IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.78 OF 2017

ALONG WITH

INCOME TAX APPEAL NO.93 OF 2017

ALONG WITH

INCOME TAX APPEAL NO.271 OF 2017

ALONG WITH

INCOME TAX APPEAL NO.285 OF 2017

ALONG WITH

INCOME TAX APPEAL NO.378 OF 2017

Pr. Commissioner of Income Tax]
Central-4, Mumbai.] ... Appellant

Versus

M/s. Kores India Ltd.] ... Respondent

Mr. Tejveer Singh for Appellant.
Mr. Firoze Andhyarujina, Senior Advocate a/w Mr. Sameer Dalal for Respondent.

CORAM :- AKIL KURESHI &
SARANG V. KOTWAL, JJ.
DATE :- 23 APRIL, 2019

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P. C. :-

1. These Appeals arise in the common background. They have been heard together and would be finally disposed of by this common order. For convenience, we may record facts from Income Tax Appeal No.78 of 2017.

2. This Appeal is filed by the Revenue to challenge the Judgment of the Income Tax Appellate Tribunal ('the Tribunal', for short).

3. The following questions are presented for our consideration.

(a) *Whether on the facts and in circumstances of the case and in law, the ITAT was justified in allowing deduction u/s 80-IB(10) of the Income Tax Act, 1961 to the assessee in respect of the Kores Towers project, without appreciating the fact that the commencement of the said project was in September, 1997 i.e. before the date of 01.10.1998 as stipulated in section 80-IB(10)(a) and therefore as the said condition was not satisfied the said project was not eligible for deduction u/s 80-IB(10)(a) ?*

(b) *Whether on the facts and in circumstances of the case and in law, the ITAT was justified in holding that all the buildings constructed by the assessee are part of the*

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Kores Towers project which was approved by the Municipal Authority on 07.06.1996 without appreciating that the approval granted to the Devpriya building on 24.12.2003 and Kores Nakshatra Projects on 19.01.2005 & 17.11.2006 are merely revision / extension of the original project approved on 07.06.1996 and therefore not eligible for deduction u/s 80-IB(10) as the condition of commencement after 01.10.1998 is not satisfied ?

(c) *Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in allowing deduction u/s 80-IB(10) of the Income Tax Act, 1961 to the assessee in respect of the Kores Towers project without appreciating that since some of the residential units had a built-up area in excess of 1000 sq.ft., the conditions as stipulated in clause (c) of section 80-IB(10) were not fulfilled and therefore the housing project was not eligible for deduction u/s 80-IB(10) ?*

4. The Respondent - Assessee is a limited company and is engaged in the business of real estate development. The issues arise out of the Assessee's return of income for the Assessment Year 2009-2010. The Revenue opposes the Assessee's claim of deduction under Section 80-IB(10) of the Income Tax Act, 1961 ('the Act', for short). The opposition of the Revenue arises in the following background.

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5. The Assessee had constructed 4 residential buildings referred to as A1, A2, B1 and B2 for which commencement certificate was issued by the local authority on 19/06/1997. The construction was completed in the year 2002-2003. Thereafter, the Assessee, in the same plot of land, undertook the construction of another building called 'Devpriya'. The commencement certificate for such construction was issued on 24/12/2003. The deductions under Section 80-IB(10) would require the commencement of a housing project after 01/10/1998. The Revenue contends that this construction of Devpriya complex was extension of the existing project and that, therefore, the commencement of construction must be treated as 19/06/1997 as in case of the original buildings. The Assessee contends that Devpriya complex was an entirely independent housing project. The Tribunal accepted the Assessee's contention upon which the Revenue has pressed questions (a) and (b) noted above.

6. Likewise, the Assessee had a plot of land adjacent to where the said 5 residential complexes were constructed. This plot of land was occupied by a factory. The Assessee sought permission from the Government department to close down this factory sometime in

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the year 2003 after which the factory building was removed and the building plans were approved. The Assessee constructed yet another residential complex known as 'Kores Nakshatra' on such land. Here also, the Revenue contends that being part of the original housing project, deduction under Section 80-IB(10) of the Act would not be available to the Assessee in relation to his income arising out of such project.

7. Another objection of the Revenue was that the Assessee had breached the condition of each housing unit in such complex not exceeding constructed area of 1000 sq.ft. The Assessing Officer and the CIT (Appeals) noted that several units adjacent to each other were allotted to the members of the same family. The partition walls between two such flats were removed. Two residential units were thus converted into one, thereby breaching the condition of each unit not exceeding constructed area of 1000 sq.ft.

8. The Tribunal, by the impugned Judgment, rejected both the objections of the Revenue. With reference to Devpriya, the Tribunal noted that the construction of an additional complex in the

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existing plot of land was possible on account of additional FSI being available to the Assessee. As on 01/10/1998, such project was not even conceived. Admitted facts are that commencement certificate for construction of Devpriya was issued by the local authorities long after 01/10/1998.

9. Similarly, in relation to Kores Nakshatra, the established facts are that the project was constructed on a piece of land where previously a factory was situated. Permission to close the factory was granted in the year 2003. Couple of years later, building plans were approved and commencement certificate was issued.

10. We find no error in the view of the Tribunal. Both the projects were independent from the original housing project where only 4 buildings were envisaged. The additional building called Devpriya and Kores Nakshatra were designed, envisaged and constructed later. There is no breach of the condition of Section 80-IB(10) of the Act which required commencement of construction only after 01/10/1998. Merely because local authority had imposed conditions in relation to Devpriya as were originally imposed in case

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of earlier 4 residential buildings, would not necessarily mean that this was an extension of the existing project.

11. In relation to the breach of condition of the units not exceeding area of 1000 sq.ft. also, we find that the Tribunal was perfectly justified in overruling the objection of the Revenue. The Revenue authorities agreed that each individual unit had built up area of less than 1000 sq.ft. The CIT (Appeals), however, noted that in some cases, adjacent units were sold to the two members of the same family who had removed the partition wall between the units. The CIT (Appeals) was of the opinion that this device was in breach of clause (f) of Section 80-IB(10) of the Act which imposes a condition that in the same family not more than one unit would be allotted. He agreed that such condition was inserted by Finance Act, 2009 with effect from 01/04/2010. However, he commented that the said condition was procedural and therefore, would apply to the pending cases.

12. In our view, the entire approach of the Revenue was erroneous. At the relevant time when the housing project was

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constructed and residential units were sold, admittedly that was no condition in Section 80-IB(10) of the Act restricting allotment of more than one unit to the members of the same family. The Assessee, therefore, was free to allot more than one unit to members of the same family. The material on record would suggest that after such units were sold under different agreements, the allottees desired that the partition wall between the two units be removed. It was thus the decision of the members to remove the wall. It was not the case where the Assessee had, from the beginning, combined two residential units and allotted one such larger unit to one member.

13. In the result, we do not find any reason to interfere. No question of law arises. The Income Tax Appeals are dismissed.

(SARANG V. KOTWAL, J.) **(AKIL KURESHI, J.)**

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