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'BUILT UP AREA' INTRODUCED WITH EFFECT FROM 1 APRIL, 2005 COULD NOT BE APPLIED RETROSPECTIVELY

"THE PRINCIPAL COMMISSIONER OF INCOME TAX – 5 V. G.K. DEVELOPERS"

Hon'ble Bombay High Court in case of ***The Principal Commissioner of Income Tax – 5 v. G.K. Developers***[1], dismissed appeal and allowed respondents the deduction allowed under section 80-1B of the Income Tax Act, 1961. Issue that arose was whether the deduction granted by Ld. Tribunal was correct since according to the DVO's report, two row houses are in violation of specified conditions under section 80-1B(10)(c), which are required to be fulfilled to receive the deduction, since the build-up area of the row houses was 1500 sq. ft. For the deduction to be allowed, the build-up area should not be more than 1000 sq. ft. Although, before 1 April 2005, the phrase "build up area" was not particularly defined and projections and balconies were not included while measuring the build-up area. Due to this the builders with particularly large balconies could also get deduction since the build-up area was effectively less than 1000 sq. ft. However, it is not fair to expect from the assessee to not apply for the deduction or to remove the balconies in order to receive the deduction. Hon'ble Court affirmed that the definition of built-up area defined under section 80-1B(14)(a) would come in effect after 1st April 2005 and could not be applied retrospectively. This was also affirmed by Hon'ble Supreme Court in case of ***Commissioner of Income Tax v. Veens Developers***[2].

Hon'ble Court while dismissing appeal emphasized that retrospective application of definitions can stand to be unjust as till the time a proper definition is not established, the citizens and subject of that law are unaware of the parameters of that law.

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[1] 2024:BHC-OS:10701-DB
[2] 2015 SCC OnLine SC 1959
[3] Majesty legal is a LAW FIRM established in 2013 by Ms. Mahi Yadav. Objective of this legal update is to provide insights on law, statutes and is personal in nature, not to be deemed as legal advice.

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

INCOME TAX APPEAL NO. 1345 OF 2018
WITH
INCOME TAX APPEAL NO. 1710 OF 2018
WITH
INCOME TAX APPEAL NO. 1560 OF 2018
(Not on board, taken on board)

The Principal Commissioner of Income Tax-5 … Appellant

vs.

G.K. Developers …Respondent

Mr. Ashok Kotangle a/w. Ms. Smita Thakur, Ms. Rajshri Kanade, Mr. Arvind Ghag, Mr. Nikelesh Kotangale for the appellant.
Mr. Sanket Bora a/w. Ms. Vidhi K. Punmiya, Amiya R. Das i/b. SPCM Legal for the respondent.

CORAM: G. S. KULKARNI &
SOMASEKHAR SUNDARESAN, JJ.
DATED: 10 July, 2024

P.C.

1. These three appeals by the revenue assail a common order dated 9 August, 2017 passed by the Income-tax Appellate Tribunal, Pune Bench (for short **"the Tribunal"**) whereby the appeals filed by the revenue against the order dated 5 May, 2015 passed by the Commissioner of Income-tax (Appeals) (for short **"CIT(A)**") came to be rejected.

2. Insofar as these appeals are concerned, the assessment years in question are A.Ys. 2006-07, 2007-08 and 2008-09.

3. In assailing the orders pased by the Tribunal, common question of law on which the appeals were admitted by us on 26 June, 2024, reads thus:

> "A. Whether on the facts and circumstances of the case and in law, the Hon'ble Tribunal was justified in granting deduction u/s. 80IB(10) without considering the DVO's report available on record wherein violation relating to two row houses having area more than 1500 sq.ft. was shown?"

4. At the outset, it is being fairly pointed out at the bar that the question of law as raised would stand covered by the decision of Supreme Court in **Commissioner of Income-tax vs. Sarkar Builders**[1] wherein the Supreme Court while examining the scheme of Section 80-IB of the Act, held that insofar the position prior to 1 April, 2005 was concerned, on the basis of the plans as approved by the Planning Authority, it was legitimate and permissible for the assessee to claim deduction under section 801B(10), as for such period (prior to 1 April, 2005), the concept of built-up area as inserted by clause (a) in Section 80IB(14), which included inner measurement of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls, but excluding the common areas, shared with other residential units, cannot be the consideration. It was held that in the absence of applying such parameters to the constructions approved prior to 1 April, 2005, it would be to absurd results, as it could not have been expected from an assessee to comply with such conditions, that was not part of the statute when

1 [2015] 375 ITR 392 (SC)

housing project was approved. The relevant observations as made by the Supreme Court in said decision are required to be noted, which reads thus:

> "15. On examining the scheme of sub-section (1) of Section 80IB of the Act, its historical turn around by amendments from time to time and keeping in view of the real purpose behind such a provision, we are of the view that in the peculiar scenario as projected in this provision, the aforesaid cardinal principle of tax law is not to be applied as, by necessary implication, application thereof stands excluded. We have already narrated the essence of this provision. For the purpose of discussing this particular issue, it is required to be noted that with effect from 01.04.2001, Section 80IB(10) stipulated that any housing project approved by the local authority before 31.03.2001 was entitled to a deduction of 100 per cent of the profits derived in any previous year relevant to any assessment year from such housing project, provided - (i) the construction/development of the said housing project commenced on or after 1.10.1998 and was completed before 31.03.2003; (ii) the housing project was on a size of a plot of land which had a minimum area of one acre; and (iii) each individual residential unit had a maximum built-up area of 1000 sq.ft., where such housing project was situated within the cities of Delhi or Mumbai or within 25 kms. from the municipal limits of these cities, and a maximum built-up area of 1500 sq.ft. at any other place. Therefore, for the first time, a stipulation was added with reference to the date of approval, namely, that approval had to be accorded to the housing project by the local authority before 31.03.2001. Before this amendment there was no date prescribed for the approval being granted by the local authority to the housing project. Prior to this amendment, as long as the development/construction commenced on or after 1.10.1998 and was completed before 31.03.2001, the assessee was entitled to the deduction. Also by this amendment, the date of completion was changed from 31.03.2001 to 31.03.2003. Everything else remained untouched. Thereafter, by Finance Act, 2003, further amendments were made to Section 80IB(10), which read as under:
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> > "(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."

16. As can be seen from the aforesaid provision, now the only changes that were brought about were that with effect from 1.4.2002: (i) the housing project had to be approved before 31.03.2005; and (ii) there was no time limit prescribed for completion of the said project. Though these changes were brought about by the Finance Act, 2003, the Legislature thought it fit that these changes be deemed to have been brought into effect from 1.4.2002. All the remaining provisions of Sectopm 80IB(10) remained unchanged.

17. Thereafter, significant amendment, with which we are directly concerned, was carried out by Finance (No.2) Act, 2004 with effect from 1.4.2005. This amendment has already been noted above. The Legislature made substantial changes in sub-section (10). Several new conditions were incorporated for the first time, including the condition mentioned in clause (d). This condition/restriction was not on the statute book earlier when all these projects were sanctioned. Another important amendment was made by this Act to sub-section (14) of Section 80IB with effect from 1.4.2005 and for the first time under clause (a) thereof the words 'built- up area' were defined. Section 80IB(14)(a) reads as under:

"(14) For the purposes of this section -

(a) "built-up area" means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units;"

18. Prior to insertion of Section 80IB(14)(a), in many of the rules and regulations of the local authority approving the housing project "built-up area" did not include projections and balconies. Probably, taking advantage of this fact, builders provided large balconies and projections making the residential units far bigger than as stipulated in Section 80IB(10), and yet claimed the deduction under the said provision. To plug this lacuna, clause (a) was inserted in Section 80IB(14) defining the words "built-up area" to mean the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls,

but did not include the common areas shared with other residential units.

19. Can it be said that in order to avail the benefit in the assessment years after 1.4.2005, balconies should be removed though these were permitted earlier? Holding so would lead to absurd results as one cannot expect an assessee to comply with a condition that was not a part of the statute when the housing project was approved. We, thus, find that the only way to resolve the issue would be to hold that clause (d) is to be treated as inextricably linked with the approval and construction of the housing project and an assessee cannot be called upon to comply with the said condition when it was not in contemplation either of the assessee or even the Legislature, when the housing project was accorded approval by the local authorities.

20. Having regard to the above, let us take note of the special features which appear in these cases:

(a) In the present case, the approval of the housing project, its scope, definition and conditions, all are decided and dependent by the provisions of the relevant DC Rules. In contrast, the judgment in M/s. Reliance Jute and Industries Ltd. was concerned with income tax only.

(b) The position of law and the rights accrued prior to enactment of Finance Act, 2004 have to be taken into account, particularly when the position becomes irreversible.

(c) The provisions of Section 80IB(10) mention not only a particular date before which such a housing project is to be approved by the local authority, even a date by which the housing project is to be completed, is fixed. These dates have a specific purpose which gives time to the developers to arrange their affairs in such a manner that the housing project is started and finished within those stipulated dates. This planning, in the context of facts in these appeals, had to be much before 01.04.2005.

(d) The basic objective behind Section 80IB(10) is to encourage developers to undertake housing projects for weaker section of the society, inasmuch as to qualify for deduction under this provision, it is an essential condition that the residential unit be constructed on a maximum built up area of 1000 sq.ft. where such residential unit is situated within the cities of Delhi and Mumbai or within 25 kms. from the municipal limits of these cities and 1500 sq.ft. at any other place.

> (e) It is the cardinal principle of interpretation that a construction resulting in unreasonably harsh and absurd results must be avoided.
>
> (f) Clause (d) makes it clear that a housing project includes shops and commercial establishments also. But from the day the said provision was inserted, they wanted to limit the built up area of shops and establishments to 5% of the aggregate built up area or 2000 sq.ft., whichever is less. However, the Legislature itself felt that this much commercial space would not meet the requirements of the residents. Therefore, in the year 2010, the Parliament has further amended this provision by providing that it should not exceed 3% of the aggregate built up area of the housing project or 5000 sq.ft., whichever is higher. This is a significant modification making complete departure from the earlier yardstick. On the one hand, the permissible built up area of the shops and other commercial shops is increased from 2000 sq.ft. to 5000 sq.ft. On the other hand, though the aggregate built up area for such shops and establishment is reduced from 5% to 3%, what is significant is that it permits the builders to have 5000 sq.ft. or 3% of the aggregate built up area, 'whichever is higher'. In contrast, the provision earlier was 5% or 2000 sq.ft., 'whichever is less'.
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> (g) From this provision, therefor, it is clear that the housing project contemplated under sub-section (10) of Section 80IB includes commercial establishments or shops also. Now, by way of an amendment in the form of Clause (d), an attempt is made to restrict the size of the said shops and/or commercial establishments. Therefore, by necessary implication, the said provision has to be read prospectively and not retrospectively. As is clear from the amendment, this provision came into effect only from the day the provision was substituted. Therefore, it cannot be applied to those projects which were sanctioned and commenced prior to 01.04.2005 and completed by the stipulated date, though such stipulated date is after 01.04.2005.

5. Admittedly insofar as the facts of the present appeals are concerned, the project “Roseland Residence” was sanctioned prior to 1 April, 2005.

6. Learned counsel for the assessee has also drawn our attention to an order passed by the co-ordinate Bench of this Court in the case of ***The***

Commissioner of Income Tax-15, Mumbai vs. Tinnwala Industries[2] wherein in similar circumstances and in relation to assessment year 2004-05, the Division Bench considering the question 'whether the Income Tax Appellate Tribunal was justified in holding that the area of balcony and rewas are not to be included while computing the built up area of the residential units, in housing project eligible for deduction under section 80IB(10) of the Act'. In answering the said question, the Court held that the expression 'built up area' introduced with effect from 1 April, 2005 could not be applied retrospectively and the Tribunal was justified in holding upto 1 April, 2005, the expression 'built up area' would exclude the balcony area. The relevant observations in that regard would be required to be noted, which reads thus:

> "5. As regards the second question is concerned, it is not in dispute that for the first time the Legislature has defined the expression 'built up area' in Section 80IB(10) by introducing clause (a) to Section 80IB(14) by Finance (No.2) Act, 2004 with effect from 1st April 2005. The question is, whether the expression 'built up area' defined with effect from 1st April, 2005 can be applied for the period prior to 1st April, 2005?
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> 6. In the present case, we are concerned for the period prior to 1st April, 2005. During that period, the expression 'built up area' in Section 80IB(10) would have to be construed by assigning a meaning as is commonly understood. It is not in dispute that under the Development Control Regulations framed by the Municipal Corporation for Greater Mumbai, the balcony area is required to be excluded while computing the 'built up area'. If the expression' built up area' in a housing project approved by the local authority does not include the balcony area, then, prior to 1st April, 2005 the same would apply while considering the eligibility under Section 80IB(10) of the Act. That is why, the Legislature has introduced the definition of 'built up area' by including the balcony area with effect from 1st April, 2005. In such a case, where the Legislature with effect from a particular date has defined a particular expression by including a meaning which is not ordinarily included in that expression,

2 Income Tax Appeal No. 3315 of 2010 dated 13 April, 2012

> then, the said definition cannot be applied retrospectively. Therefore, the inclusive definition of the expression 'built up area' introduced with effect from 1st April, 2005 could not be applied retrospectively and the CESTAT was justified in holding that upto 1st April, 2005, the expression 'built up area' would exclude the balcony area."

7. The decision of the Division Bench in *Tinnwala Industries* (supra) is stated to be confirmed by the Supreme Court in deciding the revenue's Special Leave Petition in the case of ***Commissioner of Income-tax vs. Veena Developers***[3].

8. In this view of the matter, the question of law would be required to be answered in favour of the assessee and against the revenue.

9. The appeals accordingly stand dismissed in terms of the above observations. No costs.

(SOMASEKHAR SUNDARESAN, J.) (G. S. KULKARNI , J.)

3 2015 SCC OnLine SC 1959