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

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
and
SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER

ITA Nos.1734 & 1735/Bang/2013
(Assessment years: 2010-11 & 2011-12)

Deputy Commissioner of Income-tax,
Central Circle,
Mangalore. … Appellant

Vs.

M/s.Mandavi Builders,
Mandavi Palace, End Point Road,
Manipal, Udupi-576104. … Respondent
PAN: AAOFM 0540 P

AND

ITA Nos.1786 & 1787/Bang/2013
(Assessment years: 2010-11 & 2011-12)

M/s.Mandavi Builders,
Manipal, Udupi-576104. … Appellant

Vs.

Deputy Commmisioner of Income-tax,
Central Circle,
Mangalore. … Respondent

Revenue by: Dr.K.Shankar Prasad, JCIT(DR).
Assessee by: Shri Narendra Sharma, Advocate.

Date of hearing : 10/02/2015
Date of pronouncement: 20/02/2015

O R D E R

Per Smt. P.MADHAVI DEVI, JM:

These are cross appeals, both by the assessee as well as the revenue, against the common order of the CIT(A)-VI, Bangalore, dated 30/01/2013 for the assessment years 2010-11 and 2011-12. Since similar issues are arising in both the assessment years and the grounds of appeal raised by the assessee as well as the revenue relate to the same issue, these appeals are heard and disposed of by this common and consolidated order for the sake of convenience.

2. Brief facts of the case as emanating from the assessment year 2010-11 are that the assessee is a firm which is engaged in the business of building and developing of properties. A search and seizure operation was conducted at M/s.Mandavi Promoters and Developers on 04/02/2011 during the course of which various documents belonging to the assessee were found and seized. Pursuant to the same, notice u/s 153C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] was issued for the assessment year 2010-11 and during the assessment proceedings u/s 153C read with sec.143(3) of the Act, the Assessing Officer (AO) observed that the assessee has declared a sum of Rs.12,26,80,417/- as its gross total income and claimed deduction u/s 80-IB(10) of the Act on its entire income. The assessee was, therefore, asked to substantiate its

claim of deduction by issuance of a show cause notice dated 30/11/2012. The assessee furnished details and after verification of the same, the AO observed that Mandovi Pearl City Project of the assessee consists of 195 flats out of which some owners have joined two flats and hence there are 186 flats as on date. It was further found from the building sanction plan and other documents that some of residential units are having floor area of more 1500 sq.ft. and therefore there is a violation of provisions of section 80-IB(10) of the Act. The AO further observed that the assessee has sold adjacent flats to a single or related person in violation of clauses (e) and (f) of sec. 80-IB(10) of the Act. He, therefore, came to the conclusion that the assessee has violated the provisions of sec. 80-IB(10)(c), (e) and (f) of the Act. He, accordingly, denied the deduction u/s 80-IB(10) of the Act and brought it to tax.

3. Aggrieved, the assessee preferred an appeal before the CIT(A) who confirmed the order of the AO with regard to non-compliance of the provisions but directed the AO to grant deduction proportionate to the compliance of the provisions to the assessee. Seeking the claim of 100% deduction u/s 80-IB(10), the assessee is in appeal before us, while against the direction of the CIT(A) to make proportionate disallowance, the revenue is in appeal before us.

4. The learned counsel for the assessee, Shri Narendra Sharma, while reiterating the contentions made by the assessee before the authorities below, has drawn our attention to the table drawn at pages 5 to 7 of the assessment order to demonstrate that the flats were booked during the financial year 2007-08 and 2008-09 and that flat Nos.901 & 902 in Block A, 801 & 804 in Block B, 603 & 604 in Block C, were combined before the execution of the sale deeds, but flat Nos.904 & 905, 804 & 805 in Block A, were separate residential units both in the sale deeds as well as sanctioned plans and therefore not all the flats exceeded 1500 sq.ft. and therefore the violation of sec. 80-IB(10)(c) of the Act is only in respect of few flats and the assessee has not claimed deduction u/s 80-IB(10) in respect of these flats. As regards the applicability of clause (e) and (f) of sec. 80-IB(10) of the Act, and the alleged violation of the said provision, he submitted that the said clauses have been brought into statute w.e.f. 01/04/2010 whereas the assessee had entered into agreement with the prospective buyers as early as 2007 and 2008 and some in 2009. He submitted that the assessee cannot be expected to do what was not even in the statute book at the time of allotment of flats. He submitted that since no such prohibition was existing at the time of allotment of flats, the said provisions cannot be made applicable to the assessee subsequently. He relied upon the judgment of the Hon'ble Supreme Court in the case of *Sanjeev Lal & another vs. CIT*

reported in 365 ITR 389 in support of his contention that by entering into an agreement to sell a residential house, the right in asset gets extinguished and right in personam is created in favour of the intending purchaser and therefore there is a transfer. He submitted that since the assessee had allotted the flats and also received substantial part of the sale consideration, the assessee had created a right in favour of the purchaser and therefore the assessee could not have backed out of the transaction after insertion of clauses (e) and (f) to sec.80IB(10 of the Act in the statute book. Therefore, according to him, the provisions of clauses (e) and (f) cannot be made applicable to the assessee. He also placed reliance upon the judgment of the Hon'ble Karnataka High Court in the case of *CIT vs. Anriya Project Management Services P.Ltd. r*eported in 353 ITR 12 in support of his contention that clauses (e) and (f) are prospective in nature. Without prejudice to his claim that the assessee is entitled to 100% deduction of its profits and gains, the learned counsel for the assessee placed reliance upon the decisions of the co-ordinate benches of this Tribunal in the case of (i) *M/s.SJR Builders vs. ACIT* in ITA No.1192/Bang/2008 dated 21/08/2009 and (ii) *M/s.Anriya Project Management Services P.Ltd. vs. ACIT* in ITA Nos.136 & 137/Bang/2009 dated 13/11/2009 to the effect that the assessee would be eligible for proportionate deduction u/s 80-IB(10) of the Act.

5. The learned Departmental Representative, Dr.K.Shankar Prasad, on the other hand, supported the orders of the AO and submitted that the deduction is for the project and not for individual units of the project and where there is violation even in respect of one unit of the project, the assessee is not eligible for any deduction u/s 80-IB(10) of the Act. Further he also brought to our notice that in two of the transactions which were executed by the assessee after insertion of clauses (e) and (f) to sec. 80-IB(10) of the Act, to demonstrate that the assessee has clearly violated the provisions and is not entitled to any deduction at all u/s 80-IB(10) of the Act. As regards the proportionate disallowance granted by the CIT(A), he reiterated his submission as above.

6. Having regard to the rival contentions and the material on record, we find that the assessee has sold as many as 14 flats in A, B and C blocks of Mandovi Pearl City Project. We find that two flats have been sold to a single person and it is also clear from the table on pages 5 to 7 of the assessment order that some of the flats such as flats 901 & 902 in block A, 801 & 804 in block B, 603 & 604, 701 & 702 and 703 & 704 in block C have been joined together by the assessee and also sold as such as is evident from the remarks column of the table. The flats 904 & 905 and 804 & 805 in block A have been alleged joined to suit purchasers. Thus, in respect of 10 flats, there is clear violation of

80-IB(10)(c) by the assessee itself. Further, the other objection of the AO is that there is a violation of not only clause (c) to sec. 80-IB(10) of the Act but also of clauses (e) and (f). As per clauses (e) and (f) of sec. 80-IB(10) not more than one residential unit in the housing project shall be allotted to any person not being an individual and where a person is an individual, no other residential unit in such housing project is allotted to the spouse or minor children of such individual, HUF in which such individual is the karta or any person representing such individual, the spouse or the minor children of such individual or the HUF in which such individual is the karta. This amendment has come into effect from 1/4/2010. As seen from the details given in the assessment order, except for two transactions, all the transactions have been entered into by the assessee by allotment of flats to the respective persons in the year 2007 and 2008. It is also noticed that first receipt and the blockings have also been made in the respective financial years. Therefore, we agree with the contention of the learned counsel for the assessee that the assessee could not have foreseen the amendment to sec. 80-IB(10) and could not have restricted the allotment of more than one flat to the same individual or to somebody related to such a person. Further, as held by the Hon'ble Supreme Court in the case of *Sanjeev Lal & another* (cited supra) a right in personam is created in favour of an allottee by allotment as well as part payment of consideration for

such allotment. Therefore, the assessee could not have withdrawn the allotment after introduction of clauses (e) and (f). Therefore the provisions cannot apply to the transaction entered into by the assessee prior to the introduction or insertion of clauses (e) and (f) to sec. 80-IB(10) of the Act. Further, the Hon'ble Karnataka High Court has also held that these clauses are prospective in nature and therefore can be applied only for the transactions entered into after 1/4/2010. Therefore, we are of the opinion that the provisions of sec. 80-IB(10)(e) and (f) are not applicable to all the above transactions of the assessee but are applicable to the allotment and bookings done after 1/4/2010.

7. As regards the assessee's claim that it is entitled to 100% deduction u/s 80-IB(10), we find that the issue is now settled by the decision of the Special Bench of the Tribunal in the case of *Brahma Associates vs. Joint CIT* reported in (2009) 119 ITD 255 wherein it has been held that the assessee shall be eligible for deduction u/s 80-IB(10) insofar as there is compliance with the conditions of sec.80-IB(10) of the Act. Therefore, we confirm the finding of the CIT(A) that proportionate disallowance is to be made in respect of the transactions which have been made subsequent to the introduction of clauses (e) and (f) to sec. 80-IB(10) as well as the flats where there is violation u/s 80-IB(10)(c) of the Act.

8. During the assessment proceedings, the AO also noticed that the assessee has received on-money of Rs.42,03,280/- for sale of flats. The assessee admitted that these amounts have been received in cash against specific flats proposed and on the basis of the said admission the AO treated it as assessee's business income and brought it to tax.

9. Aggrieved, the assessee preferred an appeal before the CIT(A) and also made an alternative claim that deduction u/s 80-IB(10) may be allowed on the additional income. The CIT(A), however, rejected this claim by relying upon clause(5) of sec.80A of the Act which has been introduced by the Finance Act, 2009 with retrospective effect from 1/4/2003. Aggrieved, the assessee is in appeal before us on this issue for the assessment year 2010-11.

10. The learned counsel for the assessee submitted that the AO having accepted the said income to be the income from business, is bound to allow the same as deduction as it pertains to the project eligible for deduction u/s 80-IB(10). In support of his contention, he placed reliance upon the decision of the Bombay Bench of the Tribunal in the case of *Vandanam Properties* in ITA No.7398/Mum/2010 dated 25/11/2014 wherein it was held that while computing undisclosed income for the block period, the respondent-assessee is also entitled to claim the same as deduction u/s 80-IB of the Act.

The learned Departmental Representative, on the other hand, relied upon the provisions of sec.80A(5) of the Act.

11. Having regard to the rival contentions and the material on record, we find that sub-sec.(5) of sec.80A prohibits the allowability of any claim u/s 10A, 10AA or 10B or sec.10BA C or under chapter C of the Act unless and until the assessee had made such a claim in its return of income. In the case before us there is no dispute that the assessee had made a claim of deduction 80-IB(10) and the question is only about quantification of the deduction and not the deduction itself. In such circumstances, we are of the opinion that the assessee is eligible for deduction u/s 80-IB(10 of the additional income also.

12. In the result, the assessee's appeal for assessment year 2010-11 is partly allowed and the revenue's appeal is dismissed.

13. For the assessment year 2011-12 also, we find that the only issue in the assessee's appeal is with regard to the applicability of clauses (e) and (f) of sec.80-IB(10) of the Act and in view of our decision for the assessment year 2010-11, the assessee's appeal for this assessment year is also partly allowed and the revenue's appeal is dismissed.

14. In the result, the assessee's appeals for assessment years 2010-11 and 2011-12 are partly allowed and the revenue's

appeal for assessment years 2010-11 and 2011-12 are dismissed.

Pronounced in the open court on 20th of February, 2015.

sd/-
(Abraham P George)
ACCOUNTANT MEMBER

sd/-
(Smt. P.Madhavi Devi)
JUDICIAL MEMBER

eksrinivasulu

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore