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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 19.07.2013**

\+ ITA NOS.210, 214, 215 & 250/2012

CIT ..... Appellant
Through: Mr. Sanjeev Rajpal, Sr. Standing Counsel.

versus

ANSAL HOUSING AND CONSTRUCTION LTD. ..... Respondent
Through: Ms. Kavita Jha with Mr. Vaibhav Kulkarni, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

The following questions of law arise in these appeals for consideration: -

In ITA 210, 214 & 215/2012

Did the ITAT fall into error in holding that the respondent was entitled to the deduction under Section 80 (IB) of the Income Tax Act, 1961; and

In ITA 250/2012

Was the assessee liable to pay income tax on the annual letting value of the unsold flats owned by it under the head income from the

house property?

ITA NOS.210, 214 & 215/2012

1. The brief facts are that the appellant commenced development and construction development and construction of housing projects, somewhere in NOIDA, and claimed that it had started development and constructions of housing projects in NOIDA after 13.09.1998. The Assessing Officer was of the opinion that the materials on record did not justify granting the appellant the benefit of Section 80IB in view of the language of Section 80 ID (10). The Assessing Officer, therefore, made a disallowance in respect of years 1999-2000, 2002-03 and 2003-04. The assessee carried the matter in appeal successfully. In the meanwhile, in respect of the intervened assessment years 2000-01, 2001-02, the Assessing Officer appears to have accepted the assessee' contentions. These led to an action under Section 203 by the Commissioner who invoked its revisional powers. Eventually, that culminated in a common order dated 12.06.2009 of the ITAT itself. The relevant observations of the ITAT upholding the assessee's contentions which have been noticed in the impugned orders in these cases are extracted below: -

> *"17. Respectfully following the aforesaid three decisions, we hold that the deduction to the assessee can be allowed with respect to the units which did not exceed the statutory limit of 1000 sq. Ft. And the assessee would not be entitled to reductions of the built up area in 5 houses in East End Loni and 6 houses in Avantika Aakriti, as referred to in paragraph 10 of the order aforesaid. We order accordingly.*
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> *XXX XXX XXX*

21. In view of the aforesaid two decisions, we are of the opinion that deduction under section 80-IB (10) has been rightly allowed on housing projects because the building plants of the residential units were approved after 1.10.98 only and the construction has to be deemed to have been commenced on or after the date of approval itself.

22. It should not be lost sight that these are the revision proceedings and in such proceedings the allowances of deduction under section 80IB (10) to the assessee could not be revised as the issue in any case, was debatable and one of the possible views was taken by the assessing officer while granting deduction to the assessee. It was also allowed by the CIT (Appeals) in the succeeding assessment years viz. 2002-03 and 2003-04. The revision of impugned assessment orders as sought to be made by the CIT, while exercising jurisdiction under section 263, would in such a case be merely a difference of opinion and hence not amenable to the revision jurisdiction under section 263 of the Act, in view of Supreme Court decision in the cases of Malabar Industrial Co. Ltd. v. CIT 243 ITR 83 (SC) as also later decision in CIT v. Max India Ltd. 295 ITR 282 (SC).

23. We hold therefore that CIT is not right in holding that AO failed to make enquiries or to apply his mind and allowed deduction under section 80IB (10) of the Act. We, therefore, vacate his order and restore that of the AO. It is, however, except for the construction found to be in excess built up area over 1000 sq. ft. as aforesaid and in respect of which the assessee would not entitled to deduction."

2. The Revenue carried the matter further in appeal to this Court in respect of the said years 2000-01 and 2001-2002 by preferring ITA 480/2010, 485/2010 and 437/2011. By a judgment dated 24.09.2012, the Revenue's contentions were rejected both as to the findings of the Tribunal with regard to the tenability of invocation of Section 263 as

well as the merits. This is evident from the following extract of the judgment of this Court for the said years dated 24.09.2012:

"12. The Tribunal was of opinion that merely because there was a honest and bonafide difference of opinion between the assessee and the Assessing Officer on the one hand and the CIT on the other with regard to the interpretation to be placed on a provision of law or there was a possibility of more than one reasonable view of the statutory provision, it cannot be said that the assessment was erroneous or prejudicial to the interest of the Revenue. In this view of the matter, the Tribunal vacated the orders of the CIT passed under Section 263 of the Act for both the years. It may be added that the Tribunal placed reliance on the following judgments of the Supreme Court:-

(1) Malabar Industries Co. Ltd. V/s. CIT (2000) 243ITR 83, G.M. Mittal 263 ITR 255
(2) CIT Vs Max India Ltd. (SC) (2007) 295 ITR 282

13. The Tribunal however, observed that since no submissions were made by the assessee as regard the disallowance under Section 14A, the orders of the CIT on that issue had to be affirmed.

14. We are not persuaded to take a view different from the view taken by the Tribunal. A clear finding was recorded by the Tribunal that the assessee had filed the details and calculations about the built-up area of the residential units.
It would be unreasonable to hold that the Assessing Officer ignored those details. Moreover the statutory auditors had clearly mentioned the dates of approval of the lay out plan of the residential colonies. The Assessing Officer was thus made aware of the dates on which the approvals were granted in respect of each of the four housing projects. The more important aspect was the applicability of clause (a) of Section 80IB(10). On this aspect the Tribunal held that any construction carried out before the receipt of necessary approvals would be unauthorized and could not be recognized. It was found by the Tribunal that in any case there was only site development by filling of pits, leveling of land,

construction of roads, wells, laying of sewerage and electricity lines etc. Further there was no dispute regarding the date of commencement of construction with respect to the projects, namely, Golf Link-II and East End Loni. The Tribunal has found that both these projects commenced after 1st October, 1998. With regard to the other two projects, namely, Golf Link-I and Avantika Akruti, the Tribunal held that the date of commencement of construction had to be reckoned from the date when the construction of the building plan of each project was approved by the concerned authority. On examination of the details of the chronological events furnished by the assessee, it was held by the Tribunal that the building plans of each house submitted by the assessee were not sanctioned as such by the competent authority before 1st October, 1998. They were rejected and time and again modifications were proposed by the authority; finally the approvals of the building plans were issued after 1st October, 1998, except for 26 houses in Avantika Akruti Project. The Tribunal has also referred to certain orders of the Pune and Bombay Benches of the Tribunal where the date of approval by the competent authority was considered crucial to determine the date of commencement of development or construction. This discussion of the Tribunal shows that the determination of the question as to when the undertaking commenced development and construction, in the absence of any statutory prescription, has to be decided in a pragmatic and reasonable way. It would have been an entirely different issue had there been a statutory prescription of what would be the date of commencement of construction or development. It is certainly a debatable issue on which more than one plausible view is reasonably possible and merely because the Assessing Officer has taken one plausible view, it cannot be said that the assessment is erroneous or prejudicial to the interest of the Revenue.

This position stands well settled by the judgments of the Supreme Court cited supra. The Tribunal applied the tests laid down in these judgments to the case.

15. For the above reasons, we are of the view that no substantial question of law arises for our consideration in ITA Nos.485/2010

& 480/2010. The orders of the Tribunal are accordingly upheld and the appeals filed by the Revenue are dismissed."

3. In view of above observations which also indicates that this Court was satisfied that approval of the building plans were issued after 1.10.1998 except in respect of 26 houses in Avantika Aakruti Project, this Court is not persuaded that any substantial question of law arises and is not inclined to take a different view from the one taken in ITA 480/2010, 485/2010 and 437/2011. The Revenue's appeal so far as they urged this ground is insubstantial and, therefore, rejected.

Point no.2

4. So far as the point no.2, i.e., whether the respondents could have been assessed on the basis of ALV of the unsold flats, the Court is of the view that in a previous decision dated 31.10.2012 passed in ITA 18/1999 and connected matters - *CIT v. Ansal Housing Leasing Finance Ltd.,* the Court relying upon previous decision of the Supreme Court answered an identical question of law in favour of the Revenue holding that the assessee could have been assessed on the basis of ALV of the unsold flats. This question - which arises in ITA 215/2012 for assessment year 2003-04 is accordingly answered in favour of the Revenue and against the assessee.

5. In view of the above findings, ITA Nos.210 and 214/2012 are dismissed. ITA 215/2012 is partly allowed but in the above terms.

ITA 250/2012

6. The sole question which arise in this case is identical to point

no.1 decided in ITA 210, 214 & 215/2012. The Tribunal had relied upon its previous order dated 12.06.2009 as is evident from paragraph-9 of the impugned order. For the reasons mentioned in the order on aforesaid appeals, this Court affirms ITAT's order dated 9.9.2011. No substantial question of law arises. Consequently, ITA 250/2012 is dismissed.

7. ITA 210, 214, 215 & 250/2012 are disposed of in the above terms.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

JULY 19, 2013
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