

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 127 OF 2021**

Omega Investments and Properties Ltd. ... Appellant.
V/s.
The Commissioner of Income Tax-3 ... Respondent.
AND

WRIT PETITION NO. 1217 OF 2020

Omega Investment and Properties Ltd. ... Appellant.
V/s.
Income Tax Officer -3(2)(4) and anr. ... Respondents.

Dr. K. Shivram, Senior Advocate a/w. Mr. Ajay Kumar Singh for the
Appellant/Petitioner.

Mr. Suresh Kumar a/w. Ms Krunali Satra and Ms Mohinee
Choughule for the Respondents.

**CORAM : NITIN JAMDAR &
N.R. BORKAR, JJ.**

DATE : 7 JUNE 2022.

PC:

1. The Appeal and Writ Petition are connected and have been argued together, and by consent, they are taken up for disposal by this common order.

2. The Appellant/Petitioner is referred to as Assessee, and the Respondents in the Appeal and Petition are referred to as Revenue.

3. The Assessee had undertaken a Slum Rehabilitation Project at

Parel, Mumbai, namely "Kingston Tower". According to the Assessee, the project was initially approved by the Slum Rehabilitation Authority on 7 October 2002. However, due to issues regarding F.S.I., the Assessee filed an amended plan, which was approved subsequently, and a Letter of Intent for approval was issued on 16 April 2004 and an amended intimation of approval for the project was issued on 4 June 2004. The Assessee had filed a return of income for the assessment year 2007-08, declaring a total income of Rs.22050/-. The Assessee had claimed deduction under Section 80-IB(10) of the Income Tax Act, 1961 (for short, "the Act") of Rs.20533831/-. The assessment for 2007-08 was completed on 15 May 2009, and the deduction under particular provisions was granted. After that, the case for the assessment year 2007-2008 was reopened under Section 148 of the Act vide notice dated 17 December 2012 and an order was passed by the Assessment Officer on 7 March 2014, against which the Assessee filed an Appeal before the Commissioner of Income Tax (Appeals), Mumbai, which was allowed by the Commissioner of Income Tax (Appeals) by order dated 30 November 2015. The Revenue filed an Appeal before the Income Tax Appellate Tribunal, which was allowed by the impugned order dated 9 April 2018. After the order was passed on 9 April 2018, the Assessee filed an application for Rectification on 17 April 2018 under Section 254 (2) of the Act. This Rectification Application was rejected by order dated 29 November 2019.

4. Against the order of the Tribunal dated 9 April 2018, the Assessee has filed the Income Tax Appeal No. 127 of 2021, and against the order rejecting the Rectification Application dated 29 November 2019, the Assessee has filed Writ Petition No. 1217 of 2020.

5. We have heard learned Counsel for the parties.

6. Having heard the learned Counsel, the Appeal is admitted on the following question of law:

“Whether in facts and circumstances and in law whether, the Hon’ble Tribunal erred in disallowing the deduction to the assessee u/s.80IB (10) in respect of redevelopment project which was eligible for deduction in view of the said provisions of the Income Tax Act, 1961.”

7. Rule in the Writ Petition. Rule is made returnable forthwith. The learned Counsel for the Revenue waives notice.

8. Considering the order that is proposed to be passed, the Appeal and Writ Petition are taken up for consideration forthwith.

9. Before the Tribunal, the Assessee had made reference to the orders passed in favour of the Assessee for the assessment years 2009-10 and 2010-11, in which it was held that the approval was given to the Assessee's project on 4 June 2004 which being beyond

the relevant date of 1 April 2004 as per the provisions under Section 80-IB(10) of the Act, the Assessee was entitled to the benefit of the said provisions. The Tribunal, in the impugned order, sought to distinguish the earlier orders passed by the Tribunal for the assessment years 2009-10 and 2010-11 on the ground that the Tribunal and the Commissioner of Income Tax (Appeals) in respect of assessment years 2009-10 and 2010-11 had proceeded on erroneous factual premise as regards the relevant date when the correct date of approval of the project was 7 November 2002 and this error goes to the root of the matter. Having observed so, the Tribunal held that it would not be bound by the order passed by itself in respect of Assessee's own case for the assessment years 2009-10 and 2010-11. The Tribunal also relied upon the decision of the Tribunal in the case of *Bhavya Construction v. ACIT - (2017)77 Taxmann.com 66 (Mum-Trib.)* Accordingly, by the impugned order, the Tribunal allowed the Appeal.

10. In the Rectification Application, the Assessee sought to point out that in respect of the assessment year 2009-10, the decision of the Tribunal holding in favour of the Assessee, but the view of the Tribunal for the assessment year 2009-10 (ITA No. 997/M/2013) was approved by this Court by dismissing the appeal filed by the Revenue ITA No. 159 of 2015 by the order dated 25 July 2017. The Assessee also sought to point out that the decision of the Tribunal in

the case of *Bhavya Constructions Vs. ACIT*, this Court, by order dated 30 January 2020 in *Income Tax Appeal No. 1009 of 2017*, had set aside the same and remanded the matter to the Tribunal for a fresh hearing. However, the Tribunal did not consider the Rectification Application and dismissed the same.

11. The Assessee contends that if the Tribunal wanted to differ from the earlier view, the matter ought to have been referred to the Larger Bench. The Assessee contends that the date of approval of the project referred to in the earlier order was not a mistake or oversight, but it was a specific finding on the issue and simpliciter taking a different view was improper on the part of the Tribunal. The Assessee also contends that when the fact that the orders of Tribunal for the assessment years 2009-10 and 2010-11 were confirmed by this Court was pointed out, it ought to have been taken into consideration, and the Application for Rectification was without any reasons erroneously rejected. Apart from this position, the learned Counsel for the Assessee has also placed on record a copy of the order passed by this Court in *Income Tax Appeal No. 265 of 2017* in respect of the Assessee's own case for the assessment year 2010-11. The learned Counsel for the Revenue supported both the impugned orders.

12. The Tribunal has proceeded on the premise that there was an error in the orders passed by the Tribunal for the assessment years

2009-10 and 2010-11 in respect of the Assessee's case, which goes to the root of the matter and therefore, the Tribunal is entitled to take a different view. However, the fact that the orders passed by the Tribunal for the assessment years 2009-10 and 2010-11 were challenged by the Revenue by filing appeals in this Court, and they were dismissed, confirming the findings rendered therein was the material aspect which ought to have been considered by the Tribunal. If it was missed out when the Tribunal passed the order impugned dated 9 April 2018, when it was sought to be placed on record through Rectification Application, at that time, the Tribunal should have considered the implications of the order. The order passed by this Court in respect of the assessment year 2010-2011 has been rendered thereafter on 9 April 2018. Even the order setting aside the decision in the case of *Bhavya Construction Co.* and remanded the proceedings to the Tribunal was rendered on 30 January 2020.

13. Therefore, on the aspect of what will be the relevant date in the facts of the Assessee's case, the orders passed by this Court dismissing the Revenue's Appeals would be relevant, and the implication of the same ought to be considered by the Tribunal before deciding whether the Assessee is entitled to the benefit of provisions under Section 80-IB(10) of the Act in respect of the relevant assessment year. In these circumstances, we are of the

opinion that the impugned order passed by the Tribunal dated 9 April 2018 is required to be quashed and set aside. The Appeal filed by the Revenue being ITA No. 868/ Mum/2016 is required to be restored and considered on its own merits in the light of observations made in this order and after considering the documents/orders sought to be placed on record through Rectification Application. The question framed stands answered accordingly.

14. The impugned order passed by the Tribunal dated 9 April 2018 is quashed and set aside, and the appeal being ITA No. 868/Mum/2016 is restored to the file. The Tribunal will decide the Appeal afresh on its own merits in the light of observations made in this order and in the light of documents sought to be placed on record by the Assessee in his Miscellaneous Application dated 17 April 2018.

15. Appeal and Writ Petition are disposed of in the above terms.

16. In the light of the disposal of this Appeal by the above order, the impugned order rejecting the Rectification Application does not survive.

(N.R. BORKAR, J.)

(NITIN JAMDAR, J.)