understood in common parlance, the expression 'housing project means "constructing single building or a group of buildings consisting of several residential units". In this case, the assessee had conceived project for development and construction of independent houses. Accordingly, he entered into an agreement with the land owners as well as prospective buyers and constructed 162 independent houses. Therefore, in our opinion, the assessee's project is an housing project, which is within the ambit of section 801B(10) of the Act. The Id. CIT

(Appeals) has considered the issue elaborately in his order [page 28 and 29]. Therefore, we do not find any infirmity in the order of the Id. CIT (Appeals) and the ground raised by the Revenue stands dismissed.

21. The second issue for our consideration is whether the approval of the Project and completion date is as per section 801B(10) of the Act or not. The assessee, initially entered into an agreement dated 15.06.2004 with 17 land owners to develop the land to the extent of 7.11 acres and built housing project on a layout, which has already been approved by the CMDA and paid advance of Rs.86,05000/-. Thereafter, the assessee has developed roads, parks, play areas, etc. The assessee has applied for approval of construction of 3 prototype houses and the same was approved on by the Pallikaranai Panchayat and started negotiating with prospective buyers and after registration, the assessee has constructed independent house. The objection raised by the Assessing Officer that the 3 prototype houses are not having 1 acre area of land and therefore held that the assessee is not eligible for deduction under section 801B(10) on the ground that plot must be in 1 acre of land. This aspect was considered by the Id. CIT (Appeals) in detail in his order at page 33 to 35. From the careful consideration of the assessment order and CIT (Appeals)'s order with details filed by the assessee in the paper book, we have to find whether the project undertaken by the assessee is on the size of the plot of land having an area of minimum- 1 acre or not. The size of the plot, as taken by the assessee, is 7.11 acres and after developing roads, parks, play area, etc. the left over area for construction of the house is 3.675 acres. Therefore, the Assessing Officer was not correct in saying that the housing project is not on a plot of 1 acre area. The assessee has taken 3 prototype houses and got it approved from the local authority and on the basis of that the assessee has pursued prospective buyers and entered into an agreement for construction as well as selling of the land and completed the housing project. The method adopted by the assessee is according to his business convenience and in our opinion, the housing project is on the size of plot of land having more than 1 acre and therefore, on this account, the benefit available under section 801B(10) cannot be denied and the project constructed by the assessee is in 1 acre of land and we find, no reason to interfere with the order of the Id. CIT (Appeals). Accordingly, the issue raised by the Revenue stands dismissed.

22. In so far as CMDA- approval is concerned, in response to Assessing Officer's letter, vide letter No. 1v12/21841/2011 dated 26.12.2011 [paper book page No. 185 & 186], the Assessing Officer has received a letter from the Member-Secretary, CMDA, wherein it was expressed an opinion that if a housing project is 'made in a already CMDA approved layout, than in such case, the Competent Authority for issue of planning permission and building permit for independent buildings in each plot under ordinary building category is Pallikaranai Town Panchayat previously and Chennai Corporation now. In the case of the assessee, the assessee had entered into an agreement with the landowners and paid an advance and developed the land and after negotiation with prospective buyers, he has sold the plots and constructed independent houses. Therefore, in our opinion, the approving authority is local authority i.e. Pallikaranai Panchayat. Hence, no separate CMDA approval is required In the assessment order, the Assessing Officer has raised one more objections that the " date on which the layout approved has to be taken into consideration for the purpose of approval of the project. We find no reason to take layout approval date for approval of the housing project for simple reason that the layout was approved on 22.09.2003 and" subsequently "assessee had entered into an agreement with the land owners on 15.06.2004. When the layout was approved, the assessee was not conceived the project. In the assessment order, the Assessing officer has raised one more objection that the assessee has taken several approvals and then multiple approvals for the same project was taken then the first approval of the project should be taken as the date of approval of the project. In this case, the assessee, after entering into an agreement with the land owners, taken approval for the 3 prototype houses (3 units) and got approved from the Local authority on 06.05.2005. This approval was only for 3 units out of 162 units. The, assessee, by showing the prototype 3 models and sold the land, construction agreement entered into and submitted for approval of the local authority. This is the modus operandi adopted by the assessee. In that process, the assessee got approval for remaining 159 independent housing units and the last unit approval by the local authority was on 29.03.2007 and ultimately the entire project was completed and completion certificate was obtained from the Pallikaranai Panchayat on 03.03.2011. The Id CIT(Appeals), after considering the entire facts of the case, has observed that "though the assessee got approval of building on various dates, the date

of approval of the building was taken on the date on which he has obtained first approval for construction of 3 prototype houses. However, the building plan approvals for the remaining houses have also been obtained before 31.03.2008 as required by section 8018(10) and all these dwelling units in the project were completed and completion certificate was obtained on 03.03.2011 as required by clause (a) of section 80IB(10)". By following the decision of the Hon'ble Bombay High court in the case of CIT v. Vandana Properties 353 ITR 36 (Born). The Hon'ble Bombay High Court has observed in .para 22 in respect of Explanation to section 80IB(10) (a), which as introduced w.e.f 01.04.2005 that "what the said Explanation contemplates is that where the approval in respect of housing project is granted more than once, then, that housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority. For example, in respect of a housing project, the assessee may seek amendment of the building plan at several stages of the construction and the same may be approved. In such a case, the Explanation provides that for the purposes of section 80IB(10) the housing project shall be deemed to have been approved on the date on which the first approval was granted by the local authority. Thus, the Explanation to section 80IB(10) (a) refers to approval granted to the same housing project more than once and the said Explanation would not apply where the approval is granted to different housing projects". In the present case, at the cost of repetition, we have to state that the so called initial approval on 06.05.2005 was, in fact, obtained in respect of 3 prototype units. It will be misleading, we say that the said approval of the prototype units cover the entire units of the project and the said approval should be taken at the approval for the whole project. Such a conclusion will be a travesty of truth. It is on the basis of the approval of the prototype units that the assessee had finalized its project and commenced negotiations with potential customers. When the assessee was successful in selling out the individual units of the project on the basis of the prototype, the occasion actually arose to the assessee to seek for the approval of the projects as a whole. Since the project consisted of individual dwelling unit, it was necessary to obtain individual approval and the last approval for the last unit obtained was, in fact, on 29.03.2007. Therefore, it is this date on 29.03.2007, which is to be reckoned as the date of approval of the local authority for the whole housing project contemplated by the

assessee. The limitation period of five years of completion of the project runs from the date of 29.03.2007. The project was completed on 03.03.2011; within the limitation period of five years. Therefore, in the light of the judgement of the Hon'ble Bombay High Court rendered in the case of CIT v. Vandana Properties (supra) and the facts of the case as explained above, the objection of the Assessing Officer that the project was not completed within the time is not sustained in law. Therefore, as already stated, we endorse the findings of the Id. CIT(Appeals) on this issue.

23. The next aspect for our consideration is whether the assessee is developer or works contractor. The assessee initially entered into an agreement with 17 land owners to the extent of land in 7.11 acres and paid an advance of Rs. 86,05,000/- and developed the roads, parks, play area, street lights, etc. by incurring an amount of Rs. 79.20 lakhs and pursued prospective buyers and negotiated with them and thereafter sold the land and constructed independent houses. So, the assessee has taken an investment risk and also developed the area. Therefore, the assessee is a builder and developer and not a contractor. The contractor is a person undertakes to do a particular work. In this case, the assessee has not taken any simple construction work. The assessee has conceived the project, developed all necessary infrastructure facilities and constructed independent houses and completed the project well within the time as stipulated under the Act. The Id., CIT(Appeals) has dealt with this issue at page Nos. 29 to 32 elaborately in support of various case law and also held that the project executed by the assessee was not of the nature of works contract and the assessee undertook investment - risk. Therefore, we find no infirmity in the order of the Id. CIT(Appeals) on this issue and the ground raised by the Revenue is dismissed.

24. In the assessment order, one of the objections raised by the Assessing Officer is that the sale deed was not registered in the name of the assessee and therefore, the assessee was not owner of the land and not eligible for deduction under section 80IB(10). The Id. DR has also raised this objection at the time of hearing. This aspect was considered by the Bombay Bench of ITAT in the case of Essem Capital Markets Ltd. V. ITO (2011) TIOL 196 (ITAT Mum), wherein the Tribunal held that deduction under section 80IB(10) cannot be denied on the ground that the assessee is not the owner of

the property, which he undertakes to develop nor can it be denied on the ground that the development agreement is not registered. In another case CIT v. Radhe Developers [20]2] 341 1112 403 (Gu]], wherein the Hon'ble Gujarat High Court has observed that section 80113(10) allows deduction to an undertaking engaged in the business of developing and constructing housing projects, there is no requirement that the land must be owned by the assessee seeking the deduction. Further, as the assessee was in part performance of the agreement to sell the land, given possession and had also -carried out the construction work for the development of the housing project, it had to be deemed to be the owner under section 2(47)(v) read with section 53A of the Transfer of Property Act, 1882 even though formal title had not passed. In the present case, the assessee is in similar position of the above case decided by the Hon'ble Gujarat High Court. In this case, the assessee had entered into an agreement with the land owners and paid advance and possession of the land was taken, developed the area as well as carried out construction. Similar view has been taken by the Hon'ble Jurisdictional High Court in the case of CIT v. Sanghvi and Doshi " Enterprise 255 CTR (Mad) 156, wherein the Hon 'ble High Court has observed in the provisions nowhere requires that the developer are owner of the land under section 80111(10), Therefore, the ownership is not an essential condition to get the benefit under section 801.600). In this case, the assessee being a developer as well as builder is entitled for deduction under section 801B (1 0) of the Act.

25. Another objection raised by the Assessing Officer is with regard to built up area. In the assessment order, the Assessing Officer has noted that if private terrace is included in the built up area, it exceeds more than 1500 sq ft. and therefore, the assessee is not eligible for deduction under section 80113(1 0). Further, he has relied on the decision of 1TAT Chennai Bench in the case of Sanghvi and Doshi Enterprise. The Id. CIT (Appeals) in his order at page Nos. 36 to 39 has meticulously calculated the built up area. According to the Id. CIT(Appeals), the total built up area of each residential unit is 1465.03 sq ft. He has observed that there is nothing built and it is an open space, such space cannot be included in the built up area without a specific provision in that regard. Therefore, he has held that open terrace is not to be included in the built up area and accordingly, the claim of the assessee was to be allowed. At the tune of argument, the Id. DR has

pointed that open terrace should be included in the built up area and the same was considered by the Tribunal in the case of Sanghvi & Doshi Enterprise, the same very 1TAT order has been followed by the Assessing Officer. We find that the same issue has come up for consideration before the Hon'ble Jurisdictional High Court in the case of Sanghvi and Doshi Enterprise 255 CT? (Mad) 156, wherein the Hon'ble High Court has observed that open terrace area could not be the subject matter of inclusion as built up area to deny the benefit under section of the Act. Further, the Hon'ble Jurisdictional High Court in another case CIT v. Mahalakshmi Housing (supra), the Hon'ble High Court has observed that "as per the issue in respect of inclusion of open terrace area within the built up area is concerned, the Court has already held the issue against the Revenue and the decision rendered in T.C.A No. 581 of 2008, 1186 of 2008 and 136 of 2009 the case of M/s. Ceebros Hotels Private Limited v. DCIT dated 19.10.2012 and accordingly, the order of the Tribunal on this issue is set aside. The assessee's appeal viz. T.C.A. No. 318 of 2012, stands allowed holding that open terrace area cannot form part of built up area and the assessee would be entitled to deduction under section., 80IB(10) of the Act. Keeping in view of the facts and circumstances and the decision of the Hon'ble Jurisdictional High Court and respectfully following the same, the open terrace area could not be included in the built up area for the purpose of benefit under section 80IB (10) of the Act. The Id. CIT(Appeals) has elaborately discussed the issue in his order at page Nos. 36 to 39 and held that the open terrace area are not to be included in the built up area and decided the issue in favour of the assessee. Keeping in view of above decisions of Hon'ble Jurisdictional High Court, we do not find any reason to interfere with the order passed by the Id. CIT(Appeals) and dismiss the grounds raised by the Revenue. In view of the facts and circumstances of the case, materials placed on record as well as from the order of the Id. CIT(Appeals), we are of the considered opinion that the assessee is a developer and builder of housing project and he has complied with all conditions laid down under section 80IB(10) and thus, he is eligible for deduction under section 80IB(10) of the Act and confirm the order passed by the Id. CIT(Appeals) 4cpro tanto. Accordingly, the appeal filed by the Revenue is dismissed. "

Further, the learned Senior Standing Counsel submitted that the above questions of law were also decided against the Revenue in the following Judgments reported in :-

- (i) (2013) 255 CTR (Madras) 156 [Commissioner of Income Tax v. Sanghvi & Doshi Enterprise] ;
(ii) 2013) 353 ITR 356 (Bombay) [Commissioner of Income Tax v. Vandana Properties Enterprise],; and
(iii) (2013) 341 ITR 403(Guj) [Commissioner of Income Tax v. Radhe Developers].

4. Mr.G.Baskar, learned counsel appearing for the respondent-assessee submitted that in view of the decisions of the Madras, Bombay and Gujarat High Courts, the questions of law may be decided against the Revenue and the appeal may be dismissed.

5. In view of the submissions made by the learned counsel on either side, following the ratio laid down in (2013) 255 CTR (Madras) 156 [cited supra], 2013) 353 ITR 356 (Bombay) [cited supra] and (2013) 341 itr 403(Guj) [cited supra], the questions of law are decided against the Revenue and in favour of the assessee. The appeal is liable to be dismissed. Accordingly, the Tax Case Appeal is dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

Rj

To

- 1.The Income Tax Appellate Tribunal,
Chennai,"B" Bench.
- 2.The Commissioner of Income Tax Appeals VIII,
Chennai.
- 3.The Assistant Commissioner of Income Tax Business,
Circle -IV, Chennai - 34.

+1cc to Mr. M.Swaminathan, Advocate, S.R.No. 24547
+1cc to Mr. G.Baskar, Advocate, S.R.No. 24803

T.C.A.No. 209 of 2015

PVS (CO)
GN(06/07/2021)