

T.C.A.Nos.294 of 2018 &amp; etc., batch

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

|                      |                   |
|----------------------|-------------------|
| <b>Reserved On</b>   | <b>21.10.2024</b> |
| <b>Pronounced On</b> | <b>09.05.2025</b> |

WEB COPY

**Coram:**  
**THE HON'BLE MR.JUSTICE R.SURESH KUMAR**  
**and**  
**THE HON'BLE MR.JUSTICE C.SARAVANAN**

**T.C.A.Nos.294 to 299 of 2018 and T.C.A.Nos.355, 356, 378, 389,  
 390, 393, 396, 401, 402, 409 & 411 of 2021**

**T.C.A.Nos.294 to 299 of 2018:**

M/s.Coromondel Cabeles P. Ltd.,  
 A-7, 6<sup>th</sup> Cross Street,  
 Indira Nagar, Adyar,  
 Chennai – 600 020.  
 PAN: AAACC7190E

... Appellant

Versus

The Assistant Commissioner of Income Tax,  
 Company Circle – I (3),  
 Chennai.

... Respondent

**T.C.A.Nos.355, 356, 378, 389, 390, 393,  
 396, 401, 402, 409 & 411 of 2021:**

The Commissioner of Income Tax,  
 Chennai.

... Appellant

Versus

M/s.Coromondel Cabeles P. Ltd.,  
 A-7, 6<sup>th</sup> Cross Street,  
 Indira Nagar, Adyar,  
 Chennai – 600 020.  
 PAN: AAACC7190E

... Respondent



T.C.A.Nos.294 of 2018 & etc., batch

**Prayer in T.C.A.Nos.294 to 299 of 2018:**

WEB COPY

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the common order of the Income Tax Appellate Tribunal 'C' Bench, Chennai in I.T.A.No.1779/Mds/2013 dated 04.03.2016.

**Prayer in T.C.A.Nos.355 & 356 of 2021:**

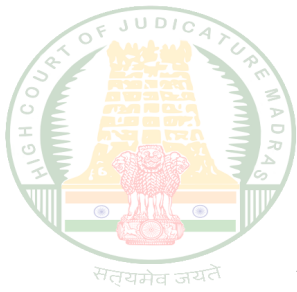
Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the separate orders of the Income Tax Appellate Tribunal 'C' Bench, Chennai in M.A.No.41/Mds/2017 in I.T.A.No.1782/Mds/2013 and M.A.No.43/Mds/2017 in I.T.A.No.1784/Mds/2013 dated 12.05.2017 respectively.

**Prayer in T.C.A.Nos.378, 389, 390, 393, 396, 401, 402, 409 & 411 of 2021:**

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the separate orders of the Income Tax Appellate Tribunal 'C' Bench, Chennai in I.T.A.No.1949/Mds/2013, I.T.A.No.1782/Mds/2013, I.T.A.No.1786/Mds/2013, I.T.A.No.1944/Mds/2013, I.T.A.No.1785/Mds/2013, I.T.A.No.1779/Mds/2013, I.T.A.No.1947/Mds/2013, I.T.A.No.1784/Mds/2013, I.T.A.No.1788/Mds/2013 dated 04.03.2016 respectively.

For Appellant in  
T.C.A.Nos.294 to 299 of 2018  
and  
For Respondent in  
T.C.A.Nos.355, 356, 378, 389,  
390, 393, 396, 401, 402, 409  
& 411 of 2021

: Mr.M.Gopinath



T.C.A.Nos.294 of 2018 & etc., batch

WEB COPY

For Respondent in  
T.C.A.Nos.294 to 299 of 2018  
and  
For Appellant in  
T.C.A.Nos.355, 356, 378, 389,  
390, 393, 396, 401, 402, 409  
& 411 of 2021

: Mr.T.Ravikumar,  
Senior Standing Counsel

### **COMMON JUDGMENT**

(Judgment of the Court was delivered by **C.SARAVANAN, J.**)

These appeals have been filed by the Assessee and the Income Tax Department under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'IT' Act). They are being disposed of by this Common Judgment.

2. The dispute in these appeals arise out of the impugned Common Order dated **04.03.2016** passed by the Income Tax Appellate Tribunal (hereinafter referred to as "ITAT") in Appeal in **I.T.A.Nos.1779-1788/Mds/2013** filed by the Assessee and Appeal in **I.T.A.Nos.1944-1949/Mds/2013** filed by the Income Tax Department for the respective **Assessment Years viz., Assessment Years 2006-2007 to 2011-2012.**



T.C.A.Nos.294 of 2018 & etc., batch

**WEB COPY** 3. For the sake of clarity, instead of referring the parties as Appellant and Respondent, we shall use the expression, 'Assessee' and 'Income Tax Department' as both of them are Appellants and Respondents in these batch of appeals.

4. The dispute in these appeals pertain to the **Assessment Years 2006-2007 to 2011-2012**. Some of the appeals have been filed by the Income Tax Department against Miscellaneous Orders passed by the Appellate Tribunal. Details of the Appeals filed by the Assessee and the Income Tax Department are tabulated below:-

**Table I**

| Sl. No. | Assessee's Appeal in TCA.Nos. | Assessment Years | Impugned Order of ITAT against which Appeal in column No.(iii) have been filed | Income Tax Department's Appeal in TCA.Nos. | Impugned Orders of ITAT against which Appeal in Column No.(v) have been filed |
|---------|-------------------------------|------------------|--------------------------------------------------------------------------------|--------------------------------------------|-------------------------------------------------------------------------------|
| (i)     | (ii)                          | (iii)            | (iv)                                                                           | (v)                                        | (vi)                                                                          |
| 1, 2    | 294/2018                      | 2006-2007        | I.T.A.No.1779/Mds/2013                                                         | 401/2021                                   | I.T.A.No.1779/Mds/2013                                                        |
| 3       |                               |                  |                                                                                | 393/2021                                   | <b>I.T.A.No.1944/Mds/2013*</b>                                                |
| 4       |                               |                  |                                                                                | 396/2021                                   | I.T.A.No.1785/Mds/2013                                                        |
| 5       | 295/2018                      | 2007-2008        | I.T.A.No.1780/Mds/2013                                                         | -                                          | -                                                                             |



T.C.A.Nos.294 of 2018 & etc., batch

WEB COPY

| Sl. No. | Assessee's Appeal in TCA.Nos. | Assessment Years | Impugned Order of ITAT against which Appeal in column No.(iii) have been filed | Income Tax Department's Appeal in TCA.Nos. | Impugned Orders of ITAT against which Appeal in Column No.(v) have been filed |
|---------|-------------------------------|------------------|--------------------------------------------------------------------------------|--------------------------------------------|-------------------------------------------------------------------------------|
| 6       | 296/2018                      | 2008-2009        | I.T.A.No.1781/Mds/2013                                                         | -                                          | -                                                                             |
| 7, 8    | 297/2018                      | 2009-2010        | I.T.A.No.1782/Mds/2013                                                         | 389/2021                                   | I.T.A.No.1782/Mds/2013                                                        |
| 9       |                               |                  |                                                                                | 355/2021                                   | MA.No.41/Mds/2017 #<br>in<br>I.T.A.No.1782/Mds/2013                           |
| 10      |                               |                  |                                                                                | 390/2021                                   | I.T.A.No.1786/Mds/2013                                                        |
| 11      |                               |                  |                                                                                | 402/2021                                   | <b>I.T.A.No.1947/Mds/2013*</b>                                                |
| 12      | 298/2018                      | 2010-2011        | I.T.A.No.1783/Mds/2013                                                         | -                                          | -                                                                             |
| 13, 14  | 299/2018                      | 2011-2012        | I.T.A.No.1784/Mds/2013                                                         | 409/2021                                   | I.T.A.No.1784/Mds/2013                                                        |
| 15      |                               |                  |                                                                                | 378/2021                                   | <b>I.T.A.No.1949/Mds/2013 *</b>                                               |
| 16      |                               |                  |                                                                                | 356/2021                                   | MA.No.43/Mds/2017 #<br>in<br>I.T.A.No.1784/Mds/2013                           |
| 17      |                               |                  |                                                                                | 411/2021                                   | I.T.A.No.1788/Mds/2013                                                        |

**Note:**

1. # dated **12.05.2017**;
2. Rest of the orders are dated 04.03.2016;
3. \* Appeal filed by the Income Tax Department before ITAT in Column (v)
4. Rest of the appeals before ITAT in Colum (iv) & (vi) were filed by the Assessee.



WEB COPY

5. The Assessee's appeals in **T.C.A.Nos.294 to 299 of 2018** were

admitted by this Court on **29.06.2018**. At the time of admission, the following substantial questions of law were framed for being answered:-

- (i) *Whether the Appellate Tribunal is correct in law in rejecting the computation of Long Term Capital Gains based on the sale agreement followed by the execution of the sale deeds and reporting of Long Term Capital Gains in the subsequent assessment years while approving impliedly the computation of Long Term Capital Gains in those subsequent assessment years based on unregistered JDA?*
- (ii) *Whether the Appellate Tribunal is correct in Law in rejecting the grounds alternatively raised for taxing the surplus based on Section 45 (2) of the Act read with the transaction presumed to be executed as per the unregistered JDA in treating the Appellant Company as a Joint Developer?*
- (iii) *Whether the Appellate Tribunal is correct in not deleting the share of profit from the housing project taxed based on the execution of the transaction through the unregistered JDA despite the tacit acceptance of the taxation of the financial results from the joint development in the status of AOP?*

6. In the appeals filed by the Income Tax Department as detailed in **Column (v)** to above **Table I** in Paragraph No.4, no questions of law were framed by this Court at the time of their admission. They were admitted during the period when the Country was still under lockdown due to the outbreak of Covid-19 Pandemic.



7. In these appeals, the Income Tax Department has raised identical

substantial questions of law which are as follows:-

1. *Whether on the facts and in the circumstance of the case, the Tribunal was right in holding that the transaction emanating from the Joint Development Agreement dated 23.11.2005 by which 62.46% of land was transferred cannot be liable to tax in Assessment Year 2006-07 as per Section 2(47)(v) of the Income Tax Act, 1961 r/w. 53A of the Transfer of Property Act, 1882?*
2. *Whether reasoning and finding of the Tribunal is proper by holding that no transfer took place in the previous year relevant to the Assessment Year 2006-07 when all the conditions stipulated under Section 53A on the T.P.Act were satisfied and the Transferee had also taken possession of the property and the Transferee was ready and willing to perform the contract was also satisfied?*
3. *Whether on the facts and circumstances of the case, the Tribunal was justified in holding that the assessment for the assessment year 2007-08 and 2008-09 as substantive when the substantive assessment for the assessment of capital gains on transfer of land was made for the assessment year 2006-07 when possession was given?*
4. *Is not the finding of the Tribunal perverse and bad by holding that the capital gains on transfer of 62.46% of land is taxable in the Assessment Year 2007-08 especially when the developer has sold part of the undivided share of the land falling under his share using the power of attorney given by the Assessee in the Financial Year 2006-07 which could happen only when the possession of the land given to the Developer?*
5. *Whether on the facts and circumstances of the case the Tribunal was right in holding that only the sale value of the land is to be taken as a consideration from the Joint Development*



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

*Agreement as against the Market value of 37.54% of constructed area received by the Assessee in terms of the Joint Development Agreement?*

6. *Whether on the facts and circumstance of the case the Tribunal was justified in remitting the claim of Rs.68,99,590/- as the cost of improvement for the Assessment Year 2007-08 to the file of Assessing Officer without recording any reasons to differ from the findings given by the Assessing Officer and the CIT (Appeals) especially all the material was available before it?*
7. *Whether on the facts and circumstances of the case the Tribunal erred in law in remitting the claim of cost of improvement when it was clearly proved the assessment proceedings that it was a bogus transaction and bills were supplied by Hawala Operator in Bombay?*
8. *Whether on the facts and circumstance of the case the Tribunal was justified in directing the Assessing Officer to compute the short term capital gains and the sale value of the building for the Assessment Year 2008-09 to 2011-12 when the receipt of such building through joint development agreement was not brought to tax in the Assessment Year 2006-07 and the said direction of the Tribunal is perverse?*
9. *Whether on the facts and circumstance of the case the Tribunal was correct and justified in cancelling the penalty levied u/s.271(1)(c) especially when the quantum assessment had not attained finality as appeals are pending?*
10. *Whether on the facts and circumstance of the case the Tribunal was right in setting aside the levy of penalty when the act of concealment of income had been substantiated beyond doubt especially in a situation where the return of income was not filed within the due date and the Original JDA was found during survey operation and return was filed in response to Section 148 notice issued thereafter only?"*



T.C.A.Nos.294 of 2018 & etc., batch

8. At the time of the disposal of the main appeal by ITAT vide

**Impugned Common Order** dated **04.03.2016** which was heard on **29.12.2015**, the Assessee had taken an alternative plea that the Assessee was entitled to the benefit of **Section 80IB(10)** of the IT Act which according to the Assessee was not considered by the ITAT while passing the **Impugned Common Order** dated **04.03.2016**.

9. The learned counsel for the Assessee submitted that the Assessee will be satisfied, if the below mentioned substantial question of law is decided. It reads as under:-

4. *Whether the Appellate Tribunal is correct in Law in rejecting the alternate grounds for computing such surplus/profits from the housing project pertaining to the share of Appellant Company under the head - "Income from Business" which alternate ground was based on the Revenue's stnad as well as the decision to compute capital gains based on the unregistered JDA?"*

10. It is noticed that though the Assessee also raised above question of law as substantial question of law, it was omitted to be framed as a substantial question of law to be answered in the Assessee's Appeal in **T.C.A.Nos.294 to 299 of 2018**.



T.C.A.Nos.294 of 2018 & etc., batch

WEB.COM

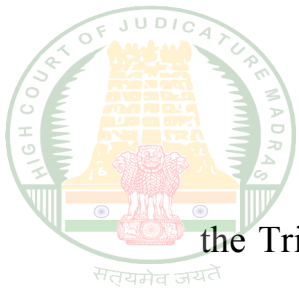
11. After hearing the arguments, we proceed to frame the following substantial question of law as the only substantial question of law to be answered based on the articulation of the case facts and dispute by the counsels.

12. For the sake of clarity, the above substantial question of law is re-phrased as follows:-

*“Whether the assessee was entitled to the benefit of Section 80IB(10) of the IT Act, in absence of a claim for deduction under Section 80AC of the IT Act, in the Return of Income filed under Section 139 of the IT Act?”*

13. It is the case of the Assessee that if the benefit of **Section 80IB(10)** of the IT Act is extended, it will efface the entire demand which was confirmed by the **Assessing Officer** vide **Assessment Orders** dated **14.05.2012, 14.06.2012** and **15.06.2012** which decision was partly affirmed by the Appellate Commissioner vide **Order** dated **28.08.2013** and by the ITAT vide the **Impugned Order** dated **04.03.2016**.

14. It is submitted that if the benefit of the Order of **Section 80IB(10)** of the IT Act is extended to the Assesse, Impugned Orders of



T.C.A.Nos.294 of 2018 & etc., batch

the Tribunal will have to be set aside and consequently, the Department's

appeal also will have to be dismissed.

15. The brief facts of the case are that the Assessee Company had signed a Joint Venture Development Agreement [JVDA] and an Agreement for Sale [AOS] both dated **23.11.2005** with a Developer named M/s.Doshi Housing, a Partnership Firm. As per these Agreements, the Assessee was required to transfer proportionate share in the land to the said Developer and as a consideration, for such transfer, the Assessee was entitled to sell 37.54% of the built up area.

16. The son of the Managing Director of the Assessee Company was introduced as a partner of the Developer Firm which was engaged to develop the land which belonged to the Assessee under these Agreements.

17. A part of the sale consideration from the transfer of the land to the Developer was upfront paid to the son of the Managing Director of the Assessee who was a partner of the Developer Firm. This was not reflected in the Returns that were filed by the Assessee.



T.C.A.Nos.294 of 2018 & etc., batch

WEB COPY

18. Assessment was also completed based on the Returns filed by the Assessee on the capital gains declared by the Assessee Company on account of the Joint Venture Development Agreement and Agreement For Sale [JVDA & AOS] both dated **23.11.2005**.

19. The capital gain was confined to the indexed value of the land and was calculated on the Guideline Value of the land. The difference between the Market Value and the Guideline Value of the land was to be paid directly to the son of the Managing Director of the Assessee.

20. Meanwhile, a Survey was conducted under **Section 133A** of the IT Act during the year 2012 by the Income Tax Department. During the survey, statements were also recorded from the Managing Director of the Assessee Company on **24.01.2012**, wherein, it was confirmed that the share in the profit from the venture was partly given as a consideration to the son of the Managing Director of the Assessee who was introduced as a Partner in the Developer Firm, viz., M/s.Doshi Housing.

21. Thus, assessments were completed for the respective **Assessment Years** under **Section 143(3)** read with **Section 147** of the IT



T.C.A.Nos.294 of 2018 & etc., batch

Act on various dates. The details of the **Assessment Orders** for the respective **Assessment Years** are as follows:-

**TABLE II**

| <i>Sl.No.</i> | <i>Assessment Year</i> | <i>Assessment Date</i> |
|---------------|------------------------|------------------------|
| 1.            | 2006-07                | 14.05.2012             |
| 2.            | 2007-08                | 14.06.2012             |
| 3.            | 2008-09                | 14.06.2012             |
| 4.            | 2009-10                | 14.06.2012             |
| 5.            | 2010-11                | 15.06.2012             |

22. These **Assessment Orders** were thus the subject matter of the Appeal before the Appellate Commissioner in **I.T.A.Nos.21 & 32 to 36/12-13/A-I** by the Assessee.

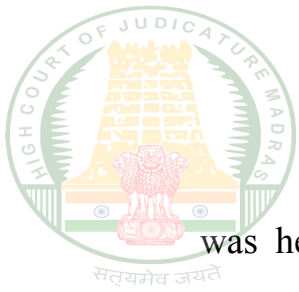
23. The Appellate Commissioner dismissed the appeal of the Assessee for the **Assessment Year 2006-2007** vide Order dated **28.08.2013** holding that **AOS & JVDA** dated **23.11.2005** came into effect from the same date. Therefore, the Assessee was held liable to pay tax on capital gains from the sale value of the project equivalent to 37.54 % of the saleable area that was receiveable by the Assessee in view of Section 2(47) of the IT Act.



WEB COPY 24. Operative portion of the **Order** dated **28.08.2013** of the Appellate Commissioner in **I.T.A.Nos.21 & 32 to 36/12-13/A-I** is reproduced below:-

“5. *I have carefully considered all the facts of the case and submissions of the learned AR. As was discussed elaborately in foregoing paragraphs, it was concluded that retraction by the appellant was countered by the department successfully. Once this retraction is treated as meaningless, then all the facts revealed in the statement given by the MD and others will hold good. This means all JDA is in operation with effect from 23.11.2005. **The ensuing inference would automatically mean the long term capital gains would attract from AY 2006-07 and sale value of the project equivalent to 37.54% of the salable value is receivable in the hands of the appellant.** It is also clear from the statements and other evidences that the amount only to the extent of guideline value was accounted in the books of the appellant willfully and the balance amount was diverted to Shri.Surendernath's account as share profit in the Doshi Housing, the developer. The AO could orchestrate the facts in this case successfully within the frame work of law. In view of the matter, the assessments done by AO are upheld for all the assessment years. **However, the sale proceeds for the projects 'Etopia-I' started reaching the appellant with regard to its share of built up area for AY 2009-10 onwards, there was no capital gain arisen for AY 2007-08 and 2008-09.** Therefore, the protective assessments made by the AO for these two years are deleted. Relief given to this extent.”*

25. Since the Assessee received income with regard to its share of the built up area only from the **Assessment Year 2009-2010** onwards, it



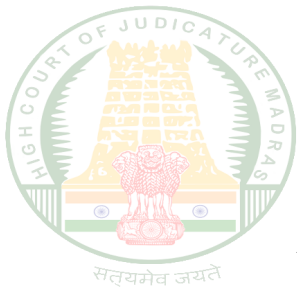
T.C.A.Nos.294 of 2018 & etc., batch

was held that there was no capital gain during the **Assessment Years**  
**2007-2008** and **2008-2009**.

26. Therefore, the **Protective Assessments** for these **Assessment Years** were **deleted**. Thus, the appeals were partly allowed and were partly dismissed by the Appellate Commissioner.

27. On further appeal before the ITAT in appeals as specified in Column Nos. (iv) & (vi) of Table I to Paragraph No. 4 of this Order, the ITAT passed the **Impugned Common Order** dated **04.03.2016** which are the subject matter of these appeals.

28. The Appellate Commissioner had partly allowed the appeals filed by the Assessee against penalty that was earlier imposed by the Assessing Officer under Section 271(1)(c) of the IT Act pursuant to **Assessment Orders** dated **14.05.2012**, **14.06.2012** and **15.06.2012** for these **Assessment Years**. The Appellate Commissioner had partly allowed the appeal by restricting the penalty to 100% from 300% for these **Assessment Years**.



T.C.A.Nos.294 of 2018 & etc., batch

29. Aggrieved by the aforesaid Common Order dated **28.08.2013** in

**I.T.A.Nos.21, 32 to 36 of 2012-13/A1** of the Appellate Commissioner, the Assessee filed Appeals in **I.T.A.Nos.1779-1784/Mds/2013** before the ITAT.

30. The Assessee had also filed appeals against the Common Order dated **28.08.2013** of the Appellate Commissioner in **I.T.A.Nos.1785 to 1788/Mds/2013** before the ITAT insofar as **Penalty Order** passed under Section 271(1)(c) of the IT Act pursuant to **Assessment Orders** dated **14.05.2012, 14.06.2012** and **15.06.2012** for these **Assessment Years**.

31. Similarly, the Income Tax Department also filed Appeals before the ITAT in **I.T.A.Nos.1944-1949/Mds/2013** against the aforesaid Common Order dated **28.08.2013** in **I.T.A.Nos.21, 32 to 36 of 2012-13/A1** of the Appellate Commissioner.

32. The ITAT partly allowed and partly dismissed these appeals vide **Common Order** dated **04.03.2016** which are impugned in these **Tax Case Appeals** as detailed in the **Table I** in **Paragraph No.4** of this Order.



T.C.A.Nos.294 of 2018 & etc., batch

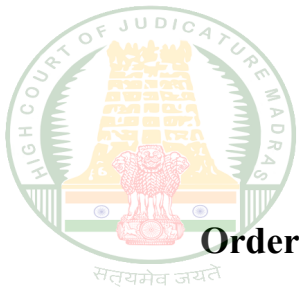
**WEB COPY 33.** Insofar as the **Impugned Common Order** dated **04.03.2016**

dropped the penalty imposed on the Assessee under Section 271 of the IT Act and on other issues arising out of the aforesaid Common Order dated **04.03.2016**, the Income Tax Department had earlier filed about **55 Appeals** in **T.C.A.Nos.354 to 358 of 2021 & T.C.A.Nos.364 to 413 of 2021.**

34. Out of these **55 Appeals** filed by the Income Tax Department, only **11 Appeals** along with **6 Appeals** of the Assessee survive for consideration before us in these **Tax Case Appeals** as detailed in **Column No.(iii) & Column No.(iv) of Table I in Paragraph No.4** of this Order.

35. We were informed that many of the appeals filed by the Income Tax Department were dismissed / disposed on account of Monetary / Litigation Policy of the Government issued from time to time.

36. Out of **11 Appeals** of the Income Tax Department, **Appeals** in **T.C(A) Nos.355 and 356 of 2021** arise out of **Impugned Common**



T.C.A.Nos.294 of 2018 & etc., batch

**Order** dated **12.05.2017** in **M.A.Nos.41&43/Mds/2017** in

**WEB CCI.T.A.Nos.1782 &1783/Mds/2013.**

37. The Assessee had earlier filed **M.A Nos.39 to 43/Mds/2017** to modify **Impugned Common Order** dated **04.03.2016** of the ITAT in **I.T.A.Nos.1779 to 1788/Mds/2013** which were disposed of along with the Appeals of the Income Tax Department in **I.T.A.Nos.1944 to 1949/Mds/2013**.

38. **T.C.A.No.396 of 2021, T.C.A.No.390 of 2021** and **T.C.A.No.411 of 2021** have been filed by the Income Tax Department against **Impugned Common Order** dated **04.03.2016** of the ITAT in the following Appeals whereby penalty imposed were dropped / modified. The other surviving appeals of the Income Tax Department insofar as reduction in penalty imposed under Section 271(1)(c) of the IT Act from 300% to 100% .

39. The Income Tax Department had filed **I.T.A.Nos.1945 & 1946/Mds/2013** for the **Assessment Year 2007-2008** and the **Assessment**



T.C.A.Nos.294 of 2018 & etc., batch

**Year 2008-2009** against the cancellation of protective demand for these

**Assessment Years.**

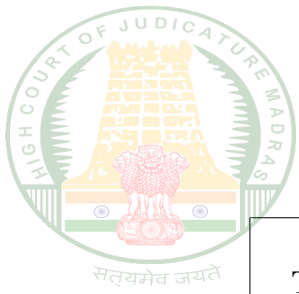
40. **I.T.A.Nos.1944, 1947, 1948 & 1949/Mds/2013** were filed before the ITAT against the Order of the Appellate Commissioner by the Income Tax Department, whereby 300% penalty imposed by the Assessing Officer for the **Assessment Year 2006-2007, 2009-2010, 2010-2011** and **2011-2012** under Section 271(1)(c) of the IT Act was reduced to 100%.

41. These Appeal in **I.T.A.Nos.1944, 1947, 1948 & 1949/Mds/2013** were filed by Income Tax Department before the ITAT.

42. Details of these Appeals are as under:-

**Table III**

| Sl.Nos.in Table -1 in Para 4 of this Order. | T.C.(A).Nos. | Assessment Year | Impugned Order dated 04.03.2016 in the Asseesse's Appeal before the ITAT |
|---------------------------------------------|--------------|-----------------|--------------------------------------------------------------------------|
| 3                                           | 393 of 2021  | 2006-2007       | I.T.A.No.1944/Mds/2013                                                   |



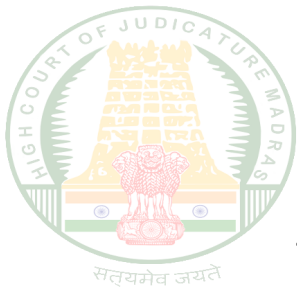
T.C.A.Nos.294 of 2018 & etc., batch

| Sl.Nos.in<br>Table -1 in<br>Para 4 of this<br>Order. | T.C.(A).Nos. | Assessment Year | Impugned<br>Order dated<br>04.03.2016 in<br>the Asseesse's<br>Appeal before<br>the ITAT |
|------------------------------------------------------|--------------|-----------------|-----------------------------------------------------------------------------------------|
| 4                                                    | 396 of 2021  | 2006-2007       | I.T.A.No.1785/<br>Mds/2013                                                              |
| 10                                                   | 390 of 2021  | 2009-2010       | I.T.A.No.1786/<br>Mds/2013                                                              |
| 11                                                   | 402 of 2021  | 2009-2010       | I.T.A.No.1947/<br>Mds/2013                                                              |
| 15                                                   | 378 of 2021  | 2011-2012       | I.T.A.No.1949/<br>Mds/2013                                                              |
| 17                                                   | 411 of 2021  | 2011-2012       | I.T.A.No.1788/<br>Mds/2013                                                              |

43. Earlier, the Assessee filed **M.A.Nos.41 & 42/Mds/2016** in **I.T.A.Nos.1780 & 1781 of 2013** under **Section 154** of the IT Act to modify **Order** dated **04.03.2016** of the ITAT in the following Appeals of the Assessee:-

**Table IV**

| Assessment Year | M.A.Nos.    | Impugned Order dated<br>04.03.2016 in the<br>Asseesse's Appeal<br>before the ITAT |
|-----------------|-------------|-----------------------------------------------------------------------------------|
| 2007-2008       | 41/Mds/2016 | 1780/Mds/2013                                                                     |
| 2008-2009       | 42/Mds/2016 | 1781/Mds/2013                                                                     |



44. These Miscellaneous Applications were disposed of by the **WEB CITAT** vide its **Order** dated **20.05.2016**. Operative Portion of the **Order** dated **20.05.2016** of the ITAT in **M.A.No.41/Mds/2016** in **I.T.A.No.1780** of **2013** and **M.A.No.42/Mds/2016** in **I.T.A.No.1781** of **2013** for the **Assessment Year 2007-2008** and the **Assessment Year 2008-2009** respectively are reproduced below:-

*“3. We have gone through the Order of the Tribunal. Admittedly, there is a mistake in mentioning the figure as Rs.8,99,590/- instead of Rs.68,99,590/-. It is a typographical mistake and it should be read as **Rs.68,99,590/-** in para 20 at page 73.*

*4. ....*

*5. We have heard both the parties. In our opinion for the assessment year 2008-09, the assessment is to be treated as substantive assessment and the income has to be computed as short term capital gains or long term capital gains as the case may be. Thus, the amended para 23 reads as follows:*

*“23. Since, we have vacated the finding of the CIT (Appeals), for the assessment year 2006-07 by observing that there is no transfer u/s.2(47)(v) of the Act, the assessment for the assessment year 2008-09 is to be treated as substantive as discussed in earlier paragraph for the assessment year 2007-08 and the income has to be computed as long term capital gains or short term capital gains, as the case may be, after giving an opportunity*



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

*of hearing to the assessee and the AO shall work out the capital gains afresh. Accordingly, the levy of interest u/s.234A for the Assessment Year 2009-09 is to be computed, which is mandatory in nature.”*

6. ....

*7. In our opinion, the assessment year in para 25 was wrongly mentioned as 2009-2010 instead of Assessment Year 2008-2009 and it should be read as Assessment Year 2008-09 only. After this correction, para 25 to be read as follows:*

*“25. Before us, the ld. AR submitted that report as well as document have no relevance with the assessment of the assessee. However, the assessee has not produced anything to prove the cost of construction. It is the duty of the assessee to produce necessary evidence to show that the assessee actually incurred towards improvement of capital asset. However, the assessee asked one more opportunity to see the document collected by the A.O., which was relied upon by him, at the back of the assessee. In view of this, we remit this issue to the file of the AO for fresh consideration and the assessee is directed to produce necessary evidence in support of the claim of the assessee, as the AO used the report collected from the Commercial Department, Maharashtra viz. MahaVat without providing the same to the assessee.*

*Accordingly, in the assessment year 2008-09, the income has to be computed*



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

*as short term capital gains or long term capital gains, as the case may be.”*

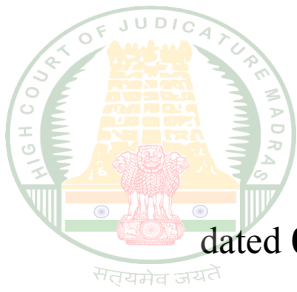
*7.1. Further, we make it clear that there is no change in final result of the appeals.*

*8. In the result, the Miscellaneous Applications are partly allowed.”*

45. The Assessee thereafter filed **M.A.Nos.264 to 268/Mds/2016** for the **Assessment Years 2007-2008 to 2011-2012**. **M.A.Nos.264 to 268/Mds/2016** were filed for Rectification of the **Order** dated **20.05.2016** of the ITAT passed in **M.A.Nos.41 & 42/Mds/2016** in **I.T.A.Nos. 1779 to 1784/Mds/2013**.

46. Before the ITAT, it was submitted that **Protective Assessment** had become substantive assessment and therefore, no further directions were required from the ITAT so as to compute capital gains as the ITAT had given direction that protective assessment automatically converted into substantive assessment for the **Assessment Years 2007-2008 to 2011-2012**. Thus, the ITAT vide its **Order** dated **20.01.2017** disposed the aforesaid Miscellaneous Applications.

47. The ITAT ordered few modifications to the **Common Order**



T.C.A.Nos.294 of 2018 & etc., batch

dated **04.03.2016** vide its **Order** dated **20.01.2017** .

WEB COPY

48. Paragraph 4 of the **Order** dated **20.01.2017** in **M.A.Nos.264 to 268/Mds/2016** for the **Assessment Years 2007-2008 to 2011-2012** reads as under:-

*“4. We heard both the parties and perused the material on record. We find force in the argument of the Ld. AR. Admittedly, this Tribunal vacated the assessment order for the Assessment Year 2006-07 holding that there are no transfer so as to attract tax on capital gains, thereafter observed that assessment orders from the Assessment Years 2007-08 to 2011-12 to be considered as substantive assessments. Being so, there is no necessity of giving further finding by the Tribunal with regard to computation of long term capital gain and short term capital gain in these assessment years.*

*4.1 Accordingly, para 23 of this Tribunal order cited supra reads as follows:*

*“23. Since, we have vacated the finding of the CIT (Appeals) for the Assessment Year 2006-07 by observing that there is no transfer u/s. 2(47)(v) of the Act, the assessment for the assessment year 2008-09 is to be treated as substantive as discussed in earlier paragraph for the Assessment Year 2007-08 and the income has to be computed after giving an opportunity of hearing to the assessee and the AO shall work out the capital gains afresh. Accordingly, the levy of interest u/s. 234A for the Assessment Year 2008-09 is to be computed, which is mandatory in nature.”*

**4.2 In other words, the Assessment Orders which**



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

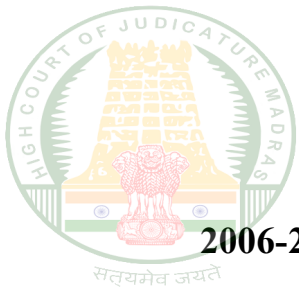
*were already passed for the Assessment Years 2007-08 to 2011-12 to be considered as substantive assessments and it is to be enforced subject to our findings with reference to other grounds raised by the assessee in its appeals for these Assessment Years. There are no other changes in the Order of the Tribunal cited supra, other than findings in our Order in M.A.Nos.41 & 42/Mds/2016 dated 20.05.2016.”*

49. The Assessee thereafter once again filed fresh application for Rectification of the **Impugned Common Order** dated **04.03.2016** in **I.T.A.Nos.1779 to 1788, 1944 to 1949/Mds/2013** vide following **Miscellaneous Applications** as detailed below:-

**Table V**

| <b>Assessment Year</b> | <b>Miscellaneous Application No.</b> | <b>Impugned Order dated 04.03.2016 in the Assessee's Appeal before the ITAT</b> |
|------------------------|--------------------------------------|---------------------------------------------------------------------------------|
| 2007-2008              | 39/Mds/2017                          | 1780/Mds/2013                                                                   |
| 2008-2009              | 40/Mds/2017                          | 1781/Mds/2013                                                                   |
| 2009-2010              | 41/Mds/2017                          | 1782/Mds/2013                                                                   |
| 2010-2011              | 42/Mds/2017                          | 1783/Mds/2013                                                                   |
| 2011-2012              | 43/Mds/2017                          | 1784/Mds/2013                                                                   |

50. The ITAT disposed of the above **Miscellaneous Application** **Nos.39-43/Mds/2017** vide **Common Order** dated **12.05.2017**. The ITAT concluded that there was no development activity in the **Assessment Year**



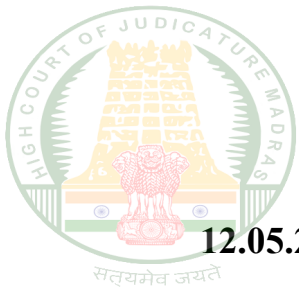
T.C.A.Nos.294 of 2018 & etc., batch

**2006-2007** in terms of Section 2(47)(v) of the Act. Therefore, capital gain was to be computed only from the **Assessment Years 2007-2008 & 2011-2012** and not from the **Assessment Year 2006-2007**.

51. The ITAT further held that Assessing Officer has to consider the issue of computation of capital gains on sale of assessee's share of constructed area, along with the undivided share in land, if it was actually transferred by the assessee in these **Assessment Years**.

52. In other words, the Assessing Officer could not bring into tax the entire share in the constructed area along with the undivided share in land, only on receipt basis of constructed area as transferred unless there is actual transfer in terms of Section 45 of the Act by the assessee in the light of the Judgment of this Court in “**CIT Vs. Dr.D.L.Racachandra Rao**”, [199] 236 ITR 51 (Mds.) and “**Statesman Limited Vs. ACIT**”, 114 ITD 595 (Kol.) wherein it was held that the Tribunal was right in law in directing bifurcation of the capital gains into long term capital gains pertaining to land and short term capital gains pertaining to superstructure.

53. Operative portion of the **Impugned Common Order** dated



12.05.2017 reads as under:-

WEB COPY

*“6. We have heard both the parties and perused the material on record. Now, the main grievance of the assessee is with regard to computation of capital gains for assessment year 2007-08 to 2011-12. It was submitted that the assessee has not effected any sale of constructed area and the assessee only sold the land vide sale agreement dated 23.11.2005 and there cannot be any capital gains on sale of constructed area which was by the Developer only. Contrary to this, ld. D.R submitted that the assessee has received 37.54% of saleable value of property in constructed area for exchange of 62.46% area of land. So, the sale of constructed area of 37.54% of total area of constructed area was sold by the assessee in these assessment years viz., 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12. Being so, it is to be taxed. In our opinion, the Tribunal has given findings on the basis of JDA entered by the assessee on 23.11.2005. Hence, consideration for transfer of 62.46% of area of land transferred by the assessee to the Developer under JDA would be the constructed area allotted to the assessee under the JDA.*

*It was also given findings that there was no transfer in terms of Section 2(47)(v) of the Act in the A.Y 2006-07 in view of the no action by Developer in this assessment year, though the JDA was entered between the assessee and Developer on 23.11.2005. **The capital gains to be computed for assessment years 2007-08 & 2011-12 and not for assessment year 2006-07 and there was no development activity in the assessment year 2006-07 in terms of Section 2(47)(v) of the Act.***

*7. Now, the contention of the ld. A.R is that in respect of sale of flats i.e., constructed area, it was not sold by the assessee. So, it cannot be brought to tax in the hands of assessee. In our opinion, this facts is required to be verified by the Assessing Officer whether actual sale of assessee's share in constructed area was sold by the assessee or not. In the event of sale of constructed area by assessee, then computation of capital gains on sale of*



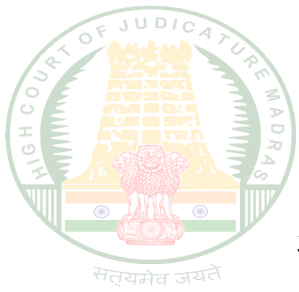
WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

*assessee's share of constructed area is to be brought to tax under the head "capital gains" after giving due deduction enumerated u/s. 48 of the Act. The AO has to consider this issue of computation of capital gains on sale of assessee's share of constructed area, along with the undivided share in land, if it was actually transferred by the assessee in these assessment years. In other words, the AO cannot bring into tax the entire share of constructed area along with the undivided share in land, only on receipt basis of constructed area as transferred unless there is actual transfer in terms of Section 45 of the Act by the assessee. It is needless to say that the AO has to consider the undivided share of cost in land, which is embedded with flats, which was sold by the assessee while computing capital gains. The Assessing Officer has to take note of the judgement of the jurisdictional High Court in the case of CIT Vs. Dr.D.L.Racachandra Rao in [199] 236 ITR 51 (Mds.) wherein held that the Tribunal was right in law in directing bifurcation of the capital gains into long term capital gains pertaining to land and short term capital gains pertaining to superstructure. For the same proposition, the order of the Tribunal in the case of Statesman Limited Vs. ACIT in 114 ITD 595(Kol.) wherein held that assessee company having transferred ownership rights only in respect of 56.8 percent of land to the developer under the development agreement and retained ownership of 43.2 per cent of land, and later sold four floors in the new multi-storeyed building constructed by the developer along with proportionate undivided shares in land to different purchasers, the sale consideration has to be apportioned between the land and superstructure, and gain arising and disposal of land is long term capital gain while the gain on disposal of four floors of the building is to be treated as short term capital gain.*

*8. With this observation, these Miscellaneous Applications filed by the assessee are disposed off accordingly."*



T.C.A.Nos.294 of 2018 & etc., batch

54. The Respondent-Income Tax Department has thus filed

**T.C.A.Nos.355 of 2021 & 356 of 2021** as detailed in **Sl.Nos.4 & 6** of

**Table I to Paragraph No.4** of this Order against the **Impugned Common**

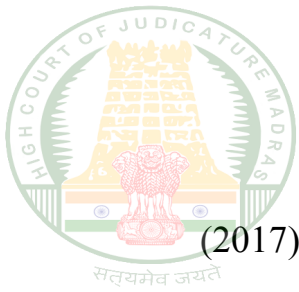
**Miscellaneous Order** dated **12.05.2017** passed by the Tribunal under

**Section 254 (2)** of the IT Act.

**Submission of the Appellant:**

55. The learned counsel for the Assessee submitted that the issue is no longer *res-integra* and is covered by a plethora of decisions of the Courts. Particularly, our attention was drawn to the decision of this Court rendered in “**Commissioner of Income Tax Vs. Sanghvi & Doshi Enterprise**”, (2013) 255 CTR (Mad) 156 and “**Commissioner of Income Tax Vs. M/s.Ceebros Property**” in **T.C.A.No.137 & T.C.A.No.138 of 2009** dated **02.11.2012**. It is submitted that the Appellant was entitled to the benefit of **Section 80IB(10)** of the IT Act.

56. It is submitted that the decision of this Court in “**Commissioner of Income Tax Vs. Sanghvi & Doshi Enterprise**”, (2013) 255 CTR (Mad) 156 has also been affirmed by the Hon'ble Supreme Court in “**Commissioner of Income Tax Vs. Sanghvi and Doshi Enterprise**”,



T.C.A.Nos.294 of 2018 & etc., batch

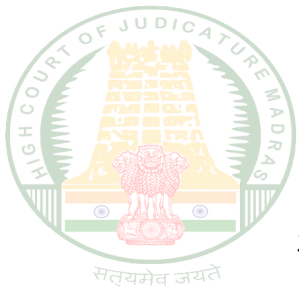
(2017) 84 taxmann.com 241 (SC).

WEB COPY

57. That apart, references were also made to few other decisions in the following cases:-

- i. **Commissioner of Income Tax Vs. Shravanee Constructions** [81 CCH 253].
- ii. **Commissioner of Income Tax Vs. Radhe Developers** [(2012) 17 Taxman.Com.156 (Gujarat) 341 ITR 403].
- iii. **The Commissioner of Income Tax Vs. Sri Lakshmi Brick Industries** [(17.03.2021-MADHC) TCA.Nos.387 to 394 of 2013:MANU/TN/1844/2021]
- iv. **M/s.Bashyam Constructions P Ltd. Vs. The Deputy Commissioner of Income Tax** dated 30.01.2019.
- v. **Astorica Leathers Vs. Income Tax Officer, Business Award III(1)** in TCA No.533 & 534 of 2018.

58. On the other hand, the learned Senior Standing Counsel for the Income Tax Department submitted that the benefit of **Section 80IB (10)** of the IT Act is not available to the Assessee as the Assessee had not claimed benefit under **Section 80IB(10)** of the IT Act in the returns filed under **Section 139 (1)** of the IT Act. It is submitted in view of the express language in **Section 80AC** of the IT Act, the benefit of **Section 80IB (10)** of the IT Act cannot be allowed.



T.C.A.Nos.294 of 2018 & etc., batch

WEB COPY

59. That apart, it is submitted by the learned Senior Standing Counsel for the Income Tax Department that the whole assessment proceedings were based on the definition of “transfer” in **Section 2 (47)** of the IT Act. It is submitted that in the background of the Survey conducted during the year 2012 and the information gathered, statements were recorded during the course of Survey, which has not been retracted.

60. It is therefore submitted by the learned Senior Standing Counsel for the Income Tax Department that the benefit of **Section 80IB (10)** of the IT Act was not available to the Assessee. It is further submitted that the Assessing Officer also did not get a chance to examine the issue as to whether the Assessee was entitled to the benefit of **Section 80IB (10)** of the IT Act since it was not claimed in the Returns filed under Section 139(1) of the IT Act. In this connection, reference was made to the following decisions of the Hon'ble Supreme Court:

- i. **Goetze (India) Ltd. Vs. Commissioner of Income Tax**, (2006) 284 ITR 323 / 2006 SCC Online SC 1446.
- ii. **Shriram Investments Vs. Commissioner of Income Tax – III**, (2024) 167 Taxmann.com 139 (SC).



T.C.A.Nos.294 of 2018 & etc., batch

WEB COPY

61. That apart, the learned Senior Standing Counsel for the Income Tax Department also drew our attention to the decision of the Hon'ble Supreme Court in “**Kunhayammed Vs. State of Kerala**”, 2001(129) ELT 11(SC).

62. Explaining the case, the learned Senior Standing Counsel for the Income Tax Department submitted that the Assessee Company's profit pertaining to the sale of land for approximately Rs.25 Crores was channelized through the son of the Managing Director as a partner in the Developer Firm who did not contribute anything for developing the project and earned share in the profits alone which was actually the suppress sale consideration of the Assessee Company.

63. It is submitted by the learned Senior Standing Counsel for the Income Tax Department that the suppression of capital gains in the form of re-routing the profits to the son of the Managing Director of the Assessee Company who was a partner of the Developer Firm, the Assessee Company concealed the capital gains and reduced the profit by introducing a bogus claim for improvement of cost by M/s.Takshil Trading Private Limited, Mumbai which had allegedly undertaken the



T.C.A.Nos.294 of 2018 & etc., batch

contract for the value of Rs.4.52 Crores. The claim of the said

M/s.Takshil Trading Private Limited was not established as genuine in nature and therefore, cost of improvement was liable to be rejected.

64. It is also submitted by the learned Senior Standing Counsel for the Income Tax Department that the crucial point to be decided is the year of taxation and as per the original JVDA, by which the Assessee had handed over possession of 62.46% of the total area of land in lieu of Agreement to receive 37.54% of the constructed space and as per the JVDA possession was handed over and the same was accepted during the **Assessment Year 2006-2007**. Therefore, the long term capital gains on the first transaction between the Assessee Company and the Developer is to be taxed in the **Assessment Year 2006-2007** and the subsequent gains when the flats are allotted to the Assessee Company and sold in the market and the year of such flat is to be taxed accordingly.

65. It is submitted that provisions of Section 2(47)(v) of the IT Act are attracted in view of the JVDA entered between the Assessee Company and the Developer Firm i.e., M/s.Doshi Housing on **23.11.2005** which was found during the course of the survey under Section 133A of the IT Act



T.C.A.Nos.294 of 2018 & etc., batch

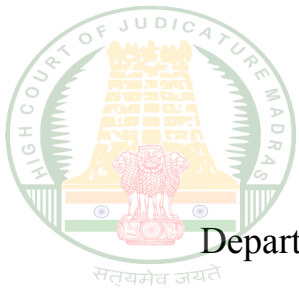
done on 24.01.2012.

WEB COPY

66. It is submitted that the ITAT erred in law in not considering the fact that Smt.Rani Gopinath in a statement recorded had clearly stated that the JVDA was in vogue and amount was paid to her son Surendranath of about Rs.25 Crores belonging only to CCPL by which she offered an additional income of Rs.25 Crores.

67. It is further submitted that in the case of “**Pullengod Rubber Produce Company Limited Vs. State of Kerala**”, 91 ITR 18, it was held that 'admission' is an extremely important piece of evidence though it is not a conclusive one. Therefore, a statement made voluntarily by the Assessee would form the basis of the assessment. The mere fact that the Assessee had retracted the statement could not make the statement unacceptable. Burden lay on the Assessee to establish that the admission made in the statement at the time of survey was wrong and infact there was no additional income.

68. The learned Senior Standing Counsel for the Income Tax



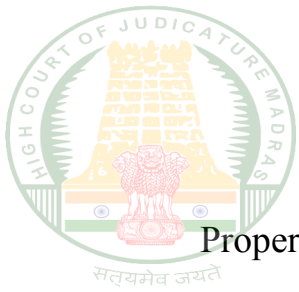
T.C.A.Nos.294 of 2018 & etc., batch

Department submitted that the Hon'ble Supreme Court in “**Narayanan Phagawan Tharao Gosavi Vatajiwale Vs. Gopal**”, AIR 1960 SC Page

100 and that of the Kerala High Court in the case of “**V.Kunhandu Vs. CIT**” reported in **219 ITR 235** have all held that statements are also binding and can form the sole basis for the assessment if they are not effectively retracted.

69. It is also submitted by the learned Senior Standing Counsel for the Income Tax Department that the ITAT failed to note that in respect of bogus cost of improvement which was clearly proved by the Income Tax Department that the claim was bogus in nature and the bills were supplied by a Hawala Operator in Bombay and the disallowance made by the Assessing Officer was therefore proper and it has been wrongly set aside by the Tribunal without any rhyme or reason.

70. It is submitted by the learned Senior Standing Counsel for the Income Tax Department that all the conditions are satisfied for levying capital gains for the **Assessment Year 2006-2007** and possession was given and also conditions stipulated by **Section 53A** of the Transfer of



T.C.A.Nos.294 of 2018 & etc., batch

Property Act, 1882 was satisfied. Therefore, it is submitted that the ITAT erred in holding that the substantive assessment to be made during the **Assessment Years 2007-2008 and 2008-2009** which is not proper.

71. It is also submitted by the learned Senior Standing Counsel for the Income Tax Department that the ITAT erred in remitting the claim pertaining to the cost of improvement for the **Assessment Year 2007-2008** to the file of Assessing Officer without recording any reason to differ from the finding rendered by the Assessing Officer and that of the Appellate Commissioner, especially when all the materials were available before the ITAT. Therefore, it is submitted that remand itself is bad, which is contrary to the Judgment of this High Court in **Cholamandalam MS General Insurance Company Limited Vs. Royal Sundaram Alliance General Insurance Company Limited** reported in (2013) 357 ITR Page 0597 (Mad.).

72. It is submitted by the learned Senior Standing Counsel for the Income Tax Department that the ITAT did not take into account the fraudulent act done and the transaction from M/s.Takshil Trading Private



T.C.A.Nos.294 of 2018 & etc., batch

WEB COPY

Limited who is a dealer from Maharashtra was suspicious, who issued false bills without delivery of goods and that the Assessing Officer had issued Notice under **Section 133(6)** of the IT Act to the Deputy Commissioner (Vigilance) on **07.02.2012**, seeking particulars of the said Company and that the Assistant Commissioner of Sales-Tax had held investigation and stated that the transactions were not genuine and no books of accounts were found and the said Company had not done any genuine business and had only done cheque discounting and has indulged in issue of bogus tax invoices.

73. It is submitted that the incorrect shifting of taxable profits to a related enterprises by claiming deduction under **Section 80IB(10)** of the IT Act was on account of **JVDA** dated **23.11.2005** whereby the Assessee and the Developer M/s.Doshi Housing by which Assessee was to receive sale proceeds for 34.5% of the constructed area in Project 'Etopia-I' and the first year of sale proceeds of the constructed area was for the **Assessment Year 2006-2007** was about Rs.35 Crores approximately and in order to suppress the true and correct profit, guideline value was shown as difference between the actual sale proceeds of the plots belonging to the Assessee share and the guideline value of the land sold during the year



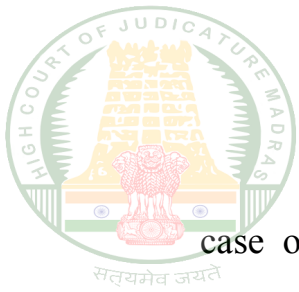
T.C.A.Nos.294 of 2018 & etc., batch

were shifted to that of the firm. The reallocated profits did not suffer

taxation since the Company had claimed deduction under **Section 80IB(10)** of the IT Act on such profits and the profits pertaining to the Company which was stipend of by introducing M.G.Surendranath as a partner for which the firm did not pay taxes on his profits for claiming deduction under **Section 80IB(10)** of the IT Act and also the partner did not pay taxes since the claim of the firm was exempt under **Section 10(2A)** of the IT Act.

74. It is submitted that the essential documentary evidence to prove the genuineness of the expenditure incurred was never produced by the Assessee nor it was shown that the Assessee has funds to support the said expenditure and had claimed it as a current liability in Schedule – H which payment had not been squired with the creditors and after a passage of six years, no tax has been deducted on the said claim of expenditure towards the cost of improvement.

75. The learned Senior Standing Counsel for the Income Tax Department submitted that the claim for deductions by the Assessee is fully covered as per the settled law of the Hon'ble Supreme Court in the



T.C.A.Nos.294 of 2018 & etc., batch

case of “**Goetze (India) Limited Vs. Commissioner of Income Tax**”,

WEB CQ(2006) 284 ITR 323 / 2006 SCC Online SC 1446 which held that

restrictions under **Section 80A(5)** of the IT Act was limited to the power of the Assessing Authority to entertain new claim other than by a Revised Return and certainly did not impinge upon the power of the Appellate Commissioner and the Tribunals. Therefore, the learned Appellate Commissioner is fully empowered to admit the additional grounds as per the settled law.

76. It is submitted that the decision of the Bombay High Court in “**EBR Enterprises Vs. Union of India**”, (2019) 107 Taxman.com 220, was not applicable to the facts and circumstances of the Assessee's case since the issue was confined to revisional power of the Commissioner under **Section 264** of the IT Act with attendant restrictions. It was further submitted that the above position of law has been upheld in the following decisions:-

- i. **Anchor Pressing Private Limited Vs. Commissioner of Income Tax**, (1986) 161 ITR 159 SC.
- ii. **NTPC Limited Vs. Commissioner of Income Tax**, (1988) 229 ITR 383 SC.
- iii. **Commissioner of Income Tax Vs. Sam Global Securities Limited**, (2014) 360 ITR 682 (Delhi).



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

- iv. **Commissioner of Income Tax Vs. Jai Parabolic Springs Limited**, (2008) 306 ITR 42, Delhi HC.
- v. **Commissioner of Income Tax Vs. Nataraj Stationery Products Private Limited**, (2009) 312 ITR 222.
- vi. **Commissioner of Income Tax Vs. Rose Services Apartment India Private Limited**, (2010) 326 ITR 100, Delhi HC, Division Bench.
- vii. **Principle Commissioner of Income Tax Vs. Western Shipyard Limited** in I.T.A.No.644/2015.
- viii. **Influence Vs. Commissioner of Income Tax**, (2015) Taxman.com 192 Delhi HC.
- ix. **Principle Commissioner of Income Tax Vs. E-Funds International Private Limited**, (2015) 379 ITR 292 (Delhi).
- x. **Oracle (BPO) Services Private Limited Vs. Principle CIT** in I.T.A.No.593/2018 dated 07.01.2019.
- xi. **Pruthvi Brokers and Share Holders Private Limited Vs. Commissioner of Income Tax**, 349 ITR 336.
- xii. **Jute Corporation of India Vs. Commissioner of Income Tax and another**, (1991) 187 ITR 688 (SC).
- xiii. **Commissioner of Income Tax Vs. Ramco International**, 221 CTR 491 (P&H).
- xiv. **Assistant Commissioner of Income Tax Vs. Amber Enterprises** in I.T.A.No.5176 MUM/2014.
- xv. **Doshi Estate Vs. Assistant Commissioner of Income Tax** in I.T.A.No.966/CHNY/2017.

77. It is the contention of the Income Tax Department that by giving possession of the land the Developer, the Assessee had sold a part of the undivided share in the land through a Power of Attorney in favour of the Partnership concern in which the son of the Managing Director of the Assessee was partner. According to the Income Tax Department, it



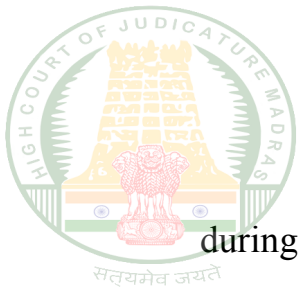
T.C.A.Nos.294 of 2018 & etc., batch

clearly indicates that since the possession of the land was transferred to the Partnership concern, there was income the hands of the Assessee during the **Assessment Year 2006-2007**.

78. Secondly, it was contested by the Income Tax Department that the ITAT erred in remitting the case back to the Assessing Authority whose decision was affirmed by the Appellate Commssioner.

79. It is submitted that the ITAT failed to note that the bogus cost of improvement has been well established in the Assessment Order and the bills were supplied by the Hawala Operator in Bombay. It is the case of the Income Tax Department that a sum of Rs.25 Crores was paid to the Assessee's Managing Director's son who was introduced as a partner in the Joint Venture between the Assessee and the said Partnership Firm.

80. It is submitted that during the course of survey, statement was recorded from the Managing Director of the Assessee Company, wherein, the Managing Director offered to pay tax on capital gains based on the value which was to be substituted as per the terms of the Joint Venture Development Agreement (JVDA) between her son who was present



T.C.A.Nos.294 of 2018 & etc., batch

during the survey.

WEB COPY

81. Further, it is the case of the Income Tax Department that by virtue of original Joint Venture Development Agreement (JVDA) dated **23.11.2005**, the Assessee had agreed to hand over possession of 62.46% of the total land area in lieu of the Agreement to receive 37.54% of the constructed space and that the said Joint Venture Development Agreement (JVDA) clearly stated possession was handed over the same which was accepted.

82. We have considered the arguments advanced by the learned counsel for the Assessee and learned Senior Standing Counsel for the Income Tax Department.

83. Basically there are four sets of appeal before us. As far as the Assessee is concerned, the Assessee has confined the scope of its appeal with regard to benefit under **Section 80IB(10)** read with **Section 80AC** of the IT Act. As far as the appeals of the Income Tax Department are concerned, there are three categories of appeals which arise out of miscellaneous orders and order dropping penalty in view of the reward



T.C.A.Nos.294 of 2018 & etc., batch

order of the ITAT.

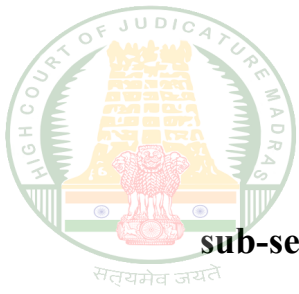
WEB COPY

84. In these appeals, we are confining our opinion to answer to the supplementary question of law framed by us as was requested by the learned counsel for the Assessee. If the benefit of **Section 80IB(10)** of the IT Act is extended to the Assessee, rest of the issue will become academic.

85. **Section 80IB** of the IT Act was inserted in the year **1999** vide Finance Act, 1999 with effect from **01.04.2000**. The provision has seen many amendments since its insertions in year 1999 vide **Finance Act, 1999** with effect from **01.04.1999**.

86. As far as the period covered by these Tax Case Appeals are concerned, **sub-section (10) to Section 80IB** of the IT Act as substituted by the **Finance Act (No.2), 2004** with effect from **01.04.2005** later as amended by **Finance Act (No.2), 2009** with effect from **01.04.2010** are relevant and few other minor amendments during the interregnum.

87. During the period covered by the **Assessment Year 2006-2007**,



T.C.A.Nos.294 of 2018 & etc., batch

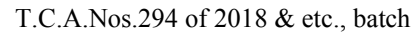
**sub-section (10) to Section 80IB** of the IT Act had only four **clauses** viz.,

**(a) to (d).** **Clauses (e) and (f) to sub-section (10) to Section 80IB** of the IT Act were inserted by **Finance Act (No.2), 2009** with effect from **01.04.2010**. Thus, for the period after **01.04.2010**, **sub-clauses (e) and (f) to sub-section (10) to Section 80IB** of the IT Act as inserted by **Finance Act (No.2), 2009** with effect from **01.04.2010** are to read along for the period in dispute covered by the appeal for **Assessment Year 2011-2012**.

88. **Sub-section (10) to Section 80IB** of the IT Act as it stood with effect from **01.04.2005** is relevant from **01.04.2005** for the **Assessment Year 2006-2007**. **Sub-section (10) to Section 80IB** of the IT Act as it stood amended with effect from **01.04.2010** is relevant from **01.04.2010** for the **Assessment Year 2011-2012**. Following table gives the snapshot of **Sub-section (10) to Section 80IB** of the IT Act with the above amendments:-

**Table VI**

| <b>Section 80IB(10) of the IT Act with effect from 01.04.2005</b>                                                                                                              | <b>Section 80IB(10) of the IT Act with effect from 01.04.2010</b>                        |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|
| <i>“10. The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31<sup>st</sup> day of March, [2007] by a local</i> | <i>'31<sup>st</sup> day of March, 2007' was substituted with '31<sup>st</sup> day of</i> |



*Inserted by the Finance Act,  
2010 with effect from  
01.04.2010.*



T.C.A.Nos.294 of 2018 & etc., batch

| <b>Section 80IB(10) of the IT Act with effect from 01.04.2005</b>                                                                                                                                                                                                               | <b>Section 80IB(10) of the IT Act with effect from 01.04.2010</b>            |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------|
| <p>(i) in a case where the approval in respect of the housing project is obtained more than once, such 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;</p>       |                                                                              |
| <p>(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority;</p>                                                                |                                                                              |
| <p><b>(iii)[in a case where a housing project has been approved by the local authroity on or after the <u>1<sup>st</sup> day of April, 2005</u>, within five years from the end of the financial year in which the housing project is approved by the local authority.]</b></p> |                                                                              |
| <p>(b) the project is on the size of a plot of land which has a minimum area of one acre:</p> <p><b>Provided that</b> nothing in clause (a) or clause (b) shall apply to a</p>                                                                                                  | <p><i>Inserted by the Finance Act, 2010 with effect from 01.04.2010.</i></p> |

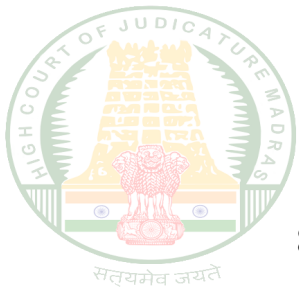


WEB COPY

| <b>Section 80IB(10) of the IT Act with effect from 01.04.2005</b>                                                                                                                                                                                                                                              | <b>Section 80IB(10) of the IT Act with effect from 01.04.2010</b>                                                                |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------|
| housing project carried out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf; |                                                                                                                                  |
| (c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the city of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at ][any other place;     |                                                                                                                                  |
| (d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed <b>five per cent.</b> of the aggregate built-up area of the housing project or two thousand square feet, whichever is less.                                                             | <b>The word 'five' per cent was substituted by the word 'three' per cent vide Finance Act, 2010 with effect from 01.04.2010.</b> |
| <i>(e) not more than one residential unit in the housing project is allotted to any person not being an individual; and</i>                                                                                                                                                                                    | <i>Inserted by the Finance Act, 2010 with effect from 01.04.2010.</i>                                                            |
| <i>(f) in a case where a residential unit in the housing project is allotted to a person being an</i>                                                                                                                                                                                                          | <i>Inserted by the Finance Act, 2010 with effect from 01.04.2010.</i>                                                            |



| Section 80IB(10) of the IT Act<br>with effect from 01.04.2005                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Section 80IB(10) of the IT Act<br>with effect from 01.04.2010 |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------|
| <p><i>individual, no other residential unit in such housing project is allotted to any of the following persons, namely:</i></p> <ul style="list-style-type: none"> <li><i>(i) the individual or the spouse or the minor children of such individual,</i></li> <li><i>(ii) the Hindu undivided family in which such individual is the karta,</i></li> <li><i>(iii) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta.]</i></li> </ul> <p><b>[Explanation.</b> - For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State Government).”</p> |                                                               |



89. The **Joint Development Agreement and Agreement for Sale**

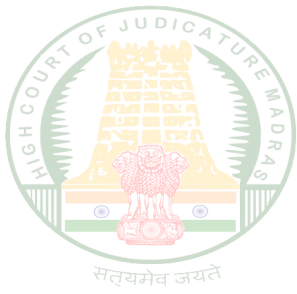
are dated **23.11.2005**. Therefore, permission of the local authority would have been after **01.04.2004**. Therefore, **Clause(a)(ii)** to **Sub-Section 10** to **Section 80IB** of the IT Act is relevant. There are also indication that the sale from the individual apartments also started flowing to the Assessee from the year **2009-2010**.

90. It has to be noted that the benefit of **Section 80IB** of the IT Act was linked for the first time to **Section 80AC** of the IT Act with effect from **01.04.2006** vide **Finance Act, 2006** as **Section 80AC** of the IT Act was inserted by **Finance Act, 2006**. **Section 80AC** of the IT Act was not there in the IT Act when **Joint Development Agreement and Agreement for Sale** dated **23.11.2005** were signed with the Developer.

91. **Section 80AC** of the IT Act as inserted by **Finance Act, 2006** with effect from **01.04.2006** read as under:-

**Section 80AC. Deduction not to be allowed unless return furnished.—**

*Where in computing the total income of an assessee of any previous year relevant to the assessment year commencing on the 1st day of April, 2006 or any subsequent assessment year, any deduction is admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC or section 80-ID or*



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

*section 80-IE; no such deduction shall be allowed to him unless he furnishes a return of his income for such assessment year on or before the due date specified under sub-section (1) of section 139.*

93. As per **Section 80AC** of the IT Act as inserted by the Finance Act, 2006 with effect from **01.04.2006**, no deduction is to be allowed under **Section 80-IA** or **Section 80-IAB** or **Section 80-IB** or **Section 80-IC** or **Section 80-ID** or **Section 80-IE** of the IT Act, if no Return of Income was filed under **Section 139(1)** of the IT Act on or before the due date specified under **sub-section (1)** to **Section 139** of the IT Act claiming such deduction under them.

94. In this connection, a reference is invited to the decision of the Hon'ble Supreme Court in “**Goetze (India) Ltd. Vs. Commissioner of Income Tax**”, (2006) 284 ITR 323 / 2006 SCC Online SC 1446, wherein it was held as under:-

*“4. The decision in question is that the power of the Tribunal under Section 254 of the Income Tax Act, 1961 is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the assessing officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of*



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

*the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income Tax Appellate Tribunal under Section 254 of the Income Tax Act, 1961. There shall be no order as to costs.”*

95. The aforesaid decision in **Goetze (India) Ltd.** (cited *supra*) was also followed by this Court recently in “**Sree Venkateswara Educational Trust Vs. The Income Tax Officer**” in **T.C.A.No.168 & 169 of 2020** vide **Order** dated **02.09.2024** in **T.C.A.No.168 & 169 of 2020** which is as follows:-

*“18. A reading of the decision of the Hon'ble Supreme Court in Goetze (India) Ltd., (cited supra) makes it clear that it restricts the power of the Assessing Authority and does not impinge on the power of the Income Tax Appellate Tribunal (ITAT) under Section 254 of the Act. The Hon'ble Supreme Court has clearly held that limited to the power of the Assessing Authority and does not impinge on the power of the Income Tax Appellate Tribunal under Section 254 of the Income Tax Act, 1961.*

...

*24. The Hon'ble Supreme Court in Formica India Division, Bombay, Burma Trading Corporation Limited Vs. Collector of Cenral Excise and others, 1995 Supp (3) SCC 552/1995 (77) ELT 511, had held as under:-*

*“When it was found that they were liable to pay duty on the intermediary porduct and had not paid the same, but had paid the duty on the end product, they would not ordinarily have complied with the requirements of Rule 56A. Once the Tribunal took the view that they were liable to pay duty on the intermediary product and they*



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

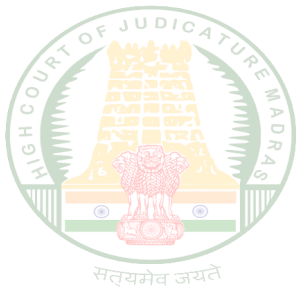
*would have been entitled to the benefit of the notification had they met with the requirement of Rule 56A, the proper course was to permit them to do so rather than denying to them the benefit on the technical ground that the point of time when they would have done so had elapsed and they would not be permitted to comply with Rule 56A after that stage had passed. We are, therefore, of the opinion that the appellants should be permitted to avail of the benefit of the notification by complying at this stage with Rule 56A to the satisfaction of the Department.”*

*25. In our view also, if assessments are to be completed, deductions and applicable exemptions that are otherwise available to an assessee can be extended by the Assessing Officer to an assessee before finalising the assessment.*

96. The aforesaid decision has been recently reiterated by the Hon'ble Supreme Court in “**Shriram Investments Vs. Commissioner of Income Tax – III**” (cited *supra*).

97. In “**Commissioner of Sales Tax Vs. Auriya Chambers of Commerce**”, (1986) 3 SCC 50 : 1986 SCC (Tax) 449 : (1987) 167 ITR 458 : (1986) 62 STC 327, the Hon'ble Supreme Court held that the rules or procedures are hand-maids of justice not its mistress. Relevant portion of the judgement is extracted hereunder:-

“29. It is true that except special provisions indicated before, there is no specific provision which prescribes a



WEB COPY

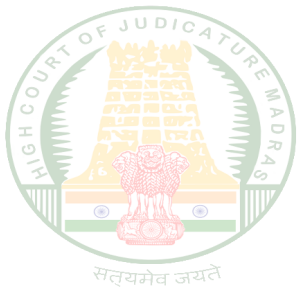


T.C.A.Nos.294 of 2018 & etc., batch

procedure for applying for refund in such a case. But the rules or procedures are handmaids of justice not its mistress. It is apparent in the scheme of the Act that sales tax is leviable only on valid transaction. If excess amount is realised, refund is also contemplated by the scheme of the Act. In this case undoubtedly sales tax on forward contracts have been illegally recovered on a mistaken view of law. The same is lying with the government. The assessee or the dealer has claimed for the refund in the revision. In certain circumstances refund specifically has been mentioned. There is no prohibition against refund except the prohibition of two years under the proviso of Section 29. In this case that two years prohibition is not applicable because the law was declared by this Court in Budit Prakash Jai Prakash case on May 3, 1954 and the revision was filed in 1955 and it was dismissed in 1958 on the ground that it had been filed after a long delay. Thereafter, the assessee had filed an application before the Sales Tax Officer for refund. The refund claimed for the first time on May 24, 1959. The Sales Tax Officer had dismissed the application as barred by limitation under Article 96 of the First Schedule of the Indian Limitation Act, 1908.”

98. In this connection, attention is also drawn to the decision of the Hon’ble Supreme Court in “**Unichem Laboratories Ltd. Vs. Commissioner of Central Excise**”, 2002 (145) E.L.T. 502 (S.C.) wherein the Hon’ble Supreme Court held as under:-

*“13.....There can be no doubt that the authorities functioning under the Act must, as are in duty bound, protect the interest of the Revenue by levying and collecting the duty in accordance with law - no less and also no more. It is no part of their duty to deprive an assessee of the benefit available to him in law with a view to augment the*



WEB COPY

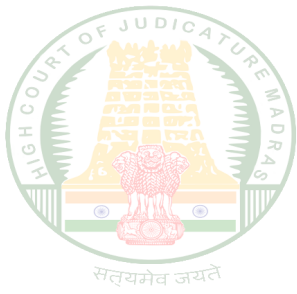


T.C.A.Nos.294 of 2018 & etc., batch

*quantum of duty for the benefit of the Revenue. They must act reasonably and fairly.”*

99. The Hon'ble Supreme Court in “**Formica India Division, Bombay, Burma Trading Corporation Ltd. Vs. Collector of Central Excise and Others.,**” 1995 Supp (3) SCC 552, held as under:-

*“2. The High Court, however, took note of the fact that no contention had been raised before the Tribunal that the appellants should be permitted to meet the requirements of Rule 56-A of the Central Excise Rules and, therefore, they cannot be permitted to avail of that benefit in a writ petition brought under Article 266 of the Constitution. That indeed was a technical view to take because if the appellants were entitled to the benefit of the Notification No. 71/71 CE dated 29.05.1971, to deny that benefit on the technical ground of non-compliance with Rule 56-A would be tantamount to permitting recovery of double duty on the intermediary product. The circumstances in which the appellants did not pay the duty on the intermediary produce before putting the same to captive consumption for producing that stage, the appellants contested the correctness of the classification and had, therefore, not paid the duty on the intermediary product. **When it was found that they were liable to pay duty on the intermediary product and had not paid the same, but had paid the duty on the end product, they could not ordinarily have complied with the requirements of Rule 56-A. Once the Tribunal took the view that they were liable to pay duty on the intermediary product and they would have been entitled to the benefit of the notification had they met with the requirement of Rule 56-A, the proper course was to permit them to do so rather than denying to them the benefit on the technical ground that the point of time when they could have done so had elapsed and they could not be permitted to comply with Rule 56-A after that stage had passed. We are, therefore, of the opinion that the appellants should be permitted to***



WEB COPY



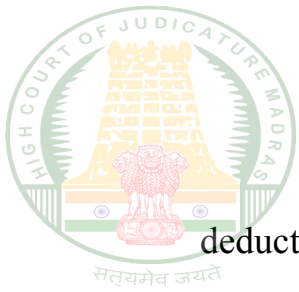
T.C.A.Nos.294 of 2018 & etc., batch

*avail of the benefit of the notification by complying at this stage with Rule 56-A to the satisfaction of the Department.”*

100. A reading of **Section 80AC** of the IT Act as extracted above indicates that to be eligible for deduction under **Section 80IB(10)** of the IT Act as also the other provisions referred therein, an assessee should have to have filed a Return of Income under **Section 139(1)** of the IT Act on or before the due date and made a claim.

101. Thus, the restriction to claim the benefit under **Section 80IB(10)** of the IT Act cannot be imposed on the Assessee for the period prior to **01.04.2006**. In other words, the benefit of **Section 80IB** of the IT Act will be otherwise available to the Assessee for the **Assessment Year 2006-2007** on the income earned between **01.04.2005-31.04.2006** [i.e., **Previous Year 2005-2006**].

102. Thus, the deduction under **Section 80IB(10)** of the IT Act has to be restricted when read along with **Section 80AC** of the IT Act only with effect from **01.04.2006**, as it contained a restriction for availing



T.C.A.Nos.294 of 2018 & etc., batch

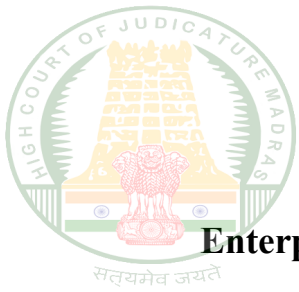
deduction under **Section 80IB** of the Act.

WEB COPY

103. Thus, the requirement of **Section 80AC** of the IT Act as inserted by the **Finance Act, 2006** with effect from **01.04.2006** cannot be made applicable to the **Assessment Year 2006-2007**.

104. Therefore, failure on the part of the Assessee to make a claim on the income earned during the **Previous Year 2005-2006** i.e., between **01.04.2005** and **31.03.2006** which income was assessable during the **Assessment Year 2006-2007** cannot be denied even if no claim was made in the Return of Income that was filed under **Section 139(1)** of the IT Act in view of Para 4 of the decision of the Hon'ble Supreme Court in **Goetze (India) Ltd.** (cited *supra*) and other decisions of the Hon'ble Supreme Court referred to *supra*.

105. In these cases, the Assessee is however claiming the benefit of **Section 80IB(10)** of the IT Act for the entire period in dispute between **Assessment Years 2006-2007** to **2011-2012** in the light of the decision of this Court in “**Commissioner of Income Tax Vs. Sanghvi & Doshi**



T.C.A.Nos.294 of 2018 & etc., batch

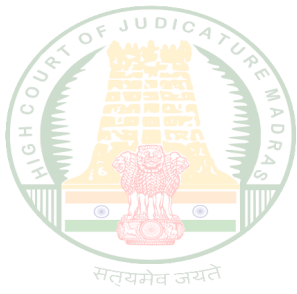
**Enterprise**", (2013) 255 CTR (Mad) 156 as affirmed by the Hon'ble Supreme Court in "**Commissioner of Income Tax Vs. Sanghvi and Doshi Enterprise**", (2017) 84 taxmann.com 241 (SC).

106. In the above case, the Division Bench of this Court in "**Commissioner of Income Tax Vs. Sanghvi & Doshi Enterprise**", (2013) 255 CTR (Mad) 156, dealt with deduction under **Section 80IB(10)** of the IT Act.

107. In "**Commissioner of Income Tax Vs. Sanghvi & Doshi Enterprise**", (2013) 255 CTR (Mad) 156, the substantial questions of law raised were answered in favour of the Assessee Company and against the Income Tax Department. The Division Bench thus reframed the substantial question of law as under:-

*"2. In the course of the hearing before this Court, the Revenue, however, presented a petition for reframing the questions of law, since the questions admitted did not project the issues fully. On a perusal of the questions now raised before this Court, after hearing the learned Senior Counsel appearing for the assessee, who had no serious objection for reframing the questions, the following substantial questions of law as reframed arise for consideration:*

*1. Whether on the facts and in the circumstances of the*



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

*case, the Tribunal was right in holding that developer or builder, is eligible for claiming benefit under s.80-IB(10) and assessee can be treated as developer or builder, eligible for claiming benefit under s.80-IB(10) of the IT Act?*

*2. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee had complied with the condition of submission of completion certificate from local authority within the time-limit as per the provisions of s.80-IB(10)(a) of the IT Act?*

*3. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee is entitled for the deduction under s.(a) for the housing project with respect to residential flats with built-up area not exceeding 1500 Sq.ft even though in the same housing project, the assessee had constructed flats exceeding built-up area of 1500 Sq.ft?*

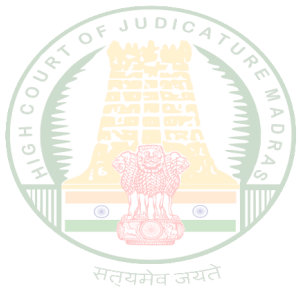
*4. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the provisions of s.(a) provide for partial deduction to the housing project with respect to residential flats with built-up area of less than 1500 Sq.ft where the same project contains flats with built-up area exceeding 1500 Sq.ft?”*

108. The Division Bench in “**Commissioner of Income Tax Vs.**

**Sanghvi & Doshi Enterprise**”, (cited *supra*) held as under:-

“29. ...As rightly pointed out by learned senior counsel appearing for the assessee, a bare reading of Section 80IB of the IT Act shows that the deduction contemplated therein is oriented towards the project and not with reference to an assessee. It is no doubt true that the project has to be done by the assessee, but then, when the deduction is specific enough as regards the particular activity, we fail to see how one should assume any significance in the matter of considering a deduction.

30. As rightly pointed out by the learned senior counsel appearing for the assessee, in the decision in CIT Vs. Radhe Developers (*supra*), the Gujarat High Court



WEB COPY

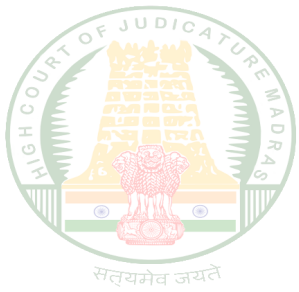


T.C.A.Nos.294 of 2018 & etc., batch

considered the question on ownership as a condition for grant of deduction under Section 80IB(10) of the Act in depth and accepted the case of an assessee similarly placed. It held that the provisions nowhere require that developers who are the owner of the land alone would be entitled for grant of deduction under Section 80IB(10) of the Act. Going through the decision of the Gujarat High Court, we have no hesitation in holding that we are in respectful agreement with the law declared by the Gujarat High Court”.

109. The said decision was also affirmed by the Hon'ble Supreme Court in “**Commissioner of Income Tax Vs. Sanghvi and Doshi Enterprise**”, (2017) 84 taxmann.com 241 (SC). However, a reading of the above decision indicates that the benefit of **Section 80IB(10)** of the IT Act was claimed by the said Assessee in the Return of Income filed under **Section 139** of the IT Act in the said case.

110. However, for the **Assessment Year 2007-2008** [**Previous Year 2006-2007** i.e., on the income earned between **01.04.2006** and **31.03.2007** and thereafter such benefit cannot be extended to the Assessee for the reasons stated hereinafter in view of the restriction in **Section 80AC** of the Act.



T.C.A.Nos.294 of 2018 & etc., batch

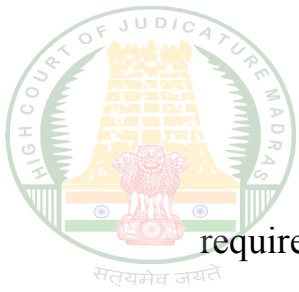
WEB COPY

111. In this connection, we are duty bound to make a reference to the decision of the King's Division Bench in “**Cape Brandy Vs. Inland Revenue Commissioners**”, (1921) 1 KB 64, wherein, Rowlatt J. had expressed the principle in the following words:-

“In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language said.”

112. The above view of the King's Division Bench has been followed by the Hon'ble Supreme Court in several decisions rendered in the context of tax case laws. Therefore, the benefit of **Section 80IB(10)** of the Act cannot be straight away extended to the Assessee in the light of the express language in **Section 80AC** of the IT Act for the rest of the **Assessment Years** barring **Assessment Year 2006-2007**.

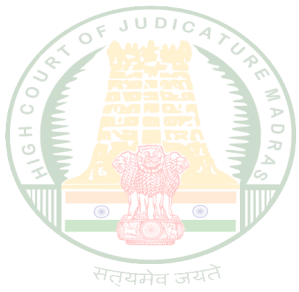
113. In this case, admittedly, no such deduction was claimed under **Section 80IB** of the Act by the Assessee in the Return of Income filed under **Section 139(1)** of the IT Act. **Section 80AC** of the IT Act makes it expressly clear that the benefit of the aforesaid provision cannot be allowed if no Return of Income was filed before the due date specified under the aforesaid provision of the IT Act. This is the express



T.C.A.Nos.294 of 2018 & etc., batch

requirement of **Section 80AC** of the IT Act and therefore, cannot be read down in a statutory appeal even though, the Assessee would have been otherwise entitled to the benefit of **Section 80IB** of the Act but for the restriction in **Section 80AC** of the Act. Since, the scope of Section 260A of the IT Act is limited, we do not have powers similar to the powers vested with the Supreme Court under Article 142 of the Constitution of India.

114. The decisions that have been referred to by the Assessee also do not deal with the cases where there was a failure to make a claim for deduction in the Return of Income filed under **Section 139(1)** of the IT Act under any of the provisions enumerated in **Section 80AC** of the IT Act. The cases cited by the Assessee did not deal with a case where statutory requirements in **Section 80AC** of the IT Act was not observed. Therefore, the decisions referred to by the Assessee, cannot come to the rescue of the Assessee for the rest of the **Assessment Years** barring **Assessment Year 2006-2007**.



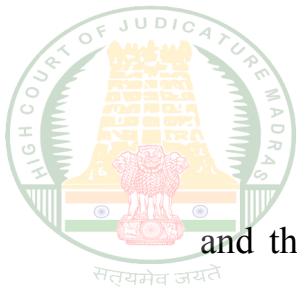
T.C.A.Nos.294 of 2018 & etc., batch

115. We are therefore of the view that the decision of this Court in

“**Commissioner of Income Tax Vs. Sanghvi & Doshi Enterprise**” (cited *supra*) and the other decisions of the Hon'ble Supreme Court (cited *supra*) cannot be applied straight away and blindly to allow the deduction under **Section 80IB(10)** of the IT Act in view of the express restriction in **Section 80AC** of the IT Act for the **Assessment Years 2007-2008** onwards.

116. The decision of the Hon'ble Supreme Court in “**Goetze (India) Ltd. Vs. Commissioner of Income Tax**”, (2006) 284 ITR 323 / 2006 SCC Online SC 1446 which was referred to *supra* which has been followed in few other cases cannot be extended to the Assessee for the **Assessment Years 2007-2008** onwards, as no claim was made by the Assessee in the Return of Income filed by the Assessee under **Section 80IB(10)** of the IT Act.

117. It is our *prima facie* view that claiming deduction in the Return of Income under **Section 139(1)** of the IT Act though was only procedural



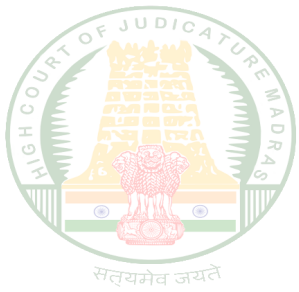
T.C.A.Nos.294 of 2018 & etc., batch

and the restrictions in **Section 80AC** of the Act as inserted for the first time in the IT Act vide Finance Act, 2006 with effect from **01.04.2006** was

directory and not mandatory. However, such a declaration can be made by this Court only under Article 226 of the Constituion of India and not under Section 260A of the Income Tax Act, 1961. In case such challenge is made, the Court will independently decide the issue.

118. Therefore, the benefit of **Section 80IB(10)** of the IT Act can be claimed by the Assessee for the **Assessment Year 2007-2008** onwards subject to a valid challenge to **Section 80AC** of the IT Act in a separate and collateral proceeding following the ratio of the Hon'ble Supreme Court in **Auriya Chambers of Commerce, Unichem Laboratories Limited and Formica India Division** (cited *supra*).

119. Therefore, the substantial questions of law is partly answered against the Assessee for the period covered between **Assessment Years 2007-2008 to 2011-2012** with the above liberty to challenge the restriction in Section 80AC of the Act in the manner known to law.



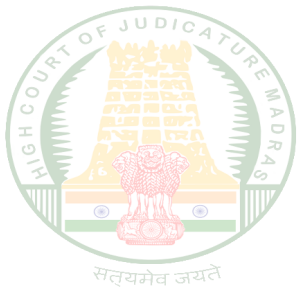
T.C.A.Nos.294 of 2018 & etc., batch

WEB COPY

120. Therefore, the substantial question of law in **T.C.A.No.294 of 2018** for the **Assessment Year 2006-2007** are answered in favour of the Assessee and answered against the Income Tax Department in terms of the decisions of this Court rendered in **Sanghvi & Doshi Enterprise** (cited *supra*) as apporved by the Hon'ble Supreme Court in the light of the ratio in Paragraph 4 of **Goetze (India) Ltd.**, (cited *supra*) and **Auriya Chamber of Commerce**, (cited *supra*).

121. The substantial questions of law in the appeals for the rest of the **Assessment Years** i.e., from the **Assessment Years 2007-2008** to **2011-2012** covered by Assessee's appeals in **T.C.A.Nos.295 to 299 of 2018** are to be answered against the Assessee and in favour of the Income Tax Department for the present subject to a valid challenge / declaration under Article 266 of the Constitution of India.

122. Therefore, **T.C.A.Nos.295 to 299 of 2018** are dismissed for statistical purpose to enable the Assessee to work out the remedy in the manner known to law.



T.C.A.Nos.294 of 2018 & etc., batch

123. Cosequently, rest of the appeals filed by the Income Tax

Department as detailed in **Column No.V to Table I in Paragraph.No. 4**

of this Order are also allowed for statistical purpose. Liberty is given to the parties to revive these appeals subject to the Assessee succesfully moving a collateral proceeding for declaring the restrictions in **Section 80AC** of the IT Act as directory and not mandatory.

124. In the result, these Tax Case Appeals are dismissed/allowed as under:-

- i. **T.C.A.No.294 of 2018 is allowed.**
- ii. **T.C.A.Nos.295 to 299 of 2018 are dismissed for statistical purpose.**
- iii. **T.C.A.Nos.355, 356, 378, 389, 390, 393, 396, 401, 402, 409 & 411 of 2021 are allowed for statistical purpose.**
- iv. No costs.

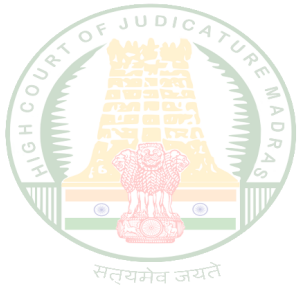
(R.S.K., J.)

(C.S.N., J.)

09.05.2025

Neutral Citation : Yes / No

nst/mrr/arb

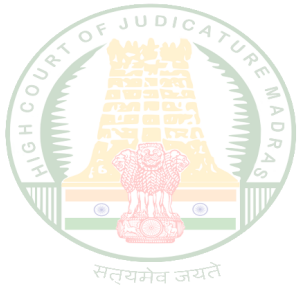


T.C.A.Nos.294 of 2018 & etc., batch

WEB COPY

To:

- 1.Income Tax Appellate Tribunal 'C' Bench,  
Chennai.
- 2.The Assistant Commissioner of Income Tax,  
Company Circle I (3),  
Chennai.



WEB COPY



T.C.A.Nos.294 of 2018 & etc., batch

**R.SURESH KUMAR, J.**

and

**C.SARAVANAN, J.**

nst/mrr/arb

Pre-Delivery Common Judgment in  
T.C.A.Nos.294 to 299 of 2018,  
T.C.A.Nos.355, 356, 378, 389, 390, 393,  
396, 401, 402, 409 & 411 of 2021

09.05.2025