

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री डि.एस. सुन्दर सिंह, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.858, 859 & 860/Mds/2016

निर्धारण वर्ष / Assessment Years : 2010-11, 2011-12 & 2012-13

The Deputy Commissioner of
Income Tax,
Corporate Circle – 1(1),
Chennai - 600 034.

v. M/s Acestar Properties Pvt. Ltd.,
No.12, South Mada Street,
Srinagar Colony, Saidapet,
Chennai - 600 015.

(अपीलार्थी/Appellant)

PAN : AAFCA 7237 B

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Supriyo Pal, JCIT

प्रत्यर्थी की ओर से/Respondent by : Sh. B. Ramakrishnan, CA

सुनवाई की तारीख/Date of Hearing : 13.03.2017

घोषणा की तारीख/Date of Pronouncement : 28.04.2017

आदेश / O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

All the three appeals of the Revenue are directed against the respective orders of the Commissioner of Income Tax (Appeals)-1, Chennai, dated 22.1.2016 and pertain to assessment years 2010-11, 2011-12 and 2012-13. Since common issue arises

for consideration in all these appeals, we heard these appeals together and disposing of the same by this common order.

2. The only issue arises for consideration is deduction claimed by the assessee under Section 80-IB(10) of the Income-tax Act, 1961 (in short 'the Act').

3. Shri Supriyo Pal, the Ld. Departmental Representative, submitted that the assessee is engaged in the business of promoting housing projects. The assessee has constructed nearly 426 residential units. All the residential units in the first floor have private open terrace ranging from 100 to 700 sq.ft. According to the Ld. D.R., the private open terrace is for exclusive use of attached residential units. The access to private open terrace is only from residential units as opening doors provided only from residential units like from bedroom, halls, etc. The private open terrace was sold to the owners for their exclusive use, therefore, according to the Ld. D.R., the private open terrace is nothing but a built-up area as provided in Section 80-IB(10) of the Act. According to the Ld. D.R., it is nothing but an extension of floor space area for exclusive use of residential units. Therefore, the floor space index exceeds

1500 sq.ft., hence, the assessee is not eligible for deduction under Section 80-IB(10) of the Act.

4. The Ld. Departmental Representative further submitted that on appeal by the assessee, the CIT(Appeals) by placing reliance on the judgment of Madras High Court in CIT v. Mahalakshmi Housing (2014) 41 taxmann.com 146, a copy of which is available at page 24 of the paper-book, allowed the claim of the assessee. Referring to this judgment of Madras High Court, the Ld. D.R. submitted that the Madras High Court by following its earlier order in Ceebros Hotels Pvt. Ltd. v. DCIT in Tax Case (Appeal) No.581 of 2008 dated 19.10.2012, found that open terrace cannot form part of built-up area. According to the Ld. D.R., it is not open terrace as claimed by the assessee. It is an extended portion of the residential unit. The assessee has constructed four-storied building. In the first floor, the portion of building was extended for the exclusive use of particular residential unit. It is not open terrace to all the residents. According to the Ld. D.R., other than the person to whom the residential unit was allotted, no one can access that extended area. The door to the private open terrace was attached with the bedroom of the residential unit allotted to the individual, therefore, it cannot be

compared as open terrace area, which was not the subject matter for consideration in Mahalakshmi Housing (supra). According to the Ld. D.R., what was constructed by the assessee is a private terrace and not open terrace. Therefore, the judgment of Madras High Court in Malakshmi Housing (supra) may not be applicable.

5. Referring to the judgment of Madras High Court in Ceebros Hotels Pvt. Ltd. (supra), a copy of which is available at page 8 of paper-book, the Ld. D.R. submitted that the question arose for consideration before the High Court was whether the open terrace of 7th floor is within the meaning of "built-up area"? The Madras High Court after considering the unreported judgment of Bombay High Court in CIT v. M/s Tinnwala Industries in Tax Appeal No.3315 of 2010 dated 13.04.2012 and the judgment of Karnataka High Court in CIT v. Anriya Project Management (Services) Pvt. Ltd. (2012) 21 Taxmann.com 140, found that the word "built-up area" has to be given the same meaning as in the Development Control Rules. The High Court found that the local authority has excluded open terrace area from working of built-up area. Therefore, it is not open to the Revenue to review the approval given by the competent authority to hold that terrace also included in the built-up area. In

view of this judgment of Madras High Court, according to the Ld. D.R., the CIT(Appeals) is not justified in allowing the claim of the assessee.

6. On the contrary, Sh. B. Ramakrishnan, the Ld. representative for the assessee, submitted that the assessee built-up residential apartments. No part of residential unit exceeded 1500 sq.ft. The area is provided at pages 1 to 7 of the paper-book. According to the Ld. representative, the Assessing Officer by taking into consideration the terrace area, found that it exceeded 1500 sq.ft.. The saleable area included the common area also. The plinth area of each residential unit in all the units is less than 1500 sq.ft. Therefore, according to the Ld. representative, it cannot be said that the assessee has constructed residential unit exceeding 1500 sq.ft. Moreover, in view of the judgment of Madras High Court in Ceebros Hotels Pvt. Ltd. (supra) and Mahalakshmi Housing (supra), open terrace has to be excluded from built-up area. Therefore, according to the Ld. representative, the CIT(Appeals) has rightly allowed the claim of the assessee.

7. We have considered the rival submissions on either side and perused the relevant material available on record. The question

arises for consideration is whether the private terrace attached with residential unit would form part of built-up area for the purpose of computing deduction under Section 80-IB(10)? By placing reliance in the judgment of Madras High Court in Ceebros Hotels Pvt. Ltd. (supra) and in Mahalakshmi Housing (supra), the assessee claims that open terrace has to be excluded and it cannot be treated as built-up area.

8. We have carefully gone through the judgment of Madras High Court in Ceebros Hotels Pvt. Ltd. (supra), a copy of which is available at page 8 of the paper-book. The Madras High Court found that while contemplating deduction under Section 80-IB(10) of the Act to a housing project approved by the local authority, the area excluded from the working of built-up area by the local authority, cannot be taken as built-up area. In fact, the Madras High Court has observed as follows at para 36 of its judgment:-

“Given the fact that contemplation of deduction is to Housing Projects approved by the Local Authority, we hold that once the Local Authority have excluded open terrace from the working of built-up area, it is not open to the Revenue to review the approval given by the competent authority to hold that terrace would also be included in the built-up area. As already held the definition also does not speak in different language from what is given in the measurement provision of Bureau of

Indian Standards in the context of the definition of Balcony in the Indian Standard.”

9. In view of the above judgment of Madras High Court, it is necessary to examine the housing project approved by the local body. In other words, whether the so-called private open terrace said to be attached with private residential unit would form part of built-up area as per housing project or it was excluded from the approval granted by local authority. Since the copy of building approval was not available on record, this Tribunal is of the considered opinion that the matter needs to be reconsidered.

10. Moreover, from the order of the Assessing Officer it appears that in each floor there is a projection, which was termed as “private open terrace”. The entry to such open terrace is only from inside the residential unit. It is not open to other residents to enter that place. Therefore, it is not a common area like open terrace. In view of the above, this Tribunal is of the considered opinion that the matter needs to be re-examined and bring on record whether the so-called private open terrace forms part of built-up area in the approval given by local authority or not. Since the approval of local authority is not available on record, the matter needs to be reconsidered. Accordingly, the orders of the lower authorities are

set aside. The Assessing Officer shall re-examine the matter afresh in the light of the approval granted by the local authority to the housing project, which shall be brought on record to ascertain whether the so-called private open terrace is part of built-up area or not. The Assessing Officer shall re-examine the matter afresh, in accordance with law, after giving a reasonable opportunity to the assessee.

11. In the result, all the appeals filed by the Revenue are allowed for statistical purposes.

Order pronounced on 28th April, 2017 at Chennai.

sd/-

(डि.एस. सुन्दर सिंह)

(D.S. Sunder Singh)

लेखा सदस्य/Accountant Member

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 28th April, 2017.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-1, Chennai
4. Principal CIT, Chennai-1, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.