IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 4 OF 2014

M/s. Commonwealth Developers
CD Fountainhead
Opp: CD Countryside (Canape)
Murida, Fatorda,
Salcete Goa 403 602
(Represented by its partner
Datta Damodar Naik,
aged about 59 years,
s/o Damodar K. Naik) … Appellant

V e r s u s

The Assistant Commissioner of
Income Tax Circle 1,
3rd Floor, Blessing Pioneer
Commercial Complex,
Opp. District and Sessions Court,
Old Market, Margao Goa. … Respondent

Mr. Chythanya K. K. with Mr. Shailesh Redkar, Advocates for the appellant.

Ms. Asha Desai, Advocate for the respondent.

Coram :- SMT. R. S. DALVI &
F. M. REIS, JJ.

RESERVED ON : 29.01.2014

PRONOUNCED ON : 11.03.2014

J U D G M E N T *(Per F. M. Reis, J.)*

The above appeal was fixed for final disposal on the following substantial questions of law by order dated 23.01.2014.

1. Whether the rear courtyard inclosed by walls of a residential unit could be included as built-up area of the residential unit ?

2. Whether the learned Tribunal can inquire into and get measured the courtyard which was not included in the built-up area and which is not the lis between the parties ?

2. We have heard Mr. Chythanya, learned counsel appearing for the appellant and Ms. A. Desai, learned counsel appearing for the respondent.

3. Briefly, the facts of the case are that the appellant/assessee submitted its return of income declaring a total income of Rs.53,620/- on 30.10.2006. An order was passed under Section 143(3) of the Income Tax Act on 21.11.2008 on the returned income of Rs.53,620/-. Thereafter, CIT invoked its jurisdiction under Section 263 and set aside the order passed under Section 143(3) vide order dated 30.3.2011 with a direction to the AO to examine the relevant facts in connection with the claim of deduction of the

assessee under Section 80-IB(10) of the Income Tax Act. The AO proceeded to examine the claim of deduction of the appellant under Section 80-IB(10) amounting to Rs.1,71,24,680/-. The AO ultimately came to the conclusion that the appellant was granted permission on 07.07.2003 by the Margao Municipal Council for construction of row villas with built-up area of 1500 square feet comprising of ground floor and first floor and the compound wall in the property bearing Chalta Nos. 34 and 35 of P. T. Sheet No. 77 situated at Fatorda,Margao. The AO noted that the appellant did not fulfill the conditions specified under Section 80-IB(10) of the said Act essentially on the ground that only flats/apartments constructed on the land will have common areas sharing with other residential units and as such since the construction of villas/bungalows/row houses are independent and do not share common areas, the appellant did not fulfill one of the conditions specified under Section 80-IB(10) of the said Act and as such invited the objections of the appellant. A reply was filed by the appellant disputing the said contention and inter-alia pointed out that all the conditions specified in Section 80-IB(10) of the said Act were duly satisfied by the appellant. But however, the AO disallowed the claim of the appellant under Section 80-IB(10) of the said Act. The

appellant preferred an appeal before CIT (A). The CIT(A) ultimately deleted the disallowance by the AO inter-alia observing that there was nothing in the Act to suggest that such deduction was available only to the projects to construct apartments or flats and that the absence of common areas cannot disqualify the appellant from claiming the deduction under Section 80-IB(10). It was further observed that the intention of the legislature has been ensured by limiting the size of the residential unit to 1500 square feet. Accordingly, the deduction refused by the AO was ordered to be deleted and the appeal was allowed. Thereafter, the respondent preferred an appeal before the Income Tax Appellate Tribunal. The learned Tribunal after examining the material on record inter-alia held that the presence of common area is not a condition in order to qualify for deduction under Section 80-IB(10) of the said Act. Nevertheless, upon inspection of the concerned residential unit came to the conclusion that the row house constructed by the appellant had a courtyard on the rear which also had to be added for computing the said built up area of 1500 square feet and as such the appeal filed by the respondent/revenue was allowed. Being aggrieved by the said order, the appellant preferred the above appeal which was ordered to be considered on the aforesaid

substantial questions of law.

4. The learned counsel appearing for the appellant dealing with the first substantial question of law has taken us through the provisions of the Income Tax Act and pointed out the meaning of the words 'built-up area' as contemplated therein. The learned counsel has pointed out that in order to invite the inclusion of an area as 'built-up area' there should be something built in such area. The learned counsel further pointed out that when the area is open to the sky the question of holding that there is anything built therein to be included as 'built-up area' would not arise at all. The learned counsel further pointed out that in case the rear courtyard area is excluded the residential unit would not exceed 1500 square feet and as such the judgment of the learned Income Tax Appellate Tribunal deserves to be quashed and set aside as the appellant is eligible for deduction under Section 80-IB(10) of the said Act. The learned counsel has thereafter taken us through the judgment of the Income Tax Appellate Tribunal and pointed out that the issue with regard to the area of the residential unit was not at all disputed by the respondent and in any event, the approach of the learned Tribunal is erroneous in terms of the provisions of the Income

Tax Act. The learned counsel has thereafter taken us through the relevant provisions of the Income Tax Act and pointed out that the impugned judgment of the learned Income Tax Appellate Tribunal deserves to be quashed and set aside.

5. On the other hand, learned counsel appearing for the respondent has supported the impugned judgment. The learned counsel has pointed out that the dispute with regard to the area of the residential unit is a question of fact which cannot be interfered by this Court in the present appeal. The learned counsel further submitted that the learned Tribunal on the basis of an inspection has come to the conclusion that the residential unit put up by the appellant was exceeding 1500 square feet and as such the appellant was not entitled for the deduction in terms of Section 80-IB(10) of the said Act. The learned counsel further submitted that as the area of the courtyard is enclosed by the compound wall, it was in exclusive use of the appellant being the owner of the residential unit and as such the learned Tribunal has rightly included the said area to compute the 'built-up area'. The learned counsel has thereafter taken us through the definition of the words 'built-up area' under the said Act and pointed out that only the common open spaces are to be excluded for

computing the 'built-up area' and not the exclusive area. The learned counsel as such submits that the above appeal deserves to be rejected.

6. We have examined the submissions of the learned counsel and also gone through the records. Before we proceed to consider the rival contentions we would take note of the relevant provisions of the Income Tax Act to decide such controversy. Section 80-IB(10) of the Income Tax Act reads as under :

> "The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, [2008] by a local authority shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if,-
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> (a).....
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> (i).....
>
> (ii).....
>
> (iii).....
>
> Explanation.....

(i).....

(ii).....

(b).....

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the city 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"

7. Section 80-IB(14)(a) reads thus :

"(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".

8. It would be appropriate to note that the said

definition of the words 'built-up area' was inserted by the Finance Act of 2004 w.e.f. 01.04.2005 much before the plans were approved in the present case.

9. On going through the said provisions, in order to avail of the deduction the built-up area of the residential unit cannot exceed 1500 square feet. Having regard to the rival contentions the only aspect to be examined is whether the area of the rear courtyard which is open to the sky and appurtenant to the residential unit is to be included to compute the built-up area as provided under Section 80-IB(10) of the said Act. In order to examine the situation at loco we called upon the appellant and the respondent to produce the photographs with regard to such courtyard area and we have noted that such area is an open piece of land though enclosed by a compound wall but without any masonary construction therein. It is also contended by the appellant that such area has not been transferred in favour of the owner of the residential unit. In fact, a copy of the agreement was even produced before the learned Tribunal to show that the built-up area mentioned in the agreement in respect of each villa is 134.83 square metres as computed by the Architect. In this background, we shall proceed to

examine the rival contentions. The built-up area is the carpet area plus the thickness of outer walls and balcony. The carpet area of a property is defined as net usable area from the inner side of one wall to another. The carpet area comprises of carpet area of the demised premises, toilet areas within such demised premises. Thus, it can be seen that to meet the requirement of an area to be treated as a 'built -up area' some construction has to be in existence in such area. The meaning of the words 'building' and 'built-up' as per the Oxford dictionary reads thus :

> '**Building**' :- A structure with a roof and walls. The process or trade of building houses and other structures.
>
> '**Built-up**' :- (of an area) densely covered by buildings. Increased in height by the addition of parts.

10. Thus, unless and until it is shown that some construction is put up the area of the courtyard which is open to the sky cannot be included to compute the built-up area. The definition of the words 'built-up area' was introduced by the Finance Act of 2004 w.e.f. 1.4.2005, which is not otherwise applicable to the facts of the present case, also

clearly provides that the built-up area would mean the inner measurements of the residential unit at the floor level including the projections and balconies as increased by the thickness of the wall but does not include the common area shared with other residential unit. In such circumstances, the built-up area is to be worked out from the wall of the residential unit. The question of extending it to mean that the area within the compound around an open land is erroneous. The building plan sanctioned by the statutory authorities does not disclose that the built-up area was exceeding 1500 square feet of the residential unit. The Karnataka High Court in the judgment reported in ***[2012] 209 Taxman 65*** in the case of ***Commissioner of Income Tax V/s G.R. Developers,*** has observed at paras 5 and 9 thus :

> ***"5.*** Prior to the insertion of this definition in the aforesaid section, built up area did not include projections and balconies as per the National Building Code, Building Industry Practice and also according to the Building by-laws. Probably taking advantage of this fact, the

builders provided these balconies and projections which made these residential units bigger than 1,500 square feet and thus, had the benefit of this prevision on the one hand. Whereas the object, with which this provision was made in reality was defeated as probably such residential units would be beyond the reach of the common man.

9. In respect of approvals obtained prior to 01.04.2005, if such section 14(a) of Section 80-IB is held to be applicable, then, the assessee has to necessarily seek for a modified plan. Otherwise, if he proceeds with the construction without obtaining the sanction of the modified plan, he would not be eligible for benefit of tax exemption under Section 80-IB(10). Similarly, if a valid approval is obtained and the building is constructed in all respects prior to

01.04.2005 and if the said substituted provision is held to be applicable retrospectively, the assessee would not be entitled to the benefit of tax exemption, if he effects sales subsequent to 01.04.2005. Such an interpretation not only would be absurd but have disastrous consequences so far as the assessee is concerned. Therefore, it cannot be said that, that was the intention of the legislature while bringing in the substitution. So we should keep in mind the object behind enacting this provision, namely to bring in investments and to encourage the infrastructure development of middle income housing projects. If the aforesaid provision is held to be retrospective in nature, it would negate the object of the said provision. It is settled law that the Courts have to harmonize these

> provisions and interpret the same in a manner to achieve the object of the legislature than to distress the said object. In that view of the matter, the definition of built-up area as inserted in sub-section 14(a) of Section 80-IB by Finance No.2 Act of 2004, which came into effect from 01.04.2005 cannot be held to be retrospective; it applies only to such housing projects, which are approved subsequent to 01.04.2005. In that view of the matter, the assessee, in the instant case, is entitled to the benefit of the aforesaid provision and hence the said substantial question of law is answered in favour of the assessee and against the revenue."

In such circumstances, the contention of the learned counsel appearing for the respondent that built-up area is to be calculated on the basis of the said definition cannot be accepted as it is not in dispute that the project of

the appellant was approved much prior to 01.04.2005. Hence, the question of going into the said definition in the facts of the present case would not arise.

11. In the present case, it cannot be disputed that the area which is sought to be included by the learned Tribunal to calculate the built up area is the rear courtyard. The meaning of a courtyard in the Legal dictionary inter-alia signifies a space of land around a dwelling house which might be enclosed appurtenant to which buildings and structures may be erected. A courtyard is an enclosed ground attached to a house. It is not in dispute that the sanction granted by the local authority discloses that the built-up area of the residential unit was less than 1,500 square feet as required under the said provisions of the Income Tax Act. To understand the meaning of the words 'built-up area' in the context of the development permitted in the State, it would be also appropriate to consider the definition of the words 'built-up area' under the Goa (Regulation of Land Development and Building Construction) Act, 2008 which reads thus :

> "**Built-up area**" means all areas which are built upon and essentially forming

part of the building/buildings and which includes all area computed under covered area/floor area as well as all area specifically exempted under covered area/floor area calculations".

12. The building bye laws of the Municipal Council of Mapusa Goa also has definition of the words 'built up area' at clause 2(11) which reads thus :

"'built up area' means and includes an area which is built up on whether below or above ground level and shall include main structure with cellars, out-houses, servant quarters, privies, bath rooms, ramps or stairways leading to cellars or upper floor, water purification plants, humidification ducts, smoke chimneys, reservoirs, swimming pools, but shall not include any area covered by balconies not projecting more than 1.2 metre, steps, septic tanks, soak pits manholes, fountains, constructed below the level of ground, swing frames, compound walls

and gates".

Though, the said definitions are for the purpose of respective statutory Regulations nevertheless, the same have been examined to consider what is the meaning of built up area in terms of such regulations. Considering the above, in order that an area is to be included to be a built up area to avail of deduction under Section 80-IB(10) of the Income Tax Act, something has to be built on in order that such area can be included for calculating the built-up area. The Division Bench of the Karnataka High Court in the Judgment reported in ***(2012) 209 Taxman 65*** in the case of ***Commissioner of Income Tax V/s G.R. Developers***, has observed at paras 3 and 3(a) thus :

> "**3**. **First Substantial Question of Law :**
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> From the aforesaid material, it is clear that the assessee obtained approval for building housing project on 14.06.2002 and has built 84 flats in an area, which is in excess of one acre of land. The construction is completed within the period stipulated. 84 flats, according to the assessee is within the 1,500 square

feet. The material on record discloses that a head room is constructed. The head room is not included in the sale deed. The local authority, after construction of the building, inspected the same and has granted occupancy certificate. Therefore, the construction put up by the assessee prima facie can be said to be as per the sanctioned plan. If after issue of occupancy certificate and after sale of these residential flats, if the owners of these flats on the top floor decided to put up a head room and engaged the very same contractor and the engineer may have put up the identical structures, it cannot be said that the assessee has put up the said construction and thus, contravened the requirement of Section 80-IB. The material on record does not disclose that the assessee put up the said construction prior to the sale of those flats and excluded the said construction in the sale deed with an intention of getting

benefit of Section 80-IB(10).

3(a) Insofar as balconies are concerned, prior to 01.04.2005, the area covered by them has to be excluded in calculating the built-up area. As the housing project was approved on 14.06.2002 and in the said plan, all these balconies are shown and excluding those balconies, the construction put up is admittedly less than 1,500 square feet. After 01.04.2005, the authorities cannot add the balcony area to the built up area and deny the benefit to the assessee. Therefore, as the material on record discloses that all the 84 or 83 flats constructed are less than the 1,500 square feet, the assessee cannot be denied the benefit and taxed on the ground that it exceeds 1,500 square feet. Hence, this question of law is answered in favour of the assessee and against the revenue."

13. The Division Bench of the Madras High Court in

the judgment reported in ***2012- TIOL-951-HC MAD-IT*** in the case of the ***Commissioner of Income Tax, Channai V/s M/s Mahalakshmi Housing*** has held at para 5 thus :-

> **"5.**..... that the open terrace area cannot form part of the built up area; in the result, the assessee would be entitled to deduction under Section 80-IB(10) of the Act and that the assessee would be entitled to proportionate relief as regards the units having built up area not more than 1500 square feet....."(emphasis supplied).

Considering the ratio laid down in the aforesaid judgments, we find that the area of courtyard cannot be included to calculate the built-up area in terms of Section 80-IB(10) of the Income Tax Act. The learned Tribunal was not justified to come to the conclusion that the said area of the courtyard is to be included to calculate the built-up area and thereby holding that the residential unit was more than 1500 square feet which would disentitle the appellant to claim such deduction. The contention of the learned counsel appearing for the respondent that the findings of the fact arrived at by

the learned Tribunal cannot be interfered in the present appeal cannot be accepted in the facts of the present case as the Tribunal has misconstrued the provisions of Income Tax Act and the material on record to deny the benefit of deduction to the appellant in terms of Section 80-IB(10) of the said Act. The first substantial question of law is answered accordingly.

14. In view of the findings on the first substantial question of law, there is no need to examine the second substantial question of law.

15. In view of the above, we pass the following :

O R D E R

(i) The appeal is allowed.

(ii) The impugned judgment dated 13.09.2013 passed by the learned Income Tax Appellate Tribunal is quashed and set aside.

(iii) The appeal stands disposed of accordingly.

F. M. REIS, J **SMT. R. S. DALVI, J**

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