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

INCOME TAX APPEAL NO. 470 OF 2017
ALONGWITH
INCOME TAX APPEAL NO. 945 OF 2017

Principle Commissioner of Income
Tax – 32 ….Appellant

V/s.

Vishnu Enterprises …Respondent

Mr. Arvind Pinto for Appellant.
Mr. M. Subramanian i/b Mr. Vishnu S. Hadade for Respondent.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATED : 3rd MARCH, 2022

P.C. :

1. Appellant is impugning the order dated 9th March, 2016 passed by the Income Tax Appellate Tribunal (ITAT) upholding the conclusions arrived at by the Commissioner of Income Tax (Appeals).

2. The substantial question of law proposed in ITXA No.470 of 2017, read as under :

<u>QUESTION OF LAW</u>

1. Whether on the facts and in the circumstance of the case and in law, the Hon'ble ITAT was justified in not taking into consideration a turning fact; namely that the land in question had been conveyed to the SRA and the firm was merely constructing on the dictates of the SRA as its contractor.

2. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was correct in its proposition that the Respondent firm be considered a developer and not a contractor, in view of the undisputed fact of having conveyed the land to the SRA.

> *3. Whether in law and on the facts of the instant case, was the Tribunal justified in merely upholding the orders of the CIT(A); without proper appreciation of the facts of the land having been transferred to the SRA; thereby reducing the firm to the status of a contractor for the former.*

3. If one considers these three questions in totality, the revenue's case is quite clear, i.e., since assessee was not the owner of the land when development work took place, assessee is not entitled to the benefits of Section 80IB(10) of the Income Tax Act, 1961 (the Act).

4. We have considered the order of the ITAT, CIT(A) and the Assessing Officer, copies whereof are annexed to the Appeal memo.

5. Based on the facts alleged before the CIT(A) and the ITAT, the ITAT has come to a conclusion on facts agreeing with the view taken by CIT(A) that the agreement entered into between assessee and SRA should be considered as a whole in order to ascertain the status of assessee. We are in agreement with this approach of the ITAT. Moreover, on examination of the agreement, copy whereof was also tendered to the court on the court's direction, a view has been taken that the assessee cannot be considered as a mere contractor simply for the reasons that the land was conveyed to SRA, since assessee has taken up the entire responsibility to construct the tenements along with infrastructural facilities and the building so constructed has been handed over to SRA. This is what emanates from the agreement which we have also considered with the assistance of the counsel.

6. Whether the proviso to Section 80IB of the Act requires that ownership of the land would be a condition precedent for developing housing project has been considered by the Hon'ble Gujarat High Court in ***Commissioner of Income Tax vs. Radhe Developers***[1]. The Gujarat High Court has rejected the argument of Revenue that in order to receive benefit under Section 80IB(10) of the Act requirement of ownership of the land must be read into the statute. The relevant portion of the judgment reads as under :

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31. Neither the provisions of Section 80IB nor any other provisions contained in other related statutes were brought to our notice to demonstrate that ownership of the land would be a condition precedent for developing the housing project. It was perhaps not even the case of the Revenue that under the other laws governing construction in urban and semi-urban areas, there was any such restriction. It is, however, the thrust of the argument of the Revenue that in order to receive benefit under Section 80IB(10) of the Act, such requirement must be read into the statute. We cannot accept such a contention. Firstly, as already noted, there is nothing under Section 80IB(10) of the Act requiring that ownership of the land must vest in the developer to be able to qualify for such deduction. Secondly, term "developer" has been understood in common parlance as well as in legal sense carrying a much wider connotation. The Tribunal itself in the impugned order has traced different meanings of term "developer" explained in different dictionaries, which read as under:-

"a. The Webster's Encyclopedia unabridged of the English Language gives following meaning of the term developer as:
"1. One who or that which develops;
2. A person who invests in and develops the urban or suburban potentialities of real estate.

b. Oxford Advanced Learners Dictionary of Current English Fourth Indian Edition gives meaning of the term 'developer' as persons or company that develops land.

1 [2012] 341 ITR 403 (Guj)

c. Random House Dictionary of the English Language, the following can be found.
Develop:
a. To bring out the capabilities or possibilities of; bring to a more advanced or effective state.
b. To cause to grow or expand.
Developer:
a. The act or process of developing; progress.
b. Synonym: Expansion, elaboration, growth, evolution, unfolding, maturing, maturation.

d. Webster Dictionary, the following definitions emerge:
a. To realize the potential of;
b. To aid in the growth of strength, develop the biceps,
c. To bring into being: make active (develop a business)
d. To convert (a tract of land) for specific purpose, as by building extensively.
e. Law lexicon Dictionary: The following definitions could be seen:
Development
a. To act, process or result of development or growing or causing to grow; the state of being developed.
b. Happening."

32. Section 80IB(10) of the Act thus provides for deductions to an undertaking engaged in the business of developing and constructing housing projects under certain circumstances noted above. It does not provide that the land must be owned by the assessee seeking such deductions.

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7. It will also be apposite to reproduce paragraph no.7 of the order in ***Commissioner of Income Tax - 24 vs. Abode Builders***[2] which reads as under:

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[3] *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.*

2 ITXA No.2020 of 2017 dated 16th February, 2022
3 341 ITR 403 (Guj)

Therefore, in our view the questions as proposed do not raise any substantial question of law.

8. In Income Tax Appeal No.945 of 2017 following four substantial questions of law are proposed.

QUESTION OF LAW

1. Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in cancelling the order of the CIT issued under section 263; failing to note that the CIT had cancelled the original assessment since there was no verification or enquiry done in the original assessment.

2. Whether in law and on the facts of the instant case would the lack of verification or enquiry permit the CIT to exercise powers under section 263 of the Act.

3. Whether in law and on the facts of the instant case, the Tribunal was in gross error in placing reliance on the order of the CIT(A) for 2007-08 to hold that the issue was debatable; the Tribunal ought to have appreciated that each assessment year is a separate entity and therefore was required to consider the facts and circumstances that were before the A.O. and the CIT for 2006-07.

4. Whether in law and on the facts of the case, was the Tribunal justified in holding that the Respondent Assessee was eligible for deduction under section 80(IB)10; not appreciating the Explanation to the said sub-section that this deduction is not available to a contractor.

9. If we consider Question No.4 then we will not have to go to consider Question No.1, 2 and 3 because Question No.4 is similar to the questions proposed in Income Tax Appeal No.470 of 2017, which we have held does not raise any substantial question of law.

10. In our view, the Tribunal 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.

The appeals are devoid of merits and dismissed with no order as to costs.

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