

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

INCOME TAX APPEAL NO.347 OF 2016

The Commissioner of Income Tax-24 .. Appellant
v/s.
Gundecha Builders .. Respondent

Mr. Arvind Pinto for the appellant.
Ms. Aasifa Khan I/b. Niraj P. for the respondent.

**CORAM : M.S. SANKLECHA &
A.K. MENON, JJ.
DATED : 31st JULY, 2018.**

P.C.

1. This Appeal under Section 260A of the Income Tax Act, 1961(the Act) challenges the order dated 18th February, 2014 passed by the Income Tax Appellate Tribunal (Tribunal). The impugned order relates to Assessment Year 2008-09.

2. The Revenue urges the following questions of law for our consideration:-

“(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in treating the income received on letting out as house property income?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that receipts from the sale of stilt parking as part of the residential unit and therefore also eligible for a deduction under Section 80IB(10)?

(iii) Whether on the facts and in the circumstances of the case and in law, the Tribunal is right in allowing the appeal of the assessee and deleting the disallowance under Section 80IB on common expenses relatable to Poiser Project and Saki Naka Project, which were debited to Sakinaka Project with clear cut intention to suppress the profit of Sakinaka Project, which is fully taxable thereby increasing the profit of Poiser Project?"

3. **Regarding Question no.(i):-**

(a) The respondent-assessee is engaged in the business of developing real estate projects. During the previous year relevant to the subject assessment year this respondent has claimed a sum of Rs.30.18 lakhs under the head income from house property. The same was not accepted by the Assessing Officer who held it to be business income in Assessment Order dated 30th December, 2010 under Section 143(3) of the Act. Consequently the deduction available on the account of repair and maintenance could not be availed of by the respondent.

(b) Being aggrieved with the order dated 30th December, 2010, the respondent filed an appeal to the Commissioner of Income Tax (Appeals) (CIT(A)). By an order dated 25th March, 2011 the CIT(A) allowed the appeal holding that the rental income received by the

respondent has to be classified as income from house property. Thus, 30% deduction on account of repairs and maintenance be allowed.

(c) Being aggrieved with the order dated 25th March, 2011, the appellant-revenue filed an appeal to the Tribunal. By the impugned order dated 19th February, 2014 the Tribunal holds that the dispute stands squarely covered by the decision of the Supreme Court in ***Sambhu Investment (P)Ltd. v/s. CIT (2003) 263 ITR 143.***

(d) However, Mr. Pinto in support of the appeal points out that after the above decision the issue now stands concluded in favour of the revenue by the decision of the Supreme Court in ***Chennai Properties and Investments Limited, Chennai v/s. CIT (2015)14 SCC 793 and Rayala Corporation Private Limited v/s. ACIT (2016)15 SCC 201.*** In view of the above, it is submitted that the appeal should be admitted.

(e) In the present facts it is undisputed that the respondent-assessee is in the business of development of real estate projects and letting of property is not the business of the respondent-assessee. In both the decisions relied upon by Mr. Pinto i.e. Chennai Properties (supra) and Rayala Corporation (supra), the Supreme Court on facts

found that the appellant was in the business of letting out its property on lease and earning rent therefrom. Clearly it is not so in this case. Further, Ms. Khan the learned counsel appearing for the respondent-assessee invites our attention to the decision of this Court in *CIT v/s. Sane & Doshi Enterprises (2015) 377 ITR 165* wherein on identical facts this Court has taken a view that rental income received from unsold portion of the property constructed by real estate developer is assessable to tax as income from house property.

(f) In view of the above, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

4. **Regarding Question no.(iii):-**

(a) Mr.Pinto, the learned counsel appearing for the revenue very fairly states that this issue stands concluded against the appellant-revenue and in favour of the respondent-assessee by virtue of the orders of this Court in respect of assessment years 2006-07 and 2007-08 decided in *CIT v/s. M/s. Gundecha Builders (ITXA Nos.2253 of 2011 and 1513 of 2012 order dated 7th March, 2013)*. In both the above appeals, the identical question was dismissed on the ground that the same does not give rise to any substantial question of law.

(b) In the above view, this question does not give rise to any substantial question of law. Thus, not entertained.

5. **Regarding Question no.(ii):-**

(a) The appeal may require admission as appeals filed by the revenue in respect of the same respondent-assessee for the assessment years 2006-07 and 2007-08 being CIT v/s. M/s. Gundecha Builders (supra) were admitted on 7th March, 2013.

(b) However, Ms. Khan, the learned counsel appearing for the respondent-assessee invites our attention to the order of this Court dated 25th July, 2011 in *CIT v/s. Purvankara Projects Limited (ITXA no.4975 of 2010)* which dismissed an identical question as raised herein, as not giving rise to any substantial question of law. Ms. Khan further points out that in the present proceeding also the CIT(A) as well as the Tribunal have rendered a finding of fact that the car parking space stilt forms part and parcel of the housing project after obtaining the approval from the competent authority. Prima facie, it appears that the issue stands concluded in favour of the respondent-assessee.

(c) However, it would be appropriate to admit this appeal on the question no.(ii) and to list it along with Income Tax Appeal nos.1513 of 2012 and 2253 of 2011 filed by the revenue in respect of the same respondent-assessee for final disposal. This is so as the issue seems to be covered by the decision of this Court and Purvankar Projects Limited.

6. The appeal admitted on the substantial question of law at question no.(ii).

7. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

8. In the above view as agreed by the Advocates, this appeal be listed along with income tax appeal nos.2253 of 2011 and 1513 of 2012 for final hearing on 3rd September, 2018 at 3.00 p.m.

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)