IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1244 OF 2016
ALONGWITH
INCOME TAX APPEAL NO.83 OF 2018

The Principal Commissioner of Income Tax-17
Room No.121, Aaykar Bhavan,
M.K. Road, Mumbai – 400 020. .... Appellant

Versus

M/s. Vardhan Builders
422 Commerce House,
140, Nagindas Master Road,
Mumbai – 400 023. .... Respondent

Mr. Suresh Kumar for the Appellant.
Mr. Firoze Andhyanrujina, Senior Advocate a/w. Mr. Maneek F. Andhyarujia i/b. Mr. Sameer Dalal for the Respondent.

CORAM : DHIRAJ SINGH THAKUR AND VALMIKI SA. MENEZES, JJ.

DATE : 24th NOVEMBER, 2022

PER DHIRAJ SINGH THAKUR, J.(OPEN COURT):

INCOME TAX APPEAL NO.1244 OF 2016

1. The present appeal has been filed, under Section 260A of the Income Tax Act, 1961 ("the Act"), against the order dated 28.10.2015 passed by the Income Tax Tribunal, Mumbai in Income Tax Appeal No.4635/Mum/2013, for the relevant assessment year 2009-10.

2. The following questions of law have been proposed for our consideration:-

"A. Whether on the facts and circumstances of the case and

law the Ld. ITAT has erred in not considering the two facts at all unearthed during survey proceedings dated 1/12/2011 which clearly suggest non compliance of the requirement of provision of section 80 IB of the Act?

B. Whether on the facts and circumstances of the case and in law the Ld. ITAT has erred in holding that the structural changes noticed in the building as on the date of survey could not be determinative of the facts which exited on the date of sale and giving of possession without looking into the fact that there were unsold stock of flats on the date of survey and the structural position of the sold and unsold flats were same i.e. adjacent flats were merged intone unit and the same facts is not examined by the Ld. ITAT. Hence observation of the Ld. ITAT that there were unsold stock of flats on the date of survey and their structural position of the sold and unsold flats were same i.e adjacent flats were merged into one unit and the same flats is not examined by the Ld. ITAT at all. Hence, observation of the Ld. ITAT that changes which take place subsequent to giving of possession cannot deny the claim of deduction u/s.80IB(10) is not justified since, structural position of the unsold flats as on the date of the survey has not been examined by the Ld. ITAT?

C. Whether on the facts and circumstances of the case and in law the Ld. ITAT has erred in not considering the true facts unearthed during survey proceedings and the documents impounded which clearly indicates that there were only three flats, only three main door, only three electric meter, advertisement were placed for the flats measures built up area 1572.95 sq.ft. 1391.98 sq. ft. and 1083.98 and 1083.64 sq.ft per floor?

D. Whether on the facts and circumstances of the case and in law the Ld.ITAT has erred in not considering report of Shri. Shirish R. Hindia and Ketan Vakharia, independent architects, wherein they have surveyed and reported only three flats per floor, statement of the flats owners and reports of the inspectors on duty during survey proceedings who have physically verified the subject premises – Poseidon dated 01/12/2011?

E. Whether on the facts and circumstances of the case the appellate prays that the order of the ITAT on the above

> grounds be set aside and that of Assessing Officer be restored"

3. The dispute in the present appeal centers around whether the assessee was entitled to the benefit of deduction in terms of Section 80IB(10) of the Act. According to Section 80IB(10) of the Act, an undertaking is entitled to the benefit of 100% deduction on the profits derived in the previous year relevant to any assessment year from such housing project if, such an undertaking fulfills the requirement of the dates fixed under the said Section for initiating construction and completion thereof within the time prescribed. One of the most important condition envisaged in the said section is with regard to the area of residential unit which is supposed to be not more than 1000 sq.ft., if the same is situated within the city of Delhi or Mumbai or within 25 kilometers from the municipal limits of these cities and 1,500 square feet at any other place.

4. The assessee-respondent is an undertaking who has developed a residential project at Andheri in Mumbai. It claims deduction in terms of Section 80IB(10) of the Act, which was refused by the Assessing Officer on the ground that some of the flats constructed in Tower 'A' of its housing project had exceeded the area of 1000 sq.ft. as envisaged under the aforesaid Section. This conclusion was arrived at by the Assessing Officer based upon the survey report, which survey was conducted in the year 2011. At this stage, it would be pertinent to mention that the project in the instant case is a residential project, which was initiated in the year 2002 and was completed in the year 2008. The admitted fact is that the completion certificate was obtained by the respondent upon completion of residential project in the year 2008 itself i.e. much before the survey was

conducted by the respondent in the year 2011.

5. In this survey report, which formed the basis for the Assessing Officer to deny the benefit of 100% deduction on the profits derived from such a residential project, the Assessing Officer relied upon and highlighted the following facts:-

> i. That there were only three flats on each floors in 'A' Wing of the project as against five flats shown in the BMC approved plans.
>
> ii. That each flats measure built up area of 1572.95 sq.f.t, 1391.98 sq.ft. and 1083.64 sq.ft. per floor.
>
> iii. That there were only three electric meters per floor for three flats constructed on each of the floors.
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> iv. That there were only three main doors on each floor.
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> v. That the copy of advertisements given in national dailies also indicated that the same were for 2/3/5 bedroom hall kitchens and pent houses for this project.
>
> vi. That there were only three flats per floor was endorsed by the report from independent architects Shri. Shirish R. Hindia and Shri. Ketan Vakharia who had surveyed the building.

6. Against the order passed by the Assessing Officer, an appeal was preferred by the respondent-assessee where each of the grounds which formed the basis of the order of the Assessing Officer to deny the benefit of Section 80IB(10) of the Act was dealt with. It would be worthwhile to reproduce the conclusion drawn by the CIT (Appeals) in the penultimate paragraph of his order, which are as under:-

> "It is seen that the AO has denied deduction u/s.80IB(10) on the basis of the evidence found as on the date of survey on 1.12.2011, whereas the appellant is claiming deduction on the basis of the approved plans of BMC, occupancy certificate issued by BMC, possession letters and

agreements for sale of flats entered into with the individual buyers. I have already held that the evidence on record does not indicate that the appellant had combined two or more flats. On an overall appreciation of the records and documents, it is seen that:

a. As per the approved plans of BMC all the flats in 'A' wing of the building are having built up area of less than 1000 sq.ft.;

b. The plan layout prepared by the architects and approved by BMC show that the area of each of the individual flats is having a built up area of less than 1000 sq.ft. The area measurement given by the appellant in their written submissions, is as per the actual area of each flat on completion of the building construction and the same is also certified by the Engineers of the Mumbai Municipal Corporation.

c. As per the approved plans each of the individual flats are self contained units having separate drawing room, dining room, kitchen, bed rooms and toilets;

d. The BMC Authorities have issued an occupancy certificate for the building thereby certifying that the construction and development of the building is as per approved plans;

e. The individual flats have been separately sold to various buyers as per the registered agreements for sale executed with the buyers;

f. The Stamp Duty Registration Authorities have registered the agreements as individual flats and have assessed the stamp duty for each of the individual flats;

g. As per the possession certificate issued to the buyers of flats, the buyers have been given possession separately for each of the individual flats;

h. As per the electric lines layout for the building, each of the flats has independent electrical wiring connection to the meter room;

i. Separate water connection, plumbing and sewage disposal lines have been provided for each of the individual flats separately;

j. As per the certificate of the electric contractor, separate

> electrical connection has been provided for each of the individual flats;
>
> k. As per the society records, maintenance charges is paid separately by each flat and society is raising bills on each flat separately;
>
> l. The appellant has neither got its plans amended in respect of any of the flats and they stand as separate units as per the approved plan, Occupation Certificate and as of today, in the records of the BMC;
>
> m. Some of the flat owners have been issued notice u/s.488 of Bombay Municipal Corporation Act in the year 2011 for unauthorized alterations/additions in the flats."

7. Being aggrieved by the order passed by the CIT (Appeals), an appeal was preferred by the Revenue before the Income Tax Tribunal. The Tribunal vide its order dated 28.10.2015, dismissed the said appeal and upheld the view expressed by the CIT (Appeals). The Tribunal held that the project was completed as early as on 28.03.2008 and on the basis thereof, a completion certificate was issued by the competent authority and that completion certificate can only be issued if the construction was in accordance with the sanctioned plans dated 15.04.2022. The Tribunal also proceeded to hold that there was no allegation by the survey team during the earlier survey conducted in the year 2006 that the assessee was not raising the construction as per the approved plan. It was also held that if there was any modification effected to a residential unit completed and in regard to which a completion certificate had been issued by the competent authority, the assessee could not be held responsible.

8. Learned counsel for the respondent vehemently urged that the Tribunal could not have summarily brushed aside the second report submitted pertaining to the year 2011, which clearly reflected that there

were only three units on each floor exceeding 1000 sq.ft. and if that was so, it was urged that the assessee could not be held entitled to the benefit of 100% deduction in terms of Section 80IB(10) of the Act.

9. Learned counsel for the respondent, on the other hand, urged that the view expressed by the Tribunal is a finding of fact recorded on the basis of the detailed view expressed by the CIT (Appeals). It was further urged that each of the issues, on which the Assessing Officer had proceeded to deny the benefit of 100% deduction u/s.80IB(10) of the Act, had meticulously been discussed, point by point, which required no interference, being a finding of fact.

10. We have heard the learned counsel for the parties at length.

11. The entire emphasis of learned counsel for the respondent in the present case has been upon the survey report, which was available with the Assessing Officer, which survey was conducted in the year 2011. We have also gone through the very comprehensive order passed by the CIT, which has discussed all the issues which have been flagged by the survey team point by point.

12. The statement of one Samir Makhani to the extent that he had purchased a single unit with one entrance, but under two agreements in regard to Flat No.1603 and 1604, also appears to have been subsequently changed when he stated that changes have been made in the said flats by merging the same and while Flat No.1603 was standing in his name, Flat No.1064 was in the name of his mother and that two separate agreements had been executed.

The conclusions drawn by the CIT (Appeals) based on the material on record goes to show that the view expressed and subsequently upheld

by the Tribunal cannot be in any way said to be a view or a conclusion which is perverse. The question essentially involved in the case, which had to be established beyond any doubt by the Revenue, ought to have been that the respondent had not only built but also sold the residential units, in respect of which the benefit of 100% deduction was claimed with an area of more than 1000 sq.ft., which only then could have justified the action of the Revenue in denying the benefit of 100% deduction under the said provision.

In the present case, however, the revenue has failed to establish that fact. Not only this even the completion certificate could not have been issued by the competent authority, as rightly held by the Tribunal, if there was any violation of the approved plans by the municipal authorities.

13. Be that as it may, we cannot persuade to take a view different from the one which has been taken by the Tribunal, which is an essential finding of fact. For the aforementioned reasons, no substantial question of law arises. The Appeal is dismissed.

INCOME TAX APPEAL NO.83 OF 2018

14. Since the facts and issues involved in this appeal are identical to the one in Income Tax Appeal No.1244 of 2016, the view already expressed in Income Tax Appeal No.1244 of 2016 relevant to the assessment year 2009-10 shall apply in the facts and circumstances of Income Tax Appeal No.83 of 2018 as well. In view thereof, Income Tax Appeal No.83 of 2018 is accordingly dismissed.

[VALMIKI SA. MENEZES, J.] [DHIRAJ SINGH THAKUR, J.]