IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 17.03.2021

CORAM:

THE HON'BLE MR. JUSTICE M.DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

T.C.A.Nos.387 to 394 of 2013

The Commissioner of Income Tax,
Chennai. ... Appellant in all 8 TCAs

Vs.

M/s.Sri Lakshmi Brick Industries,
H-6, Ambattur Industrial Estate,
Ambattur, Chennai – 600 058. ... Respondent in all 8 TCAs

Appeals preferred under Section 260A of the Income Tax Act, 1961, against the orders of the Income Tax Appellate Tribunal, Chennai, "B" Bench, dated 22.11.2012 in I.T.A.Nos.1644 to 1647/Mds/2012 for the assessment years 2006-07, 2007-08, 2008-09, 2009-10 and I.T.A.Nos.1662 to 1665/Mds/2012 for the assessment years 2006-07, 2007-08, 2008-09 and 2009-10.

For Appellant : Mr.M.Swaminathan,
(in all 8 TCAs) Senior Standing Counsel

For Respondent : Mr.R.Sivaraman
(in all 8 TCAs)

COMMON JUDGMENT

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

Challenging the orders passed in I.T.A.Nos.1644 to 1647/Mds/ 2012 in respect of the assessment years 2006-07, 2007-08, 2008-09 & 2009-10 and the orders passed in I.T.A.Nos.1662 to 1665/ Mds/2012 in respect of the assessment years 2006-07, 2007-08, 2008-09 & 2009-10 on the file of the Income Tax Appellate Tribunal, Chennai "B" Bench, the Revenue has filed the above appeals.

2.The appeals in T.C.A.Nos.387 to 390 of 2013 were admitted on the following substantial questions of law:

> "1)Whether on the facts and circumstances of the case, the Tribunal was right in holding that the assessee had satisfied the conditions laid down under the Section 80IB(10) and is eligible for deduction said under 80IB(10)?
>
> 2)Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that assessee who is only a owner of the land and had out sourced the work of constructing the building and had realised the sale proceeds in the form of constructed area is entitled for deduction u/s 80IB?
>
> 3)Whether on the facts and circumstances of the case,

the Tribunal was right in holding that assessee can be treated as developer or builder, eligible for claiming benefit under Section 80IB(10)?

4)Whether on the facts and circumstances of the case, the Tribunal was right in holding that assessee need not be a builder cum developer for claiming benefit under Section 80IB(10)?

5) Whether on the facts and circumstances of the case, the Tribunal was right in holding that assessee is entitled for deduction under Section 80IB(10) even though the construction work was outsourced to a sub contractor?

6) Whether on the facts and circumstances of the case, the Tribunal was right in holding that assessee is entitled for deduction under Section 80IB(10) even though the Company that had under taken the development had also claimed the deduction under Section 80IB(10)?"

3.The appeals in T.C.A.Nos.391 to 394 of 2013 were admitted on the following substantial question of law:

"Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that the appeal of the revenue as infructuous wherein the revenue had raised the grounds against the order of the CIT (A) admitting the

additional grounds raised by the assessee with respect to capital gains and considering the income as capital gains and giving consequential deductions and reliefs?"

4.So far as the appeals in T.C.A.Nso.387 to 390 of 2013 are concerned, Mr.M.Swaminathan, learned senior standing counsel appearing for the appellant – Revenue fairly submitted that the questions of law involved in these appeals were already decided by the Hon'ble Division Bench of this Court in the judgment reported in ***[2019] 103 taxmann.com 425 (Madras) [Bashyam Constructions (P) Ltd., Vs. Deputy Commissioner of Income Tax, Corporate Circle - 1 (2), Chennai]*** wherein the Division Bench held as follows:

"...

8.As noticed by the Court in the case of Shravanee Constructions (supra), the assessee contributed land, undertook development activity in the land and has complied with all the conditions, thereby being entitled to the benefit under Section 80IB(10) of the Act. The assessee in his explanation to his Assessing Officer, vide letter dated 20.03.2013, stated that the company has incurred initial expenses towards the housing project like architect fee, plan

reclassification charges, construction expenses, project administrative expenses etc. The Tribunal states that the expenses are not reflected in the P & L account. However, this aspect was considered by the CIT(A) and by referring to the P & L account, stated http://www.judis.nic.in that the assessee has not taken the cost of the land into consideration thereby claiming more surplus income for the purpose of 80IB(10) benefit. Further, the CIT(A) noted that the assessee has shown only increase in work-in-progress of Rs.2.22 crores along with some minimal expenses in its P & L Account, but this has nothing to do with the cost of the land alone. This aspect of the matter has not been dealt with by the Tribunal, but the Tribunal made a sweeping observation that the expenses are not reflected in the said account. Therefore, we do not agree with the reasoning given by the Tribunal in this regard.

9.A Division Bench of this Court in the case of CIT vs. Sanghvi and Doshi Enterprise, [2013] 29 taxmann.com 386 (Madras), examined a similar question raised by a developer/promoter. The question of law framed for consideration was whether the assessee therein, who was a builder/promoter was eligible for deduction under Section 80IB(10) of the Act. The Division Bench after considering the facts of the case and the terms of the joint development

agreement, as in the instant case, decided the question in favour of the said assessee in the following terms:-

> "30. ..... Thus, seen in the background of the data available as regards the date of sale, the clause in the agreement between the owner of the land and the assessee and the sale agreement with the prospective purchasers, it is evident that what the assessee had undertaken is not a mere construction, but developing and construction of a project, which qualifies for a deduction under Section 80IB of the Income Tax Act. As rightly pointed out by learned Senior Counsel appearing for the assessee, a bare reading of Section 80IB of the Income Tax 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."

The above decision was followed by another Division Bench in Income tax Officer vs. Doshi Enterprise, [2013] 55 taxmann.com 500 (Mad.).

10.Similar decision was taken by a Division Bench in the case of CIT vs. Ceebros Property Development (P.) Ltd., [2014] 41 taxmann.com 263 (Madras).

11.In CIT vs. Radhe Developers, [2012] 17 taxmann.com 156 (Gujarat), the substantial question of law, which was framed for consideration was whether the Tribunal was right in law in allowing deduction under Section 80IB(10) read with Section 80IB(1) to the assessee, when the approval by the local authority as well as completion certificate was not granted to the assessee, but to the landowner and the rights and the obligations under the said approval were not transferable, and when the transfer of dwelling units in favour of the end-users was made by the landowner and not by the assessee. The question was decided in the favour of the assessee therein, in the following terms:-

> "30. The essence of sub-section (10) of Section 80IB, therefore, requires involvement of an undertaking in developing and building housing projects approved by the local authority. Apparently, such provision would be aimed at giving encouragement for providing units in the urban and semi-urban areas, where there is perennial and acute shortage of housing, particularly, for the middle income group citizens. To ensure that the benefit reaches the people, certain conditions were provided in sub-Section (10) such as specifying date by which the undertaking must commence the developing and construction work as also providing for the minimum area

of plot of land on which such project would be http://www.judis.nic.in put up as well as maximum built up area of each of the residential units to be located thereon. The provisions nowhere required that only those developers who themselves own the land would receive the deduction under Section 80IB (10) of the Act."

12.The said decision in Radhe Developers (supra) was followed by the High Court of Gujarat in CIT vs. Moon Star Developers, (2014) 88 CCH 0211 GujHC; and in the case of CIT vs. Prathama Developers, [2013] 32 taxmann.com 336 (Gujarat).

13.The High Court of Bombay in CIT vs. Cajetano Mario Pereira, (2014) 88 CCH 0152 MumHC, held that Section 80IB(10) does not require that the ownership of land must vest in the developer to be able to qualify for such deduction. The Revenue preferred appeal against all such cases, which were clubbed as a batch before the Hon'ble Supreme Court and all the decisions were affirmed by the Hon'ble Supreme Court in the case of CIT vs. Veena Developers, (2015) 93 CCH 0184 ISCC.

14.It is interesting to note that in all these decisions, the Revenue placed reliance on the aspect of ownership as a criteria for grant of deduction under Section 80IB of the Act and submitted that Section 80IB(10) contemplates grant of

deduction and it being a deduction provision, the same has to be complied in absolute terms by the assessee. The Courts have held that in a case of development, the developer is also entitled to claim deduction and ownership is not the criteria. Unfortunately, in the instant case, the Revenue took a reverse stand contrary to the consistent stand taken by them before this Court and other High Courts, which was rejected by the High courts and affirmed by the Hon'ble Supreme Court.

15.We may point out that the decision of the Division Bench in the case of Sanghvi and Doshi Enterprise (supra) was affirmed by the Hon'ble Supreme Court as reported in (2017) 84 taxmann.com 241 (SC).

...

21.The correctness of the above finding was not considered by the Tribunal and the Tribunal merely stated that no expenses were recorded in the P & L account. Therefore, the contention advanced by the Revenue in this regard is not tenable. That apart, a plain reading of Section 80IB(10) of the Act evidently makes it clear that deduction is available in a case where an undertaking develops and builds a housing project. The Section clearly draws the distinction between 'developing' and 'building'. In the preceding paragraphs, we have noted the factual position as could be culled out from the joint venture agreement, which clearly

shows that the assessee is the developer and M/s.ETA is the builder and mutual rights and obligations are inextricably linked with each other and undoubtedly, the project is a housing project thereby, the assessee would be entitled to claim deduction under Section 80IB (10) of the Act."

5.Further, the learned senior standing counsel submitted that the Income Appellate Tribunal, while allowing the appeals filed by the assessee, erroneously dismissed the appeals filed by the Revenue as infructuous.

6.When the Tribunal had set aside the order passed by the Commissioner of Income Tax and allowed the appeals filed by the assessee, the Tribunal should have dismissed the appeals filed by the Revenue and the appeals would not become infructuous.

7.Mr.R.Sivaraman, learned counsel appearing for the respondent – assessee submitted that the ratio laid down by the Hon'ble Division Bench in the judgment reported in ***[2019] 103 taxmann.com 425***

(Madras) [Bashyam Constructions (P) Ltd., Vs. Deputy Commissioner of Income Tax, Corporate Circle - 1 (2), Chennai], may be followed and the appeals may be dismissed.

8.Having regard to the submissions made by the learned counsel on either side, following the ratio laid down by the Hon'ble Division Bench of this Court in the judgment reported in ***[2019] 103 taxmann.com 425 (Madras) [Bashyam Constructions (P) Ltd., Vs. Deputy Commissioner of Income Tax, Corporate Circle - 1 (2), Chennai]***, cited supra, the questions of law raised in the appeals in T.C.A.Nos.387 to 390 of 2013 are decided against the revenue and in favour of the assessee and the appeals are dismissed. Consequential to the dismissal of the appeals in T.C.A.Nos.387 to 390 of 2013, the appeals in T.C.A.Nos.391 to 394 of 2013 are also dismissed. So far as the question of law raised in the appeals in T.C.A.Nos.391 to 394 of 2013 are concerned, we are not giving any finding for the reason that we have already decided the questions of law in the appeals in T.C.A.Nos.387 to 390 of 2013 in favour of the assessee. No costs.

[M.D., J.] [T.V.T.S., J.]

Index : Yes/No **17.03.2021**
Internet : Yes
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To

The Income Tax Appellate Tribunal, Chennai, "B" Bench

M.DURAISWAMY, J.

and

T.V.THAMILSELVI, J.

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