

OD-21

IA No. GA/1/2020
In ITAT/169/2019
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

M/S. SOUTH CITY PROJECTS (KOLKATA) LIMITED
VERSUS
PRINCIPAL COMMISSIONER OF INCOME TAX, KOLKATA-4

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 1st December, 2021

Appearance :-

Mr. J. P. Khaitan, Sr. Adv.

Mr. Saurabh Bagaria, Adv.

Mr. Rites Goel, Adv.

Mr. Pranav Sharma, Adv.

... For Appellant

Mr. S. N. Dutta, Adv.

Mr. Soumen Bhattacharya, Adv.

... For Respondent

The Court : This appeal by the assessee filed under Section 260A of the Income Tax, 1961 (the Act, for brevity) is directed against the order dated 21st June, 2019 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata in ITA No. 1543/Kol/2014 for the

assessment year 2009-10. The assessee has raised the following substantial question of law for consideration :-

- i) Whether deduction under the provisions of Section 80IB(10) of the Income Tax Act, 1961, as it stood prior to its amendment by the Finance (No.2) Act, 2009, was admissible in respect of separate sales to the same buyer of two separately situated independent residential units, each having built up area of less than one thousand five hundred square feet?
- ii) Whether the built up area of the two independent residential units can be clubbed merely because one of the units is for the residence of the servants and the purported findings of the Tribunal denying deduction of Rs.4,05,48,257/- under Section 80IB(10) of the Income Tax Act, 1961 are arbitrary, erroneous, unreasonable and perverse?

We have heard Mr. J. P. Khaitan, learned Senior Counsel, assisted by Mr. Pranav Sharma, learned Advocate appearing for the appellant and Mr. S. N. Dutta, learned Standing Counsel, appearing for the respondent. The assessee is a company engaged in undertaking various real estate and housing development projects. During the assessment year under consideration (A.Y. 2009-10) the assessee has shown profit derived from housing project at Flat

No.375, Prince Anwar Shah Road, Kolkata, which included profit from sale of residential units and rent from commercial properties. The assessee claimed that they are entitled for deduction under Section 80IB(10) of the Income Tax Act, 1961 for its profits derived from sale of residential units. The Assessing Officer considered the said claim and rejected the same holding that the embargo placed under Section 80IB(10) of the Income Tax Act, 1961 would stand attracted as the area of the residential complex exceeds 1500 sq. ft. The assessee carried the matter on appeal before the Commissioner of Income Tax (Appeal) [CIT(A)] contending that the utility area is a separate unit and cannot form integral part of the housing area for the project and that the agreement entered into between the assessee company and the purchaser is separate in respect of the residential flat and that of the utility area and the Assessing Officer committed a serious factual error in not appreciating the documents placed before him while rejecting the claim for deduction under Section 80IB(10). The CIT(A) rejected the appeal by order dated 28th May, 2014. The sum and substance of the conclusion arrived at by the CIT(A) is that it is not the case of the assessee that the utility rooms can be treated as a separate and independent unit and utility room and flats are combined unit and therefore the limit of the area contemplated under Section 80IB(10)(c) will apply.

Further, considering the argument of the assessee that separate conveyance deeds were executed in regard to the flats and utility rooms, the CIT(A) held that at best it can be treated to be an attempt to avoid tax liability by deliberately keeping the flat area within the stipulated limit 1500 sq. ft. The assessee being aggrieved by such order filed appeal before the Tribunal. The Tribunal on its own part re-examined the factual position and took note of the terms and conditions of the agreement entered into between the appellant assessee and the purchaser of the flats. The Tribunal after noting the finding recorded by the CIT(A) held that the assessee sold residential flats and utility rooms in the housing project and profits received from the sale of flats and utility rooms were claimed to be eligible for deduction under Section 80IB(10). The Tribunal noted that the Assessing Officer had called upon the assessee to furnish details of sale with bifurcation of unit wise area of flats and utility rooms sold and in response to which the details were furnished and the Assessing Officer observed that in respect of 73 parties the assessee had sold flats along with the utility rooms wherein the total area had exceeded the limit of 1500 sq. ft, which had resulted in violation of provisions of Section 80IB(10)(c). It is the factual conclusion which was held by the CIT(A) was noted by the Tribunal and the Tribunal while considering the submission made by the assessee held that the utility rooms in the instant case is nothing but servants cottages and 73 flats were

sold together with the utility rooms thereby the area which has been sold exceeded 1500 sq. ft. The argument advanced by the assessee before the Tribunal as has been advanced before us by the learned Senior Counsel for the appellant assessee with regard to the fact that two units were separate and thereby separate documents in respect of the sale, was considered by the Tribunal and a factual finding has been recorded by the Tribunal that the utility rooms/servants quarters cannot be sold independently to any other person other than the flat owner to whom the said servant quarters is attached. Therefore, the Tribunal concluded that it is of absolutely no relevance whether servant quarters documentation has been made by a separate conveyance deed or by way of a separate letter to the concerned flat owner and the substance of the transaction needs to be seen than its form. Thereafter, the Tribunal also noted the facts which are brought on record by the Assessing Officer in respect of the various sales which have been done by the appellant assessee and concluded that it is not in dispute that while taking into account inner measurement of the 73 residential units plus the respective servants quarters, the total extent exceeds 1500 sq. ft. thereby violating Section 80IB(10)(c). Thus, it rejected the case of the assessee.

Considering the findings recorded by the Assessing Officer, the first appellate authority and the Tribunal, we find that the matter is entirely factual and the documents have been gone into and on our

part also we have examined the Indenture of Conveyance dated 20th September, 2010 executed by the assessee in favour of the purchaser, which clearly shows that prior to the execution of conveyance deed there were agreements entered into between the parties which will go to show that the utility rooms/servants quarters forms integral part of the residential flat. Thus, we find that no questions of law, much less substantial questions of law arises for consideration in this appeal.

Accordingly, the appeal fails and is dismissed.

With the dismissal of the appeal, the connected application is also dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)