IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 08TH DAY OF MARCH 2017

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL
AND

THE HON'BLE MR.JUSTICE N. K. SUDHINDRARAO

INCOME TAX APPEAL NO.468 OF 2015
C/W.
INCOME TAX APPEAL NO.22 OF 2012
INCOME TAX APPEAL NO.591 OF 2013

IN I.T.A.NO.468/2015

BETWEEN:

1. PR. Commissioner of Income-Tax,
C.R. Building,
Queens Road,
Bangalore.

2. Deputy Commissioner of Income-Tax
Circle – 5(1)(2),
Bangalore.

.. APPELLANTS

(By Sri E.I.Sanmathi, Adv.)

AND:

M/s. Oceanus Dwellings Pvt. Ltd.
No.297, 1st Floor, 1st Cross
7th Main, BTM 2nd Stage
Bangalore – 560 076

..RESPONDENT

(By Sri N. Jagadish Baliga, Adv.)

This appeal is filed under Section 260-A of I.T. Act, 1961 arising out of order dated 30.04.2015 passed in ITA Nos.1466/Bang/2014, for the assessment year 2010-2011, praying this Hon'ble Court to:

i. Decide the foregoing question of law and/or such other questions of law as may be formulated by the Hon'ble Court as deemed fit.

ii. Set aside the appellate order dated 30.04.2015 passed in ITA.No.1466/Bang/2014 by the ITAT, 'A' Bench, Bangalore as sought for, in the above case.

IN I.T.A.NO.22/2012

BETWEEN:

1. Commissioner of Income-Tax - III,
Central Revenue Buildings,
Queens Road,
Bangalore – 560 001.

2. The Deputy Commissioner of Income-Tax
Circle – 7(1),
Bangalore.

.. APPELLANTS

(By Sri E.I.Sanmathi, Adv.)

AND:

M/s. Parkway Development
9th and 10th Floor,
Delta Tower
Sigma Soft-Tech Park
No.7, Whitefield

Varthur Road,
Bangalore-66

..RESPONDENT

(By Sri A. Shankar and Sri M. Lava, Advs.)

This appeal is filed under Section 260-A of I.T. Act, 1961 arising out of order dated 07.09.2011 passed in ITA Nos.1419/Bang/2010, for the assessment year 2007-2008, praying this Hon'ble Court to:

iii. Formulate the substantial questions of law stated therein,

ii. Set aside the appellate order dated 07.09.2011 passed by the ITAT, 'B' Bench, Bangalore in appeal proceedings ITA No.1419/Bang/2010, as sought for in this appeal, in the interest of justice and equity.

IN I.T.A.NO.591/2013

BETWEEN:

1. Commissioner of Income-Tax - III,
Central Revenue Buildings,
Queens Road,
Bangalore – 560 001.

2. Deputy Commissioner of Income-Tax
Circle – 12(2),
Bangalore.

.. APPELLANTS

(By Sri E.I.Sanmathi, Adv.)

AND:

M/s. Oceanus Dwellings Pvt. Ltd.

No.297, 1st Floor, 1St Cross
7th Main, BTM 2nd Stage
Bangalore – 560 076

..RESPONDENT

(By Sri N. Jagadish Baliga, Adv.)

This appeal is filed under Section 260-A of I.T. Act, 1961 arising out of order dated 05.07.2013 passed in ITA Nos.180/Bang/2013, for the assessment year 2009-2010, praying this Hon'ble Court to:

i. Decide the foregoing question of law and/or such other questions of law as may be formulated by the Hon'ble Court as deemed fit.

ii. Set aside the appellate order dated 05.07.2013 passed in ITA.No.180/Bang/2013 by the ITAT, 'B' Bench, Bangalore.

These Appeals coming on for Final Hearing this day, JAYANT PATEL *J.*, delivered the following:

J U D G M E N T

All appeals have been preferred by the revenue by raising the following substantial questions of law:

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in upholding the order of the Commissioner of Income Tax (Appeals) in directing the assessing authority to allow proportionate

deduction u/s.80IB to the extent of profits attributable to the units where the built up area is below 1500 sq.ft. even when no such apportionment is prescribed under the provisions of the Act?

(2) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the assessee is entitled to claim deduction under section 80IB in respect of profits derived from the sale of residential units, wherein the built up area is below 1500 sq.ft. without appreciating the fact that the deduction u/s.80IB(10) is project based rather than unit and there is no concept of proportionate deduction u/s.80IB(10) of the Act?"

2. We have heard Sri E.I.Sanmathi, learned counsel for the appellants and Sri N. Jagadish Baliga, learned counsel for the respondents in ITA.Nos.468/2015 and 591/2013 and Sri A. Shankar

and Sri M. Lava, learned counsel for respondent in ITA.No.22/2012.

3. Learned counsel for the appellants – revenue is unable to dispute that the Tribunal in the impugned order has relied upon its earlier decision in the case of *M/s.S J R Enterprises (2010) 3 ITR (Trib.) 569*. He has fairly contended that the aforesaid decision of the Tribunal was carried before this Court in ITA.No.32/2010 and this Court vide order dated 19.03.2012 has dismissed the said appeal.

4. We may record that in the above referred decision of this Court dated 19.03.2012 in ITA.No.32/2012, it was observed thus:

> *"The revenue has preferred this appeal challenging the order passed by the Tribunal granting proportionate benefit of exemption under Section 80IB(10) of the Income Tax Act, 1961.*

2. The assessee is engaged in construction and real estate business in the name and style of SJR Builders. It undertook construction in the name of 'SJR Eastwood' and multistorey residential project in the name of 'SJR Redwood', 'Park Vista', 'Spencer' and 'Brookland' residential projects were in the initial stage. The plan of the said project was sanctioned on 18.10.2003. Later, it was modified on 01.06.2004. In all, they constructed 152 flats, out of which 116 flats was the developer's share and 36 flats was the owner's share. In 152 flats, 8 flats consists of mezzanine floor. However, separate sale deeds were executed in respect of mezzanine floor and flats in respect of the very same purchaser. Admittedly, all these flat totally measured less than 1500 sq. ft. per unit. The total area in which this project was undertaken is 3.38 acres. Therefore, the assessee claimed 100% benefit of deduction under Section 80IB(10) of the Act amounting to Rs.2,02,08,690/- in respect of 'Redwood Project'. The Assessing Authority denied the said benefit on the ground that the main flats *exceeded the permissible limit of 1500 sq. ft. to become eligible under Section 80IB(10) of the Act. Aggrieved by the same, the assessee preferred an appeal to the Commissioner of Income Tax (Appeals). Agreeing with the said finding of the Assessing Authority, he dismissed the appeal. Aggrieved by the said order, the assessee preferred an appeal to the Tribunal. The Tribunal held that because some flats are larger than 1500 sq. ft., the assessee will not lose the benefit in its entirety. Only with reference to the flats which are more than the prescribed limit, the assessee will lose the benefit. Accordingly, the appeal was allowed and the matter was remitted back to the Assessing Authority for fresh consideration in the light of the observations made in the Tribunal's order. Aggrieved by the said order, the revenue is in appeal.*

3. The learned Counsel for the revenue assailing the impugned order contended that once it is established that the flats constructed measures more than 1500 sq. ft., *the assessee is not entitled to exemption under Section 80IB(10) of the Act. It is immaterial whether such a violation is found only in few flats and therefore, he submits that the impugned order requires to be set aside.*

4. Per contra, the learned Counsel for the assessee submitted that on the day the plan was sanctioned and up to 01.04.2005, in view of the interpretation of the building regulation, the balcony was not to be included for the built up area for the purpose of calculating 1500 sq. ft. The authorities by including the balcony area have come to the conclusion that the built up area is more than 1500 sq. ft. It is ex-facie incorrect. Similarly, prior to 01.04.2009, there was no prohibiting for a person to purchase two flats in the said project. No doubt, the total constructed area is more than 1500 sq. ft., but the mezzanine floors as such are registered under a separate sale deed and the flat is registered under a separate sale deed. The total measurement in each of the *sale deeds is not exceeding 1500 sq. ft. Therefore, the authorities were not justified in holding that the assessee is not entitled to the benefit of exemption under Section 80IB(10) of the Act. Though the Tribunal held that the assessee is entitled to a proportionate benefit, which order is not challenged by the assessee, in view of the law declared by this Court in the case of Commissioner of Income Tax vs. M/s.G.R.Developers in ITA.No.355/2009 disposed off on 29.02.2012, the assessee is entitled to a 100% benefit.*

5. Prior to 01.04.2005, the balcony area was not added to the flats for the purpose of finding out the total built up area. It is only after 01.04.2005, it was added. The word 'built up area' for the purpose of Section 80IB has been defined and the position is made clear. In the instant case, as the plan was sanctioned on 18.10.2003 and the modified plan was sanctioned on 01.06.2004, for calculating the total built up area of these flats, the space occupied by the balcony *cannot be taken into consideration. Similarly, prior to 19.08.2009, during that period, there was no prohibition for a person purchasing two flats. Therefore, when a mezzanine floor and a flat is purchased under two separate sale deeds for the purpose of finding out the benefit under the aforesaid provision, we have to look into the measurement contained in the sale deeds. If that is done, there is no violation. At any rate, the appellate Tribunal though has held that the assessee is entitled to proportionate benefit has remitted the matter to the Assessing Authority for adjudication afresh. We do not see any error committed by the Tribunal in setting aside the order passed by the lower authorities though not on the ground on which it is set aside but on the correct interpretation of the legal position.*

6. Accordingly the substantial questions of law are answered in favour of the assessee and against the assessee. The Assessing Authority shall keep in mind the statutory provisions, the interpretation placed by this

Court and then, pass appropriate orders in accordance with law. That would meet the ends of justice. Accordingly, we pass the following:

<u>ORDER</u>

i) The appeal is dismissed.

ii) The Assessing Authority shall keep in mind the statutory provision, the interpretation placed by this Court and then, pass appropriate orders in accordance with law."

5. Under the circumstance, when the Tribunal has followed its earlier decision in *SJR Enterprises* (supra), which has been not interfered with by this Court in the above referred ITA.No.32/2010, vide its decision dated 19.03.2012, the present appeals are squarely covered by the decision of this Court.

6. Under the circumstance, as such no substantial questions would continue to remain, but even if the

questions are to be examined, they would stand answered against the revenue and in favour of the assessee. All appeals are disposed of accordingly.

Sd/-
JUDGE

Sd/-
JUDGE

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