

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

BEFORE SHRI SHAILENDRA KUMAR YADAV, JUDICIAL
MEMBER,
AND SHRI RAJESH KUMAR, ACCOUNTANT MEMBER.

ITA. Nos. 2890/Mum/2013 & 841/Mum/2014
(Assessment Years: 2007-08 & 2010-11)

ACIT – 20(1) /
The I.T.O. – 20(1)(1),
Mumbai 400012

Appellant

Vs.

M/s. Abode Builders,
03, Bilquis Apartments,
Mahakali Caves Road,
Andheri (E), Mumbai 400 093

Respondent

PAN: AABFA2111K

राजस्व की ओर से/By Revenue : Shri Santanu Kumar Saikia
& Vijay Kumar Bora, D.R.
□ वेदक की ओर से / By Assessee : Shri Bhupendra Shah, A.R.
सुनवाई की तारीख/Date of Hearing : 11.08.2016
घोषणा की तारीख/Date of
Pronouncement : 26.08.2016

ORDER

PER SHAILENDRA KUMAR YADAV, J.M:

Both appeals have been filed by Revenue against the orders of Commissioner of Income-Tax (Appeals)-31, Mumbai, dated 31.01.2013 for A.Y. 2007-08 & 25.11.2013 for A.Y.

2010-11. Since, both appeals pertain to same assessee and on similar issue, so they are being disposed of by common order for the sake of convenience.

2. In ITA No. 2890/Mum/2013 for A.Y. 2007-08, Revenue has filed appeal on following grounds:

- I. The Ld. CIT (A) erred on the facts and circumstances of the case and in law in directing the AO to allow deduction u/s 80IB (10) of the I T Act amounting to Rs. 17,94,05,681/-.
- II. On the facts and circumstances of the case, the Ld. CIT (A) has erred in treating the assessee as developer, ignoring that as per the Joint Venture Agreement between the assessee and M/s Vaman Estate the development and construction of the building has to be done by M/s Vaman Estate at its own cost, and the assessee did neither invest any money nor developed/constructed the building.
- III. The Ld. CIT (A) has erred to appreciate the findings of the AO that after the Joint Venture Agreement the status of the assessee changed from the developer to mere facilitators and M/s Vaman Estate became the developer.
- IV. The Ld. CIT(A) erred on facts and circumstances of the case that the Joint Venture Agreement between the assessee and M/s Vaman Estate is not in nature of sub-contracting but M/s Vaman Estate was made 'Developer' as agreement was on principal to principal basis.
- V. The Ld. CIT(A) erred on facts and circumstances of the case that the Joint Venture Agreement mentioned that the assessee started the development work on the given land as occupants were removed, land was leveled, boundary wall was constructed, as per development plan access/approach road was

constructed, various approvals from local authorities were obtained, architect & engineers were engaged since 1991. All these activities are integral part of a development project and are initiated at the commencement of the project itself.

VI. The Ld. CIT(A) erred on facts and circumstances of the case that the development of property started somewhere after 1991 and layout plans were sanctioned by BMC as early as 21.09.1996. Even in the commencement certificate is 07.11.1996.”

3. Assessee, a partnership firm, is a developer and builder. The return of income for A.Y.2007-08 was filed on 19.10.2007 declaring total income of Rs.18,16,656/- after claiming deduction u/s.80IB(10) of the Act at Rs.17,94,05,681/-. Assessment was completed u/s.143(3) of the Act 24.12.2009 determining the assessable income at Rs.18,12,22,340/- disallowing the claim of deduction made u/s.80IB(10) of the Act.

4. The only issue before us is regarding action of Assessing Officer in disallowing the deduction of Rs.17,94,05,681/- claimed u/s.80IB(10) of the Act. Assessing Officer observed that the land on which Trans Residency project had been built was not owned by assessee but by the Malad Satguru Sadan Co-operative Society Ltd. (hereinafter as 'MSSCS') and that the conveyance deed for this land had been executed in the name of Society in pursuance to the directions of the Hon'ble Mumbai High Court vide consent decree passed on 18-07-1995. The Assessing Officer noted that assessee had been engaged as a 'developer' by the MSSCS and had made

payments on behalf of MSSCS. The officer then concluded that assessee was not the owner of the said land. Thereafter, the Assessing Officer proceeded to examine whether the assessee could be considered as a developer and raised certain queries on this aspect which were replied to by the appellant as below and the same was discussed by the Assessing Officer in para 7 of the assessment order: -

7.2 Query:"In what capacity the assessee is in the project and how he is entitled for exemption u/s 801B(10).

Reply: The assessee entered into the agreement with the society as a developer in the year 1991 and thereafter the assessee along with society filed a suit of conveyance of land in their name. Joint venture agreement was made in the year 2001 with Vaman Estate. We would like to inform you that all the permission from the BMC is in the name of the Partner of the firm. The assessee had incurred Rs.48,80,427/- before A.Y. 2005-06. (Annexure C). The assessee had also paid Rs. 66,36480/- cost of TDR and brokerage for sale of flat of Rs. 6,64,775/-. The assessee is not at all a facilitator between the society and Vaman Estate. Since, all the requisite agreement and permission is in the name of the assessee even the final possession certificate is in the name of the assessee. Assessee is entitled for deduction under section 801B (10).”

Assessing Officer considering the reply of assessee observed that assessee had entered into a joint venture agreement with M/s. Vaman Estate on 28.08.2001 and also observed that as per this agreement, the development and construction of building was to be done by the latter as its own cost and both the parties were to share the gross sale proceeds in the ratio of 50:50. He concluded that assessee did not incur any expenditure on the project, nor did he do any construction

activity and the proceeds from the project were its net profit. Assessing Officer observed that the status of assessee had changed from that of a developer to that of a mere facilitator, one the joint venture agreement was entered.

4.1 Next issue relates to claim u/s.80IB(10) of the Act. In this regard, Assessing Officer examined the date of commencement of project Trans Residency. In his view, the project began much before the stipulated date of 01.10.1998. According to Assessing officer, BMC had given sanction to the plan submitted by assessee through letter dated 21.09.1996. He observed that Explanation to Section 80IB(10) of the Act stipulated that where the approval for the concerned project was given more than once, the date of initial approval would be the operative date of approval. Therefore, queries were raised by Assessing Officer, which were replied by assessee as detailed in para 4.8 of CIT(A)'s order and considering the above, Assessing Officer observed as under:

“Vide above reply, assessee has claimed that the first approval for the residential project was obtained on 28-06-2007, which is factually incorrect as the first approval was sanctioned by BMC vide letter dated 21-09-1996.

Further, assessee is claiming that commencement certificate was obtained on 28-06-2002 from the BMC, hence the residential project at 'Trans Residency' started after 01-10-1998. Even this claim of the assessee is factually incorrect. In para 6.1 of the assessment order, it has specifically been highlighted that commencement of development started much before 01-10-1998.

In view of the above facts, the arguments advanced by the assessee are rejected.”

Finally, he concluded that it has already been held that assessee is neither the owner nor the developer of the project. The commencement of development of residential project started before the statutory date of 01.10.1998. Once it is established that if either of the above two fundamental conditions are not fulfilled though in the case of assessee both conditions are not fulfilled, assessee is not entitled to deduction u/s.80IB(10) of the IT Act, then fulfilling certain other conditions will not make it eligible for the said deduction. Accordingly, Assessing Officer rejected the claim of assessee made u/s.80IB(10) of the Act.

4.2 Matter was carried before the First Appellate Authority, wherein various contentions were raised on behalf of assessee and having considered the same, CIT(A) granted relief to the assessee.

4.3 Same has been opposed before us on behalf of Revenue inter alia submitting that CIT(A) erred in directing the Assessing Officer to allow deduction u/s.80IB(10) of the Act amounting to Rs.17,94,05,681/-. CIT(A) erred in treating the assessee as developer, ignoring that as per the joint venture agreement between assessee and M/s. Vaman Estate the development and construction of the building has to be done by M/s. Vaman Estate at its own cost and assessee did neither invest any money nor developed /constructed the building.

Even commencement certificate has not been properly appreciated by CIT(A). So, ld. Departmental Representative stated that the order of CIT(A) be set aside and that of Assessing Officer be restored. On the other hand, ld. Authorized Representative supported the order CIT(A).

4.4 Thus, issue before us is regarding allowability of claim of deduction u/s.80IB(10) of the Act. First aspect is regarding lack of ownership of land on which the project was constructed. Second basis for disallowance is that assessee not having invested in the construction activity or done construction, so he could not be considered as developer. Lastly, project was approved and commenced before the stipulated date of 01.10.1998. On these grounds, claim of assessee u/s.80IB(10) of the Act was denied by Assessing officer.

4.5 First issue regarding the ownership of the land being a primary pre-requisite for the allowability of claim of deduction u/s.80IB(10) of the Act, this controversy is settled by the decision of Hon'ble Gujarat High Court in case of CIT vs. Radhe Developers (2012) 341 ITR 403 (Guj) in favour of assessee. Following the same, this objection of Assessing Officer is not justified. We hold so.

4.6 Regarding the second aspect, of whether assessee was at all engaged in the project as a developer, we find that involvement of assessee through its partner Mr. Laiq Ahmed

has been evident in the project from the beginning with the signing of the Principal Agreement and primary acquisition of the development rights for the land in question. Thus, all activities without the completion of which, the project could not have been built, such as clearing the land from encroachment and the pursuit of legal options to resolving disputes connected to the land in question were completed due to the actions undertaken by the assessee. Assessee can also be seen to have played a key role in formation and submissions of the necessary plans for approval to the concerned authorities. It has not been disputed by the Assessing Officer that IOD was issued in the name of partner of assessee as was the commencement certificate. It was also of matter on record that assessee incurred several costs in making this land available for development including payments made for getting the plot vacated by the illegal occupants as well as pursuing of legal matters pending before various courts. Money was also spent by assessee in acquisition of the development rights as well as for putting up of compound wall etc. It is also noted that all the taxes related to the land in question were paid by assessee from 1998 onwards. It was noted that assessee's return of income for the A.Y. 2000-01 reflects the payment of Rs. 8,15,000/- to Mahal Pictures. This was the payment made for the development rights. Thus, after considering the facts brought out above and the case laws discussed, it cannot be held that assessee did not contribute to the project and was

not a developer. This reasoned finding of CIT(A) needs no interference from our side. We uphold the same.

4.7 Regarding third objection of Assessing Officer, a perusal of the joint venture agreement dated 28.08.2001, we find that the construction of the flats to be given to the Society would also be commenced by M/s. Vaman Estates only after the CC was obtained by M/s. Abode Builders. Though the Assessing Officer has found support from JVA para (xii) of Page 8 to conclude that assessee had started development of the project before 01.10.1998, a perusal of the said portion of the agreement shows that the reference was made only to work related to the leveling of the ground, putting up of a boundary, payments to various occupants etc. This work cannot be considered as indicative of commencement of the project because even after the completion of these jobs, the project, as approved or envisaged may or may not take off. In the construction and development business, there are innumerable instances where plots of land are leveled, cleared of encroachment and illegal occupants. In metropolitan cities, the procedure related to obtaining permission for construction projects entails submission of a layout plan to Municipal Authorities for approval. It is well known that prior to submission of such a layout plan, the developer must undertake the clearing, leveling and demarcation of the land on which the construction is sought to be done. None of these activities would be performed gratis by anyone and hence

expenses in relation to them must be incurred by the developer. The BMC follows the process of issuing an IOD which specifically mentions that the project can be started only after the CC received by assessee. The CC was issued only after the assessee met all stipulations laid down by the municipal authorities. Assessing Officer found support from the Explanation to Section 80(IB)(10) where it was stated that in cases where approval has been obtained more than once the initial date of approval will be material. For this act as a disqualifier, multiple approvals would need to be taken for the same project. A perusal of the submissions made in this regard show that assessee submitted the original plan for a project comprising 4 buildings to the concerned authorities on 07.11.1996, for which IOD was granted in 1997. As per the Maharashtra Regional Town Planning Act, IOD once granted has a life of four years and thus, the IOD granted with reference to the submission of the original lay-out plan was invalid after 07.01.2001. Assessee applied for IOD for the second time on 22.11.2001 and was granted permission on 24.07.2002. A perusal of the plans submitted reveals that the second project proposal was for only 3 buildings as against the 4 for which permission was sought earlier. In this proposal, Building no. 1 and Building no. 2 were merged together. The IODs for the project as completed, show that IOD for different buildings was granted on the following dates:

- Building No. 1 - 28/06/2002
- Building No.3 - 28/06/2002

- Building No.4 - 22/11/2001

4.8 In view of above, the project for which permission was granted on 24.07.2002 was not the same as that for which the IOD had lapsed in 2001. Assessee also filed a copy of letter dated 02.02.2002 from the Executive Engineer, B.P. (W.S.) H&K/E obtained through an R.T.I application in 2010. A copy of this letter was also furnished to Assessing Officer during remand proceedings vide letter dated 11.04.2011. The letter issued on 02.02.2002 clearly reveals that the IODs granted on 08.01.1997 for Buildings Nos. 1, 2, 3 and 4 had lapsed and that no work was started at site in any of the proposals so far at site. Thus, the municipal authorities concerned have found no work had started on the site till the date of issue of his letter which was well after the stipulated cut-off for eligible projects. In view of above, it was found by CIT(A) that the application dated 07.11.1996, though an initial approval was taken by one of the partners to assessee firm, the IOD given lapsed since no work could be taken up due to lack of approach road etc. The proposal after approval of which, the construction of work actually started was submitted in 2002 and CC was issued on 24.07.2002. It shows that the proposals dated 07.11.1996 and 22.11.2001 were two different proposals where the plans had altered significantly. In this background, CIT(A) was justified in holding that the project Trans Residency cannot be held to have gained approval or commenced from 08.01.1997 as the said IOD had already lapsed and no

construction work had started on the same. In view of this, IOD for the project in its new avatar stood granted on 22.11.2001 and 22.06.2002. Accordingly, project cannot be said to have either got approval or begun construction before these dates. So, the conclusion of Assessing Officer that the commencement of development of residential project started before the statutory date 01.10.1998 rightly not found tenable and CIT(A) rightly granted deduction u/s.80IB(10) of the Act. This reasoned finding of CIT(A) needs no interference from our side. We uphold the same.

5. As a result, Revenue's appeal is dismissed.

6. Similar issue arose in ITA No.841/Mum/2013 for A.Y. 2010-11. Facts being similar to that of ITA No. 2890/Mum /2013 for A.Y. 2007-08, so, following same reasoning, we are not inclined to interfere with the finding of CIT(A). We uphold the same.

7. In the result, both appeals filed by Revenue are dismissed.

Pronounced in the open Court on this the 26th day of August, 2016.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER
Mumbai: Dated 26/08/2016

Sd/-
(SHAIENDRA KUMAR YADAV)
JUDICIAL MEMBER

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. □ वेदक / Assessee

3. संबंधित □ यकर □ युक्त / Concerned CIT
4. □ यकर □ युक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, □ यकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

By order/□ देश से,

उप/सहायक पंजीकार,
□ यकर अपीलीय अधिकरण, मुंबई ।