

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C', BANGALORE

BEFORE SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

AND

SHRI. VIJAYPAL RAO, JUDICIAL MEMBER

I.T.A No.790/Bang/2014
(Assessment Year : 2009-10)

M/s. Eagleton Property Holdings,
No.4, Model House Street,
Basavanagudi, Bangalore 560004
PAN : AABFE9865C

.. Appellant

v.

Asst. Commissioner of Income-tax,
Circle -4(1), Bangalore

.. Respondent

Assessee by : Shri. V. Sridhar, CA
Revenue by : Shri. Anurag Sahay, CIT-DR

Heard on : 24.08.2015
Pronounced on : 04.09.2015

ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

In this appeal filed by assessee it assails an order dt.25.03.2014 of CIT, Bangalore- II, passed u/s.263 of the Income-tax Act, 1961 ('the Act' in short).

02. Facts apropos are that assessee had filed return of income declaring income of Rs.65,77,573/-. Assessee had claimed deduction of Rs.5,09,35,824/-, u/s.80IB(10) of the Act, for one of its housing projects called County- 1, in such return of income. During the course of assessment proceedings, AO had vide

letter dt.16.06.2011, required the assessee to file the GPA executed in its favour by M/s. Chamundeswari Build Tech P. Ltd, pursuant to which assessee had constructed residential units. AO also mentioned in such letter that assessee firm was not having any right, title and interest over the property on which construction was being done and assessee was acting only as a contractor. Reply if any given by the assessee, on this query of the AO is not forthcoming from the records before us. However it seems assessee had filed a letter dt.18.08.2011 inter alia justifying higher cost incurred by it on non-80IB projects. Thereafter assessment was completed on 23.09.2011 u/s.143(3) of the Act and in such assessment an addition of Rs.9,96,500/- was made for excess expenditure on non-80IB projects.

03. On 25.09.2013, CIT issued a notice u/s.263 of the Act, to the assessee. As per this notice, during the course of assessment proceedings for succeeding assessment year 2010-11, AO concerned had referred the assessee's claim with regard to deduction u/s.80IB(10) of the Act to the District Valuation Officer ('DVO' in short) for the County-I project. As per the CIT in the report of DVO there were adverse inferences regarding the area of residential units and ownership over the land on which construction was being done. CIT noted that for A. Y. 2010-11 based on the report of DVO, AO had denied the deduction claimed by the assessee u/s.80IB (10) of the Act. Assessee was considered as a building contractor and not as a developer. Since for A. Y. 2010-11 the claim of deduction u/s.80IB(10) of the Act was denied, as per the CIT for the impugned

assessment year also such claim could not be allowed, project being the very same. Assessee in reply to the above mentioned notice stated that it had two residential projects namely County-1 and County-II. According to its claim for which deduction u/s.80IB(10) of the Act was restricted to County-I. As per the assessee in respect of five units which were found by the DVO as having built-up area in excess of 1,500 sq.ft, he was not clear as to whether it were a part of County –I or County –II. Further as per the assessee, it had never acted as a building contractor and no money was received from the land owner for construction. Assessee pointed out that it was in possession of GPA for the land, having all powers to develop the land. As per the assessee, the consideration of Rs.1.60 Crores stood paid to the original land owner. Contention of the assessee was that the sale agreement with the buyers clearly brought out that assessee was a developer and the owner was a confirming party. As per the assessee it had shown the cost of purchase of land and full sale proceeds when the developed units were sold, in its books of account. Land ownership, as per the assessee was not a pre-requisite for preferring a claim u/s.80IB(10) of the Act. Assessee also contended that even if some units were having area in excess of 1500sft, claim of deduction u/s.80IB(1) of the Act could not be denied. For this, it placed reliance on the case of DCIT v. Brigade Enterprises (P) Ltd. [(2008) 14 DTR 037]. Thus, as per the assessee, assessment done for the impugned assessment year was neither erroneous nor prejudicial to the interests of Revenue.

04. However, the CIT was not impressed. According to him, the DVO who carried out the inspection in the presence of the accountant of the assessee had given a clear finding that a number of residential units were having built-up area in excess of 1500 sft. Therefore according to him, assessee was not eligible for the deduction u/s.80IB(10) of the Act. CIT (A) also noted that Hon'ble Apex Court had on a similar issue admitted the appeal of the Revenue, wherein it assailed the directions of the Tribunal to give pro-rata deduction u/s.80IB(10) of the Act. Vis-a-vis the ownership of the property on which development was being done, CIT was of the opinion that the land belonged to Chamundeswari Buildtek P. Ltd., and they had sold the sites directly to different purchasers. It was such purchasers of land who had entered into agreement for construction with the assessee. Assessee was constructing houses for such purchasers based on individual plan sanctions obtained by these purchasers. This being the case as per the CIT assessee was only a contractor and for this reason also not eligible for claiming deduction u/s.80IB(10) of the Act.

05. Now before us, Ld. AR strongly assailing the order of CIT submitted that even presuming some of the units had built-up area in excess of 1,500 sft, deduction claimed u/s.80IB(10) could not be denied. Reliance was placed on a coordinate bench decision in the case of DCIT v. Brigade Enterprises (P) Ltd [(2008) 14 DTR 037]. Vis-a-vis requirement of legal ownership over the land, Ld. AR relying on the judgments of Hon'ble Gujarat High Court in the cases of CIT v. Radhe Developers [341 ITR 403] and CIT v. Shree Ram Construction

[TA.430 of 2013, dt.10.12.2012], submitted that such ownership over the land was not an essential criteria. As per the Ld. AR, owner of the property had parted possession of the land and assessee was the person who was developing it. Owner had given a GPA which included power to sell the land. It was the assessee who was doing the construction. Assessee was a developer of the residential units and therefore by virtue of the above mentioned judgments, assessee was eligible for claiming deduction u/s.80IB(10) of the Act. CIT had refused to follow the coordinate bench decision in the case of Brigade Enterprises (P) Ltd (supra) though an SLP filed on the very same issue by the Revenue before the Apex Court stood dismissed. Further according to him during the course of assessment proceedings, AO had enquired about the aspect of ownership and was satisfied with the replies given by the assessee. Thus according to him, order of the AO was neither erroneous nor prejudicial to the interests of the Revenue.

06. Per contra, Ld. DR strongly supporting the order of CIT and submitted that that assessee was only a contractor and not entitled for claim of deduction u/s.80IB(10) of the Act. Buyers had purchased the property from M/s. Chamundeswari Buildek P. Ltd. It was such buyer who appointed the assessee to construct their residence. As for the reliance placed by the assessee on Radhe Builders (supra), Ld. DR submitted that there the developer was a party to a tripartite agreement in which land owner and ultimate customer had agreed to the arrangement. Here on the other hand, as per the Ld. DR, both the parties

were interested persons and there was no inter-se arrangement. Placing reliance on GPA placed at paper book page 53, Ld. DR submitted that Managing Director of Chamundeswari Buildtek P. Ltd, who was the owner of the property, was M. Ashok Kumar. Beneficiary of the GPA was the assessee, who was a partnership firm and the managing partner of the said firm was also the very same Ashok Kumar. According to him, the GPA executed by the very same person in his own favour could not be given much sanctity. It was only a method of siphoning the profits. AO had not applied his mind to these aspects. As per the Ld. DR some of the units definitely had built-up area in excess of 1500 sft and this came to the notice of the AO only during the course of assessment proceedings for the subsequent assessment year and this was also an undisputed position. As per the Ld. DR these were sufficient to show that the AO had completed the assessment for the impugned assessment year without considering the relevant aspects of the case and had never applied his mind.

07. We have perused the orders and heard the rival contentions. Query placed by the AO during the course of assessment proceedings with regard to the claim u/s.80IB(10) of the Act is reproduced here under :

“Your authorised representative has filed a copy of GPA from M/s. Chamundeswari Builders Pvt. Ltd. On which your firm has been given only power to construct and sell on behalf of them, which means that your firm is acting as an agent for the company, and all the rights of the property lies with the company only. Your firm does not have any right, title and interest over the property. It means that your firm is only acting as a contractor to them. As per explanation to section

80IB(10), the contractors are not eligible for claiming the deduction u/s.80IB(10). Therefore you are requested to show cause why the deduction u/s.80IB(10) of Rs.5,09,35,824/- claimed by you should not be disallowed and brought to tax as your firm's income."

08. Assessee's reply to this, if any, is not available on the records. However, in the original assessment order dt.23.09.2011 there is a mention regarding the claim made by the assessee u/s.80IB(10) of the Act, and this read as under :

2. The assessee firm having two projects one is covered by 80IB and another one is non 80IB. On comparison of cost of project per sq.ft., the cost of project in respect of 80IB case (county I) comes to Rs. 2,981/- per sq.ft. and cost of non 80IB project (county II) comes to Rs. 3,950/-. The assessee has been asked to explain the same vide this office letter dated 16.06.2011. In response to the above, the assessee's AR has explained vide his letter dated 18.08.2011 which is filed on 23.09.2010 stating that the cost of non 80IB project is more because it is a premium construction with good quality fittings and better amenities and interiors. The area of construction is more in respect of 80IB project and area of construction in respect of non 80IB project is less that is why the cost per sq.ft. is more and requested to accept the same. Considering the assessee's A.R's explanation, the cost of excess expenditure on the non 80IB project is estimated at Rs. 250/- per sq.ft. on the constructed area of 3986 sq.ft. which comes to Rs. 9,96,500/- and disallowed on excess expenditure debited. Accordingly, the same is brought to tax for which the assessee's AR has agreed.

09. Above narration in the assessment order does show that assessee had filed a letter dt.18.08.2011. But assessee had at no point of time ever stated that any of the units being built in County-I had built-up area in excess of 1,500 sft. AO had no information on this aspect. This came to his notice only during the course of assessment proceedings for A. Y. 2010-11 when there was a reference to the

DVO. It is not disputed that DVO in his report had stated that unit Nos.B-8, B-19, B-21, B-22 & B-31, had built-up area in excess of 1,500 sft. May be the argument of the assessee that even if some of the units had built-up area in excess of 1,500 sft, pro-rata deduction u/s.80IB(10) of the Act, should be given to it, might be acceptable in view of the judgment of Hon'ble Gujarat High Court in the case of Radhe Developers (supra). But nevertheless as noted by the CIT it is clear from the sale deed entered by Chamundeswari Buildtek P. Ltd, with various buyers, one copy of which is available at paper book page 73 to 80, that the vendor was Chamundeswari Buildtek P. Ltd and the buyers were actually buying the plots from them. Agreements entered by such buyers with the assessee for construction of residential units were separate. These aspects have not been looked into by the AO. These were very relevant in deciding whether the assessee was a developer or only a contractor. When the AO does not make the enquiries that is lawfully expected of him and which any prudent man would have done, if placed in similar circumstances, it would definitely render the order erroneous and prejudicial to the interests of Revenue. Not only was there units which had built-up area in excess of 1500 sft, but also the agreements and the power of attorney did have a bearing on the question as to whether assessee was indeed eligible for claim of deduction u/s.80IB(10) of the Act. AO had never considered these aspects nor made enquiries which were required of him. No doubt inadequate enquiry by itself will not render an order erroneous or prejudicial to the interests of Revenue. But an enquiry which by itself is only a farce and does not do justice to the duty cast on a statutory authority would be

equivalent to non-enquiry. In such circumstances, we cannot find any error in the order of CIT in considering the order of AO erroneous and prejudicial to the interests of Revenue. CIT had while setting aside the assessment only directed a fresh assessment after giving opportunity to the assessee. Thus assessee would have an opportunity to place the judicial precedence that he wants to rely on when the matter is taken up by the AO afresh. At this juncture we do not find any reason to interfere with the order of CIT.

10. In the result, appeal of the assessee stands dismissed.

Order pronounced in open court on 4th day of September, 2015.

Sd/-

Sd/-

(VIJAYPAL RAO)
JUDICIAL MEMBER

(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER

MCN

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar