

आयकर अपीलीय अधिकरण, मुंबई ए खंडपीठ

The Income-tax Appellate Tribunal -“A”Bench Mumbai

श्री राजेन्द्र,लेखा सदस्य एवं श्रीमती बीना पिल्लई, न्यायिक सदस्य

Before Shri Rajendra,Accountant Member and Ms. Beena Pillai,Judicial Member

आयकर अपील सं /ITA No.4965//Mum/2012, निर्धारण वर्ष /Assessment Year 2004-05)

आयकर अपील सं /ITA No.1860-61//Mum/2011, निर्धारण वर्ष /Assessment Year 2006-07 & 07-08)

ITO -23(2)(1), C-10/201-2 nd floor, Pratyakshakar Bhavan, BKC,Bandra(E),Mumbai-400050	Vs	M/s.Abhilasha Combines, A/36,Patil Bhavan,NSB Road, Mulund(West),Mumbai-400080 PAN:AAFFA7153F
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

आयकर अपील सं /ITA No.5001 and 02//Mum/2012, निर्धारण वर्ष /Assessment Year 2005-06 and 08-09

M/s.Abhilasha Combines, PAN:AAFFA7153F	Vs.	ITO -23(2)(1), BKC,Bandra(E),Mumbai-50
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Assessee by

: Shri Reepal G. Tralshawala

प्रत्यर्थी की ओर से/Revenue by

:Shri Sujit Bangar

सुनवाई की तारीख / Date of Hearing

:29.10.2015

घोषणा की तारीख / Date of Pronouncement

: 29.10.2015

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

Per Rajendra,A.M.लेखा सदस्य राजेन्द्र के अनुसार:

Challenging the orders dated 29.5.2012 and 6.12.2010 of the CIT(A)-11 and 33-Mumbai,respectively Assessee and the Assessing Officer(AO)have filed appeals for the above mentioned assessment years(AY.s.).All the appeals deal with similar issue-as to whether the assessee had correctly claimed the deduction u/s.80IB of the Act.Therefore,we are adjudicating them by a common single order.

ITA No./4965/Mum/2012-AY.2004-05:

Assessee-firm,engaged in the business of construction of buildings,filed its return of income on 1.11.2004,declaring nil income.The assessment was completed on 28.12.2006,u/s. 143 (3) of the Act,determining the income of the assessee at Rs.17.52 lacs.

2.Aggrieved by the order of the AO,the assessee preferred an appeal before the FAA,who allowed the appeal filed by the assessee.The order of the FAA was challenged by the AO before the Tribunal.Vide order,dated 19.01.2010(ITA/7321/Mum/2008),the Tribunal restored back the matter to the file of the AO to decide the issue afresh in light of the decision of Brahma Associates(119ITD255).

The AO after considering the submission of the assessee,dt.22.12.2012,held that the department had filed an appeal before the Hon'ble Bombay High Court with regard to commencement of development and construction of housing project as well as the commercial area,that the assessee had changed his plan deliberately to avail the benefit of 80IB,that the law had existed upto 2004-05 did not permit any construction of any commercial for claiming deduction u/s.80IB(10) of the Act, that the total built up area of the project in the assessee's project was more than 2000 sq. ft. Finally,he denied the claim,made by the it u/s.80IB(10),amounting to Rs.17.53 lacs.

The assessee preferred an appeal before the FAA.Before him,it was argued that the Tribunal had given a finding of fact that project under consideration had commenced after 01.10.

1998, that the project was completed within the stipulated time that filing of an appeal by the department against the decision of Tribunal was no ground to deny a claim/deduction made by an assessee. After considering the available material, the FAA held that the original built up commercial area was 3920 sq.ft., that the plan was approved on 7.12.2003, that the completion certificate of the plan was issued on 24.8.05. He referred to the order of the Ahmedabad Tribunal delivered in the case of Naman Construction (ITA 2424/Ahd/2009 dt. 13.5.2011), that the argument advanced by the assessee that restriction of commercial area had to be applied to the project approved on or before 1.4.2005 was in contravention with legislative intent and with the judgment of Hon'ble Bombay High Court that clause (d) section 80IB(10) is applicable irrespective whether the project has been approved on or after 01.4.05 or before 01.4.05, that the restriction to commercial area are as per clause (d) of section 80IB(10) of the Act was applicable from AY.05-06. He allowed the appeal filed by the assessee for the year under consideration, whereas the appeals for the remaining two AY.s i.e. 2005-06 and 2008-09 were dismissed.

2.2. During the course of hearing before us, the Departmental Representative (DR) stated that the matter could be decided on merits. The Authorised Representative (AR) stated that AO had not followed the directions of the Tribunal, that the project was approved before 1.4.05 and hence the restrictions imposed by the legislature for subsequent years were not applicable to the year under consideration. He supported the order of the FAA.

2.3. We have heard the rival submissions and perused the material before us. We find that the issue of availability of deduction u/s. 80IB of the Act, to the assessee, was discussed by the Hon'ble High Court of Bombay (Income Tax Appeal No. 1482 of 2011-dated 15. 02.2013- AY. 2004-05), while deciding the appeal filed by CIT-23, Mumbai. We are reproducing the relevant questions framed for the consideration of the Hon'ble Court and same read as under:

b) Whether in the facts and circumstances of the case and in law, the Tribunal was right in considering the commencement certificate dated 16-9-1998 as approved by Local Authority, as land was agricultural land. Whereas nowhere in the said certificate it is mentioned that the project was disapproved ?

d) Whether in the facts and circumstances of the case and in law, the Tribunal was right in setting aside the order with regard to commercial area back to the file of the AO for deciding it afresh in accordance with Special Bench order of Pune Bench of the Tribunal in Brahma Associates V/s. JCIT(2009)119ITD255(Pune)(SB), when the Act clearly states that built up area of the shops and other commercial establishment included in the housing project should not exceed five percent of the aggregate built up area of the housing project or two thousand square feet, whichever is less, whereas, commercial area is 3920 square feet ?”

While deciding the question b) against the Revenue, the Hon'ble Court held that the assessee was entitled to claim deduction u/s. 80IB(10) of the Act, as it had not violated the provisions of section 80IB (10)(a) of the Act.

The Hon'ble Court, further held as under:

“In so far as question (d) is concerned, counsel for the parties state that the issue is covered in favour of the assessee by the decision of this Court in the matter of Commissioner of Income Tax V/s. Brahma Associates reported in (2011)333 ITR 289 (Bom.). In view of the above we see no reason to entertain question (d) as framed.”

The department has also filed appeal for the AY. 2005-06, before the Hon'ble Court raising the similar grounds. The Court dismissed the appeal.

In our opinion, the issue has attained finality in view of the judgments of the Hon'ble Bombay High Court delivered in the above referred two AY.s. Respectfully, following the above, we decide effective ground of appeal against the AO for the AY. 2004-05.

ITA/1860-61/Mum/2011-AY.s.2006-07 & 2007-08:

3. While completing the assessments for the above mentioned two AY.s., the AO disallowed deduction u/s. 80IB(10) of the Act amounting to Rs.28.65 lakhs and Rs.30.95 lakhs respectively

on the ground that the project was approved by the local authorities before 01.10.1998.The AO also held that the commercial area of the project was more than the limit prescribed by the provisions of the section 80IB(10)(d)of the Act.The FAA allowed the appeals filed by the assessee.

While deciding the appeals filed by the AO for other AY.2004-05,we have decided the issue in against him.Following the same,we uphold the orders of the FAA for both the above mentioned AY.s. and decide the effective ground of appeal against the AO.

ITA/5001-02/Mum/2012-AY.2005-06 & 2008-09:

4.The effective ground of appeal,filed by the assessee,for both the years is about disallowance of deduction u/s.80 IB(10)of the Act.The AO and the FAA,in their orders,held that the provisions of sub section (d) to the section 80IB of the Act were applicable in the cases under consideration,that the section was applicable retrospectively.They rejected the claim made by the assessee amounting to Rs.30.47 lakhs and Rs.1.47 Crores respectively.

Before us,the AR relied upon the judgments of the Hon'ble Bombay High Court delivered in assessee's own case(supra)and further stated the Hon'ble Apex Court has also held that provisions of section 80IB(10)(d)were not retrospective. DR left the issue to the discretion of the Bench.

4.1.We find that while deciding the appeals in the cases of Sarkar Builders and others,on 15.05.2015,the Hon'ble Supreme Court (Civil Appeal No.4476 of 2015& others)has dealt the issue at length and has approved the view taken by the Hon'ble High Court in the case of Brahma Associates (supra).We would like to reproduce the relevant portion of the judgment of the Hon'ble Bombay High Court and same reads as under:

“Clause (d) was specifically inserted with effect from April 1, 2005 and, therefore, that clause cannot be applied for the period prior to April 1, 2005. Clause (d) seeks to deny section 80-IB(10) deduction to projects having commercial user beyond the limit prescribed under clause (d), even though such commercial user is approved by the local authority. Therefore, the restriction imposed under the Act for the first time with effect from April 1, 2005, cannot be applied retrospectively.”

Respectfully,following the above judgment and the judgments delivered in assessee's own case by the Hon'ble Court,we decide the effective ground of appeal in favour of the assessee for both the AY.s.

As a result,appeals filed by the AO stand dismissed and the appeals of the assessee are allowed.

फलतःनिर्धारिते अधिकारी द्वारा दाखिल की गई अपीलें नामंजूर की जाती हैं और निर्धारिते की अपीलें मंजूर की जाती हैं.

Order pronounced in the open court on 29th,October,2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 29 अक्टूबर,2015 को की गई।

Sd/-

(बीना पिल्लई / Beena Pillai)

न्यायिक सदस्य/Judicial Member

Sd/-

(राजेन्द्र / Rajendra)

लेखा सदस्य/Accountant Member

मुंबई Mumbai, दिनांक Date: 29.10.2015

व.नि.स./v.Sr.PS.

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

1. Assessee /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
5. DR “K” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि के खंडपीठ,आ.अ.न्याया.मुंबई
6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**