IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 2020 OF 2017

Commissioner of Income Tax-24,
4th Flr., Piramal Chambers, Lalbaug,
Parel, Mumbai-400 012. ...Appellant
vs.
Abode Builders
03, Bilquis Apartment,
Mahakali Caves Road, Andheri (E),
Mumbai-400 093
PAN: AABFA 2111K ...Respondent

Mr.Sham V. Walve for appellant.

Mr.Rahul Sarda i/b Mr.Shashank Dundu for respondent.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATE : 16 FEBRUARY, 2022

<u>PC :</u>

1. The appellant has proposed the following three questions of law :

> (A) Whether the facts and in the circumstances of the case, the Hon'ble ITAT has erred in treating the assessee as developer, ignoring the fact that as per the Joint Venture Agreement between the assessee and M/s. Vaman Estate the development and construction of the building was done by M/s. Vaman Estate at its own cost and the assessee did neither invest any money nor developed /constructed the building?
>
> (B) Whether the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in directing the AO to allow deduction u/s. 80IB(10) of

> the Income Tax Act, 1961, amounting to Rs.17,94,05,681/- when the assessee did not assume any risk associated with being a developer and hence was neither land owner nor developer, but mere facilitator?
>
> (C) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in directing the AO to allow deduction u/s.80IB(1) of the I.T. Act, 1961, amounting to Rs.17,94,05,681/- ignoring the fact that the commencement of development of residential project started before the statutory date of 01.10.1998?

2. According to appellant, respondent-Assessee Firm is a developer and builder who developed a residential project called "Trans Residency" on a piece of land admeasuring 12,540 sq. metre in Andheri Area of Mumbai. The assessee firm entered into a Joint Venture Agreement with another concern M/s. Vaman Estate to develop the property vide agreement dated 28-08-2001. The residential project "Trans Residency" has 7 wings in Building No. I (A to G) and 3 wings in building No. III (A to C). The construction activity was undertaken for Wing E & F first and residential units were sold before 31-03-2005. The project for E & F Wing was completed in 2005 and profits were offered for tax (deduction u/s. 80IB was claimed on the same) in the return of income filed for A.Y. 2005-06, while the rest of the project was completed in March, 2007, and proceeds on sale of residential

units was shown in the return of income filed for A.Y. 2007-08. The return of income was filed on 19.10.2007 declaring total income of Rs.18,16,656/-. The only addition was made on account of disallowance of claim u/s 80IB(10) of the Income Tax Act, 1961 ('the Act') amounting to Rs.17,94,05,681/-.

3. During the course of assessment proceedings, the Assessing Officer (AO) scrutinized the assessee's claim keeping in view two major criteria having a direct bearing on the legitimacy of the claim. The AO observed that the land on which the Trans Residency Project had been built was not owned by the assessee but by Malad Satguru Sadan CHS Ltd. and that the Conveyance Deed for the said land had been executed in the name of the society in pursuance to the directions of the High Court vide Consent Decree passed on 18.07.1995. The AO also noted that the assessee had been engaged as a 'developer' by the Malad Sadguru Sadan CHS and has made payment on behalf of the society. Based on this, the AO concluded that the assessee was not the owner of the said land. Then the AO proceeded to examine whether the assessee could be considered as a developer. The AO observed that the assessee entered into a Joint Venture Agreement with M/s. Vaman Estate on 28.08.2001 and observed that as per the

agreement, the development and construction of the building was to be done by M/s. Vaman Estate at its own cost and both the parties were to share the gross sale proceeds in the ratio of 50:50. The AO concluded that the assessee did not incur any expenditure on the project, nor did he do any construction activity and the proceeds from the project were its net profit. The AO observed that once the Joint Venture Agreement was entered into, the status of the assessee changed from that of a 'developer' to that of a 'facilitator'. The AO, thus, observed that the assessee was neither 'the owner' nor 'the Developer' of the property and accordingly the assessee was not eligible for claiming deduction u/s 80IB(10) of the Act.

4. A supplementary agreement had been executed between the assessee and M/s. Vaman Estate on 14.03.2005. Based on various clauses of both the above-mentioned agreements, the AO concluded that the BMC had given sanction to the Plan submitted by the assessee through letter dated 21.09.1996. He observed that the Explanation to section 80IB(10) of the Act stipulated that where the approval for the concerned project was given more than once, the date of initial approval would be the operative date of approval. Thus, the assessee was not eligible to claim deduction

u/s 80IB(10). Accordingly, the AO rejected the assessee's claim of deduction u/s. 80IB(10) of the Act amounting to Rs.17,94,05,681/-. The assessment was completed u/s 143(3) of the Act on 24.12.2009 assessing the total income at Rs.18,12,22,340/-.

5. Respondent-Assessee firm challenged this order before the Commissioner of Income Tax (Appeals) ['CIT (Appeals)'] by filing an appeal. The appeal was allowed by an order dated 31.01.2013. The CIT (Appeals) allowed the claim of deduction under section 80IB(10) of the Act. Aggrieved by this order of CIT (Appeals), revenue preferred an appeal before the Income Tax Appellate Tribunal, Mumbai ('ITAT'). The ITAT dismissed the appeal by an order dated 26.08.2016. Impugning the order of ITAT, this appeal has been filed.

6. The issue is regarding disallowability of claim of deduction under section 80IB(10) of the Act. Revenue had originally raised three points, namely, (a) lack of ownership of land on which the project was constructed; (b) Assessee not having invested in the construction activity or done construction, could not be considered as developer; and (c) Project was approved and

commenced before the stipulated date of 01.10.1998. On these three grounds, the claim of assessee under section 80IB(10) of the Act was denied by Assessing Officer.

7. As regards the first issue regarding the ownership of the land, though it was raised before the ITAT, has not been raised in this present appeal. Mr. Walve submits that the controversy has been settled by the Gujarat High Court in the case of ***CIT Vs. Radhe Developers*** [1] in favour of assessee. Therefore, we need to consider only the other two issues for not allowing the claim of deduction under section 80IB(10) of the Act.

8. The ITAT has given a finding of fact which is not disputed inasmuch as the ITAT has observed that respondent through, its partner one Liaq Ahmed, has been involved in the project right from the beginning with the signing of the Principal Agreement and primary acquisition of the development rights for the land in question. The AO has not even disputed that Intimation of Disapproval ('IOD') issued by the Municipal Corporation was in the name of assessee. So also the Commencement Certificate (CC). It is also noted that all tax related to the land in question were paid by the assessee from 1998 onwards. It is also noted that

1 **341** ITR **403** (Guj.)

assessee has even made payment for the development rights. What the AO has missed out is unless respondent had any role in the development of the project, the joint venture partner would not agree to share 50% profit in the project with the assessee. Therefore, on this issue, we are in agreement with ITAT.

9. As regards the other objection that the project was commenced much before the stipulated date of 1.10.1998, Mr.Walve submitted that the assessee had submitted the original Plan to the concerned authorities on 7.11.1996 for which the IOD was granted in 1997, and therefore, even if a subsequent IOD has been obtained, as per the Explanation to section 80IB(10) of the Act, where the approval for the concerned project was given more than once, the date of final approval would be operative date of approval.

10. The ITAT has once again come to a finding of fact that the project, as completed, was different from the project for which initial approval had been obtained. It is true that the original Plan which was submitted and for which IOD was granted, was in 1997. The life of the IOD once granted as per the Maharashtra Regional Town Planning Act, 1966 is four years. This finding has

not been disputed by Mr.Walve or appellant. The original Lay-out Plan became invalid after 7.01.2001. The assessee applied for IOD for the second time on 22.11.2001 and was granted permission on 21.07.2002. The ITAT has come to a conclusion on facts, which is also not disputed, that the second project proposal was for only three buildings as against the four for which the permission was sought earlier and IOD for different building was granted on different dates. The ITAT has concluded that therefore the project for which permission was granted on 24.07.2002 was not the same as that, for which the IOD has lapsed in 2001.

11. In our view, we do not find that the ITAT has 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 questions, as pressed, raise any substantial question of law.

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

(N. J. JAMADAR, J.) **(K.R. SHRIRAM, J.)**