

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND

SHRI C.N. PRASAD, JUDICIAL MEMBER

आयकर अपील सं /I.TA No. 2395/Mum/2013

(निर्धारण वर्ष / Assessment Year: 2007-08

The DCIT, Central Circle-14, R.No. 1007, 10 th Floor, Old CGO Annexe Bldg., Mumbai-400 020	बनाम/ Vs.	M/s. Siddhi Twinkle Enterprises, 1304, Allmanda Pride Park, Laukaim Industries, Thane (W)-400 067
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C.O. No. 115/Mum/2015

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स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. ABAFS 6316G

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Assessee by:		Shri Manjunatha Swamy
प्रत्यर्थी की ओर से/Department by:		Dr. Sunil Pathak Shri Subodh Ratnaparakhi

सुनवाई की तारीख / Date of Hearing :19.07.2016

घोषणा की तारीख /Date of Pronouncement :30.09.2016

आदेश / ORDER

PER C.N. PRASAD, JM:

This appeal is filed by the Revenue and the cross objection filed by the assessee against the order of the Ld. CIT(A)-37, Mumbai dated 01.01.2013 pertaining to assessment year 2007-08.

2. The Revenue has raised the following grounds in its appeal:

(i) "On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) erred in holding that the A.O. could not make addition without incriminating material regarding the claim of deduction u/s. 801B(10) of the Act without considering the fact that once the assessment is initiated u/s. 153A or 153C of the Act, it is open for the AO to make addition on any issue whether any incriminating material related that is found in the course of search or not".

(ii)"On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) erred in allowing the deduction u/s. 801B(10) of the Act relying on the case of Vandana Properties, in respect of which SLP filed by the Revenue is reported to be pending."

(iii) "On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) erred in deleting the addition of Rs. 4,16,41,820/- representing deduction claimed u/s 801B(10) without considering the fact and the provisions of section 801B(10)(a) that the entire project A to K was approved on 20.03.2002 by the local authority vide common plan considered as a single project and accordingly, I & J was only extension of project A to K requiring completion by 31.3.2008 which was not fulfilled in the case of project I & J."

3. Briefly stated the facts are that there was a search u/s. 132 of the of the Act at the premises of one of the members of the assessee (AOP) on 28.8.2008. Subsequently assessment was completed u/s. 143(3) r.w. Sec. 153A of the Act on 30.10.2010 by the Assessing Officer accepting the total income declared at Nil by the assessee after claiming deduction u/s. 801B(10) of the Act on the housing project. It appears that the Assessing Officer examined the allowability of the claim of the assessee u/s. 801B(10) and accepted the claim of the assessee while completing the assessment. Subsequently search action u/s. 132 has taken place in the case of

another member of the assessee (AOP) alongwith other associated persons and group companies. Consequent to search notice u/s. 153C was issued requiring the assessee to file return of income. The assessee filed return of income declaring Nil income in response to notice issued u/s. 153C of the Act. The assessment was completed u/s. 143(3) r.w. Sec. 153C on 29.12.2011 determining total income at Rs. 4,16,41,820/- as against Nil income returned. While completing the assessment, the Assessing Officer rejected the claim of the assessee u/s. 80IB(10) of the Act by observing that the project does not fulfill the two vital conditions prescribed u/s. 80IB(10)(a)(i) and 80IB(10)(b) of the Act.

4. On appeal, the Ld. CIT(A) deleted the disallowance holding that no incriminating material was found in respect of the claim made u/s. 80IB of the Act during the course of search and seizure proceedings and therefore he held that after initiating the proceedings, the Assessing Officer at best should have limited himself to making the assessment same as that of the original assessment framed u/s. 143(3) of the Act. Further, he has held that even otherwise on merits it is an admitted position that the assessee's claim is directly covered by the decision of the Jurisdictional High Court in the case of CIT Vs Vandana Properties. Against this order, the Revenue is in appeal before us.

5. The Ld. Departmental Representative vehemently supported the orders of the Assessing Officer in denying the claim for deduction u/s. 80IB(10) of the Act to the assessee on the housing project.

6. The Ld. Counsel for the assessee vehemently supports the order of the Ld. CIT(A). He further submits that there was no incriminating material found in the course of search and therefore the claim which was examined and allowed while completing the assessment u/s. 143(3) and also u/s. 143(3) r.w. Section 153A cannot be disallowed while completing the assessments u/s. 153C of the Act in the absence of any incriminating material. He submits that there is no pending proceedings for the Assessment Year 2007-08 as on the date of search and therefore the assessment for the Assessment Year 2007-08 has not abated. He further submits that disallowance u/s. 80IB(10) is not justified in non abated assessment where search u/s. 132 did not reveal any incriminating evidences to suggest that there is undisclosed income by the assessee. For this proposition, he places reliance on the decision of the Bombay High Court in the case of CIT Vs Continental Warehousing Corpn. (373 ITR 0645)(Bom), All Cargo Global Logistics Ltd Vs DCIT (137 ITD 0287)(SB). He further submits that even on merits, the issue is covered by the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs Vandana Properties (supra) wherein the Hon'ble High Court held that cluster of buildings from out of a large lay out would be eligible for deduction u/s. 80IB(10) of the Act.

7. Heard the rival submissions and perused the orders of the lower authorities and the decisions relied on. There was a search u/s. 132 of the of the Act at the premises of one of the members of the assessee (AOP) on 28.8.2008. Subsequently assessment was completed u/s. 143(3) r.w. Sec. 153A of the Act on 30.10.2010 by the Assessing Officer accepting the total income declared at Nil by the

assessee after claiming deduction u/s. 80IB(10) of the Act. It appears that the Assessing Officer examined the allowability of the claim of the assessee u/s. 80IB(10) and accepted the claim of the assessee while completing the assessment. Subsequently search action u/s. 132 has taken place in the case of another member of the assessee (AOP) alongwith other associated persons and group companies. The assessee filed return of income declaring Nil income in response to notice issued u/s. 153C of the Act. The assessment was completed u/s. 143(3) r.w. Sec. 153C on 29.12.2011 determining total income at Rs. 4,16,41,820/- as against Nil income. While completing the assessment, the Assessing Officer rejected the claim of the assessee made u/s. 80IB(10) of the Act. The Assessing Officer rejected the claim of the assessee u/s. 80IB(10) by observing that the project does not fulfill the two vital conditions prescribed u/s. 80IB(10)(a)(i) and 80IB(10)(b).

7.1. We have gone through the assessment order and find that there is no whisper about the incriminating material found by the Assessing Officer regarding the claim made by the assessee u/s. 80IB(10) of the Act. It appears that the deduction u/s. 80IB(10) has not been denied based on any seized materials. But it was done only on the basis of the assessee not explaining why the deduction u/s. 80IB(10) should be allowed. The Ld. CIT(A) has given a categorical finding that no incriminating material was found and no disallowance can be made u/s. 80IB (10) stating as under:

“In view of the above, it cannot be said that the action initiated by the Ld. CIT(A). A.O u/s. 153A was bad in law. Having said that, it is also important to note that in the very said decision in Anil Bhatia (supra) Hon’ble Delhi High Court took

pains to suggest that if there was no incriminating material found, the Assessing Officer has to stop short in 153A proceedings and restrict himself to the income already determined/assessed in the concluded proceedings u/s. 143(3). It is an admitted fact that no incriminating material was found in respect of 80IB claim of the appellant during the course of search and seizure proceedings and therefore after initiating the proceedings, the Assessing Officer at best should have limited himself to making the same assessment as in the original assessment framed u/s. 143(3)."

7.2. In the case of CIT Vs Continental Warehousing (supra), the Jurisdictional High Court held that in the absence of any materials unearthed during the search u/s. 153A/C proceedings to show that the relief allowed to the assessee was erroneous, the Assessing Officer while passing the order u/s. 153A r.w. section 143(3) could not have disturbed the assessment order finalized relating to the relief/deduction already allowed by the Assessing Officer. Similar is the view of the Special Bench, Rajkot decision in the case of All Cargo Global Logistics (supra).

8. In this case, admittedly, there is no incriminating material found in the course of search suggesting that the claim of the assessee u/s. 80IB(10) is false or wrong. The assessment for the Assessment Year 2007-08 was completed u/s. 143(3) and also u/s. 143(3) r.w. Section 153A and there is no pending proceeding to show that the assessment is abated hence in the absence of any incriminating material, the question of denying deduction u/s. 80IB(10) of the Act to the assessee for the Assessment Year 2007-08 does not arise. Hence, we hold that the Ld. CIT(A) has rightly allowed the claim of the assessee and accordingly his order is sustained.

9. Since we are affirming the order of the Ld. CIT(A) deleting the disallowance u/s. 80IB (10) of the Act, the C.O. filed by the assessee is dismissed as infructuouse.

10. In the result, the appeal filed by the Revenue and the cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 30th September, 2016.

Sd/-

Sd/-

(RAJENDRA)

(C.N. PRASAD)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 30th September, 2016

व.नि.स./ Rj , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,
मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai