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

INCOME TAX APPEAL NO.3 OF 2013

Commissioner of Income-Tax-12
Room No.121, Aayakar Bhavan
M K Road, Mumbai 400 020 .. Appellant.
Vs.
M/s. Hermes Developers
9, Dhiraj Chambers,
9, Hazarimal Somani Marg,
Fort, Mumbai 400 001 .. Respondent.

WITH
INCOME TAX APPEAL NO.1627 OF 2012

Commissioner of Income-Tax-12
Room No.121, Aayakar Bhavan
M K Road, Mumbai 400 020 .. Appellant.
Vs.
M/s. Hermes Developers
9, Dhiraj Chambers,
9, Hazarimal Somani Marg,
Fort, Mumbai 400 001 .. Respondent.

WITH
INCOME TAX APPEAL NO.1603 OF 2013

Commissioner of Income-Tax-12
Room No.121, Aayakar Bhavan
M K Road, Mumbai 400 020 .. Appellant.
Vs.
M/s. Hermes Developers
9, Dhiraj Chambers,
9, Hazarimal Somani Marg,
Fort, Mumbai 400 001 .. Respondent.

WITH
INCOME TAX APPEAL NO.1757 OF 2013

Commissioner of Income-Tax-12
Room No.121, Aayakar Bhavan
M K Road, Mumbai 400 020 .. Appellant.

Vs.
M/s. Hermes Developers
9, Dhiraj Chambers,
9, Hazarimal Somani Marg,
Fort, Mumbai 400 001 .. Respondent.

WITH
INCOME TAX APPEAL NO.1628 OF 2012

Commissioner of Income-Tax-12
Room No.121, Aayakar Bhavan
M K Road, Mumbai 400 020 .. Appellant.
Vs.
M/s. Hermes Developers
9, Dhiraj Chambers,
9, Hazarimal Somani Marg,
Fort, Mumbai 400 001 .. Respondent.

WITH
INCOME TAX APPEAL NO.62 OF 2013

Commissioner of Income-Tax-12
Room No.121, Aayakar Bhavan
M K Road, Mumbai 400 020 .. Appellant.
Vs.
M/s. Hermes Developers
9, Dhiraj Chambers,
9, Hazarimal Somani Marg,
Fort, Mumbai 400 001 .. Respondent.

Mr. P.C. Chhotaray for the appellant.
Mr. Nishit Gandhi i/b Rajesh Shah & Co. for the respondent.

CORAM : S.C. DHARMADHIKARI &
A.K. MENON , JJ.

RESERVED ON : 13TH OCTOBER, 2014.

PRONOUNCED ON : 27TH NOVEMBER, 2014

ORAL JUDGMENT (PER A.K. MENON, J.)

1. By this common judgment we dispose of six appeals filed under section 260A of the Income Tax Act, 1961. For the sake of convenience we will deal with the facts in Income Tax Appeal No.3 of 2013. The common question of law that has been proposed in Income Tax Appeal Nos.3/2013, 62/2013, 1627/2012 and 1628/2012 is as under :

> "Whether on the facts and the circumstances of the case, the Hon'ble Tribunal was right in law in, holding that the assessee is eligible for deduction u/s.80-IB(10) for the assessment year 2006-07 relying on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Vandana Properties in ITA No.3633 of 2009 and 4361 of 2010 dt.28.3.2012 & SLP has been filed before the Hon'ble Supreme Court, which is pending ?"

2. In Income Tax Appeal Nos.1603 of 2013 and 1757 of 2013 two identical questions of law are proposed, although as worded, they can be distinguished from the common question in Income Tax Appeal Nos.3/2013, 62/2013, 1627/2012 and 1628/2013. The two questions are as under :

> "(i) Whether on the facts and IN the circumstances of the case and in law, the Hon'ble Tribunal is justified in holding that assessee is entitled to the

deduction u/s.80-IB(10) when the area of plot on which the following project is constructed is less than 1 acre ?

(ii) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is justified in holding that assessee is entitled to the deduction u/s 80IB (10), when the area of the flat constructed is more than 1500 sq. ft. ?"

This judgment will deal with all the questions in all the above appeals.

3. Vide order under section 147 read with section 143 (3) dated 16.12.2010 the Assessing Officer held that the assessee has furnished the particulars of income and hence his gross total income under section 143(3) is Rs.1,33,12,423/- and disallowed deduction under section 80-IB(10) of the Income Tax Act. The Assessing Officer held that the claim for deduction under section 80-IB(10) pertains to residential units in project which the assessing officer found was not satisfying the upper limit of 1500 sq. ft. as the Assessing Officer found that one unit was with one kitchen, one entrance, one electric meter and single family ownership though it was the contention of the assessee's representative that two units have been merged together to form a single unit at the request of purchasers.

4. The Commissioner of Income-Tax (Appeals) found that the appellant had not fulfilled the condition of clause (b) of section 80-IB (10) and was not entitled for deduction under section 80-IB(10). According to the Commissioner of Income-Tax (Appeals) the project is on the plot of land which has a minimum area of one acre. The Assessee then preferred the appeal before the Income Tax Appellate Tribunal. By the order dated 4th May, 2010 it allowed the appeals. The tribunal concluded that the flat area is less than 1500 sq. ft. and therefore the assessee was eligible for deduction under section 80-IB(10). The tribunal negated the departmental representative's contention the agreement indicates super built up area of more than 1500 sq. ft. cannot be accepted as super built up area includes common areas, stair cases and also balcony. The tribunal concluded that the concept of super built up area cannot be equated with built up area as per regulations which refers to only to carpet area excluding balcony and terrace. Moreover, it is found by the CIT (Appeals) has held in favour of the assessee in the assessment year 2003-04 and 2004-05 on the same Blocks and this was not disputed by the revenue. Accordingly, it was held that there is no dispute with reference to area of flats less than 1500 sq. ft. in Block E-5 and I. The “Project” as whole was found to have been standing on more than one acre area and apartments constructed therein are within 1500 sq. ft. In this

manner the appeal was allowed. Being aggrieved by the said decision the department has preferred this appeal raising the aforesaid question/s.

5. Mr.Chhotaray, learned counsel for the appellant submitted that the tribunal should have remanded the matter for reconsideration instead of allowing the appeal. Mr.Chhotaray placed reliance on the judgment of this Court in case of ***The Commissioner of Income-Tax vs. Vandana Properties in Income Tax Appeal No.3633 of 2009 and 4621 of 2010*** and stated that the tribunal's order was incorrect. In fact an SLP had been filed and is pending before the Hon'ble Supreme Court. Mr.Chhotaray therefore submitted that the question be framed as aforesaid and the impugned order dated 4th May, 2012 passed by the tribunal be set aside. Mr.Gandhi, learned counsel for the respondent submitted that he supported the order of the tribunal stressing on the fact that in case of assessment year 2003-04 and 2004-05 the revenue had not raised any objection for deduction claimed under section 80-IB(10). Thus, on factual aspects the tribunal as last fact finding authority has found that the project complied with the provisions of section 80-IB(10) and held that the project was compliant with clause (b) as well although the Assessing Officer had held otherwise.

6. Having considered the facts of the case we find that the issue in these appeals relates only to section 80-IB(10) (b) and (c). Various amendments have been made to section 80-IB(10) by Finance Act 2003-04 which are as follows :

> "By Finance Act, 2003 further amendments were made to section 80-IB(10) and they read as under :-
>
> "(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if --
>
> (a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October 1998;
>
> (b) the project is on the size of a plot of land which has a minimum area of one acre; and
>
> (c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities 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."

As can be seen from the aforesaid provision, now the only changes that were brought about were that w.e.f. 1st April, 2002, (i) the housing project had to be approved before 31st March, 2005 and (ii) there was no time limit prescribed for completion of the said project. Though these changes were brought about by Finance Act, 2003, the Legislature thought it fit that these changes be deemed to have

been brought into effect from 1st April, 2002. All the remaining provisions of section 80-IB(10) remained unchanged.

7. Thereafter, by Finance (No.2) Act, 2004, w.e.f. 1st April, 2005 section 80-IB(10) was substituted and substantial changes were effected in the newly substituted sub-section (10) of section 80-IB. It reads thus:-

> "(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2007 by a local authority shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if—
>
> (a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes such construction,—
>
> (i) in a case where a housing project has been approved by the local authority before the 1st day of April, 2004, on or before the 31st day of March, 2008;
>
> (ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1st day of April, 2004, within four years from the end of the financial year in which the housing project is approved by the local authority.
>
> Explanation.—For the purposes of this clause,—
>
> (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;

(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;

(b) the project is on the size of a plot of land which has a minimum area of one acre:

Provided that nothing contained in clause (a) or clause (b) shall apply to a 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; and

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet, whichever is less."

(emphasis supplied)

8. Furthermore, as the tribunal has correctly observed the concept of "super built-up" area is used by builders to get higher price and the super built-up area includes common area of stair-case and balcony area. Since super built-up area cannot be equated with built-up area it cannot be stated in the instant case that the area of the flat is more than 1500 sq. ft.

9. There is no doubt that it is the housing project and it does not include any commercial premises. Built-up area is also defined in section 80-IB(14)(a) to read as follows :

> "Built up area means inner measurement of the residential premises at the floor level including the projections and balconies increased by thickness of walls but not include common area shared with other residential premises."

10. The words including projections and balconies were inserted with effect from 1st April, 2005 Finance Act of 2004. The question whether the definition of built up area with effect from 1st April, 2005 was prospetive or retrospective in nature has been considered by this Court in Income Tax Appeal No.3315 of 2010 between the Commissioner of Income-Tax-15, Mumbai vs. M/s.Tinnwala Industries which holds that this definition which has been brought on the statute book with effect from 1st April, 2005 would not apply to such projects which are completed prior to 1st April, 2005. There are no distinguishing features brought on record which calls for any interference. The tribunal view is a well reasoned and cannot be said to be perverse. Mr.Chhotaray's submission that the matter should be sent back to the tribunal has no merit. In the present set of facts, even if the definition of Built

area is considered it makes no difference to the Assessee's case.

11. In the circumstances we answer the question raised in the present batch of appeals in the affirmative that is in favour of the assessee and against the revenue. As far as differently worded questions in Income-Tax Appeal Nos.1603/2013 and 1757/2013 are concerned, there is no doubt that the area of entire project is more than one acre and the area of flat is within limit of 1500 sq. ft. as has been observed by the tribunal which is last fact finding authority. In the circumstances those questions are also answered in favour of the assessee and against the revenue.

(A.K. MENON,J.) ***(S.C. DHARMADHIKARI,J.)***