

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'D', KOLKATA

[Before Shri P.M. Jagtap, AM & Shri S.S. Viswanethra Ravi, JM]

I.T.A. No. 1307/Kol/2015
Assessment Year: 2012-13

ACIT, Circle-33, Kolkata.....Appellant
10B, Middleton Row,
3rd Floor,
Kolkata - 700071.

M/s. Ashiana Amar Developers.....Respondent
5F, Everest, 46/C
Chowringhee Road,
Kolkata - 700 071
[PAN: AANFA5587H]

Appearances by:

Shri A.K. Tiwari, CIT DR appearing on behalf of the Revenue.

Shri Pawan Kr. Agarwal, FCA appearing on behalf of the Assessee.

Date of concluding the hearing : September 14, 2017

Date of pronouncing the order : October 06, 2017

ORDER

Per P.M. Jagtap, AM

This appeal is preferred by the revenue against the order of Learned CIT (Appeals) - 9, Kolkata and in the solitary ground raised therein, the revenue has challenged the action of the Ld. CIT (A) in deleting the disallowance of Rs. 11,01,49,340/- made by the AO on account of assessee's claim for deduction under section 80IB of the Income Tax Act, 1961.

2. The assessee in the present case is a partnership firm which is engaged in the business of construction of housing project at Jodhpur namely "Ashiana Amar Bagh". The return of income for the year under consideration was filed by it on 27.09.2012 declaring a total income of Rs. 38,64,680/- after claiming deduction under section

80IB(10) amounting to Rs. 11,01,49,340/- in respect of the profits from the housing project. During the course of assessment proceedings, the claim of the assessee for deduction under section 80IB was examined by the AO. On such examination, he found that the housing project of the assessee was approved by Jodhpur Development Authority on 07.12.2006 and it was to be completed by 31.03.2012 in order to be eligible for deduction under section 80IB. He found that the said project was comprising of 7 phases out of which only 5 phases were completed by the assessee by 31.03.2012 and the deduction was claimed under section 80IB(10) in respect of these 5 phases. According to the AO, the assessee was required to complete the entire project within the stipulated time and having failed to comply with the requirement, it was not eligible for deduction under section 80IB(10). He also noted that the completion certificates for the project was not obtained by the assessee from the concerned local authority i.e. Jodhpur Development Authority. He, therefore, disallowed the claim of the assessee for deduction under section 80IB in the assessment year under section 143(3) vide an order dated 03.03.2015.

3. Against the order passed by the AO under section 143(3), an appeal was preferred by the assessee before the Ld. CIT (A) and after considering the submissions made by the assessee, the relevant material available on record as well as the various case laws on the point, the Ld. CIT (A) directed the AO to allow the claim of the assessee for deduction under section 80IB vide paragraph no 6 to 8 of his impugned order which are reproduced below:

“6. I have considered the submissions and the documents placed before me. The entire dispute here is pertaining to the denial of deduction claimed by the appellant firm u/s 80IB.

The sec. 80IB(10) is reproduced hereunder-

The amount of deduction in the case of an undertaking developing and building housing project approved before the 31st day of March, 2008, by a local authority shall be hundred per cent of the profit derived in the previous year relevant to any assessment year from such housing project if,

(a) Such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes such construction –

(i)

(ii)

(iii) In a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five years from the end of the financial year in which the housing project is approved by the local authority.

Explanation – For the purpose of this clause –

(i)

the date of completion of construction of the housing project shall be taken to be date on which the completion in respect of such housing project is issued by the local authority.”

From the plain reading of the provision, it is clear that if the housing project is approved before the 31st day of March, 2008 but not before 1st day of April, 2005 and if such undertaking has commenced development and construction of the housing project on or after the 1st day of October, 1998, then such construction must be completed within five years from the end of the financial year in which the housing project is approved by the local authority in order to get entitlement of deduction u/s 80IB(10). Here it is not in dispute that the appellant had obtained the approval for the project on 07/12/2006 nor the AO has disputed the fact that the appellant has commenced development and construction of the housing project on or after the 1st day of October, 1998. The AO has caused physical verification of the project by ADIT (Inv.), Jodhpur and from his report, he ascertained that the building plan was sanctioned for seven phases in the same project and the appellant could complete five of the seven phases by 31.03.2012 and the remaining two phases were completed after 31.03.2012. The AO's contention is that since the entire project was not completed within 31.03.2012, the appellant is not entitled to deduction even in respect of the completed phases. The

appellant's contention on the other hand, is that it is entitled to deduction in respect of the completed phases and it claimed deduction u/s 80IB(10) in respect of the completed five phases only.

From the paper-book filed by the appellant, it is seen that the appellant has prepared final accounts for each of the five phases – phase I, IA, II, III and IV and reports in Form No. 10CCB for each of the projects.

7. In CIT vs Gwalior Rayon Silk Manufacturing Co. Ltd. (1992) 104 CTR (SC) 243, Hon'ble Supreme Court has held: "The contextual meaning has to be ascertained and given effect to. A provision for deduction, exemption or relief should be construed reasonably and in favour of the assessee".

7.1 In the case of Bajaj Tempo Ltd. vs CIT 196 ITR 188, Hon'ble Supreme Court once again held: "A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally, and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate it."

7.2 On the basis of these judgments of the Hon'ble Supreme Court, various benches of the ITAT have accepted the proposition that where there is partial or nominal non-compliance of the requirements of law there should not be a complete disallowance of deductions. The disallowance if any, will have to be restricted to the extent of non-compliance of the provisions.

7.3 In the case of Arun Excello Foundations (P) Ltd. vs Asstt. CIT (2007) 108 TTJ (Chennai) 71, the Chennai Bench of the Tribunal accepted the assessee's plea that deduction under section 80IB(10) on the residential units constructed by the assessee be given on pro rate basis.

7.4 In the case of DCIT vs Brigade Enterprise 119 TTJ 269 Bangalore Bench of ITAT has observed in respect of claim under section 80IB under similar circumstances under:-

Even though the projects of the assessee are bigger ones consisting of independent units, the assessee had claimed the benefit under section 80IB only in respect of blocks 'A' and 'C' namely 'Mayflower' and 'Cassia'. In respect of other units viz. Magnolia, Jacaranda and Laburnum the assessee did not avail or claim the benefit under section 80IB. The Ld. CIT (A) after having considered the facts in detail, is justified in

concluding that 'Mayflower' and 'Cassia' are independent projects for the purposes of section 80IB. Further, profits from the units will have to be arrived, based on the method of accounting employed. Accounting principles would mandate recognition of profits from each until separately. It is with reference to such profits that the deduction under section 80IB would be allowed. The manner of accounting for profits would also support a conclusion that the deduction under section 80IB is to be computed qua each residential unit."

7.5 The Puna Bench of ITAT in Varun Developers, Pune vs DCIT, ITA No. 1624/PN/2011 & Hemraj S. Mundada vs Adl CIT, ITA No. 1328/PN/2009 has observed that in regard to Hemraj S. Mundada's cases relied upon by the assessee, the AO has wrongly held that its ratio is not applicable to the assessee's case. The finding of the ITAT in that case is as under:

'Since in the instant case the assessee has obtained the completion certificate before 31.03.2008 and out of the 83 flats the assessee has claimed deduction u/s 80IB(10) in respect of 61 flats where the built up area is less than 1500 sq.ft. and has not claimed the deduction u/s. 80IB(10) in respect of 22 flats where the built up area exceeds 25sq.ft., therefore, following the consistent view of the Coordinate Benches of the Tribunal we hold that the assessee is entitled to deduction u/s 80IB(10) in respect of the 61 flats of the housing project 'Leela Garden'.

8. As regards AO's contention that the appellant has violated the condition as to obtaining the completion certificate from the local authority, it is observed that the appellant had made applications to JDA for issuing the completion certificate of each phase of the project separately. However, the said authority vide separate letters for each phase has clarified that as per the Rules and Guidelines of the Housing Regulations, it cannot issue a completion certificate if the height of the building is less than 15 mts. It is further stated in the said letters by JDA that if the appellant wants, it can obtain the Certificate of Completion from an architect which was duly obtained by the appellant. What could the appellant have done if the local authority has no power under the Housing regulations of the state to issue completion certificates where the height of the buildings is less than 15 mts? The AO has not disputed the fact that the height of the building is less than 15 mts. As stated earlier, he even got physical verification of the project done by ADIT (Inv.). By submitting completion certificate from Mr. Biswajit Sengupta, a registered architect, the appellant made sufficient compliance to

satisfy the condition specified in explanation (ii) appended to sub-section (10) of section 80IB of the Act.

Aggrieved by the order of the Ld. CIT (A), the revenue has preferred this appeal before the Tribunal.

4. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that the claim of the assessee for deduction under section 80IB in respect of profits from the housing project at Jodhpur namely 'Ashiana Amar Bagh' was disallowed by the AO for the reason that the completion certificates for the said project was not obtained by the assessee from the concerned local authority and the said project comprising of seven phases was not entirely completed by the assessee by the stipulated date of 31.03.2012 in as much as only five phases out of the seven phases were completed by the assessee. At the time of hearing before us, the learned DR has strongly relied on these reasons given by the Assessing Officer while disallowing the claim of the assessee for deduction under section 80IB. The learned counsel for the assessee, on the other hand, has submitted that the assessee's claim for deduction under section 80IB was disallowed by the AO in respect of the same project even in A.Y. 2010-11 for want of completion certificates from the local authority and when the matter reached to the Tribunal, the claim of the assessee for deduction under section 80IB was allowed by the Tribunal vide its order on 22.01.2016 passed in ITA No. 12/Kol/2014. He has also placed on record a copy of the said order and perusal of the same shows that this aspect has already been considered and decided by the Tribunal in favour of the assessee vide paragraph no 4.1 to 4.1.6 of its order which read as under:

4.1.1. We find that the Registered Architect had indeed given the completion certificate vide letter dated 18.02.2010 which is reproduced below:

*"Biswajit Sengupta Architect
b.archfila.,aiiid
Ph-9887488263
01493-515305*

*A 305, Block 2, RANGOLI, Ashina Village
Bhiwadi 301019, Alwar, Rajasthan*

*Email: ahfil_sen@Fyahoo.com
Dated 18 Feb, 2010*

*Ashina Amar Developers
Village Kuri Bhagtasani,
Jodhpur Fali Road,
Jodhpur – 342001*

Sub: Completion Certificate of Phase I, Ashiana Amerbagh. A housing project of Ashina Amarbagh Developers AT Village Kuri Bhagtasani, Fatwar Jhalamand, Tehsil & District Jodhpur, Rajasthan.

This is verify that construction of Phase I of Ashiana Amarbag comprising of 95 dwelling units bearing no. E-16 to E-30, N-08, N-35 to N-50, N-77 to N-84, S-01 to S-12, S-36 to S-59, S-86 to S-97 situated at Village Kuri Bhagtasani, Patwar Jhalamand. Tehsil & District Jodhpur, Rajasthan have been completed in all respect as per approved drawing & as per norms of Building Bye Laws.

This is to further certify that the project Ashiana Amarbagh, Phase I is fit for residential use with all facilities.

*Sd/-
Biswajit Sengupta
Regd Architect: CA/75/886
BISWAJIT SENGUPTA
B.Arch, P/1A*

Regd. Architect CA/7B/BBC

4.1.2. It would also be pertinent to reproduce the bye laws of Jodhpur Development Authority which has been placed on record by the Learned AR wherein it has been stated as under:

"15. Completion Certificate:

15.1 On completion of building having a height of more than 15 metres the builders has to obtain a completion certificate. The said certificate will be given by the competent authority only after necessary verification and according to the following procedures".

4.1.3. We find from the above correspondences that the assessee had duly applied for the completion certificate from Jodhpur Development Authority (i.e. local authority) as per the condition laid down in section 80IB(10) of the Act immediately after completion of the project. However, the said authority instructed the assessee to take the completion certificate from a registered architect for official purposes. Hence in this scenario, the Learned AO insisting on the certificate from local authority would only result in impossibility of performance on the part of the assessee. The well known legal dictum *LEX NON COGIT AD IMPOSSIBLIA* (i.e. the law cannot compel a man to perform an act which he could not possibly perform) which has been given due credence by the **Hon'ble Supreme Court in the case of Krishnaswamy S. Pd. & Anr. Vs Union of India & Ors reported in (2006) 281 ITR 305 (SC)**, wherein it was held that the maxim *actus curiae neminem gravabit*, i.e., an act of court shall prejudice no man, is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other relevant maxim is *lex non cogit ad impossibilia* – the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisma all intention of compelling impossibilities and the administration of law must adopt that general exception in the consideration of particular cases.

4.1.4. Reliance is placed on the decision of **Hon'ble Gujarat High Court in the case of CIT vs Tarnetar Corporation reported in (2014) 362 ITR 174 (Guj)** wherein it was held that :

It is equally true that Explanation to Clause (A) to section 80IB(10) of the Act links the completion of the construction to the Building Use Permission being granted by the local authority. However, not every condition of the statute can be seen as mandatory. If substantial compliance thereof is established on record, in a given cases, the court may take the view that minor deviation thereof would not vitiate the very purpose for which the deduction was being made available.

4.1.5. Reliance is also placed on the decision of Hon'ble Karnataka High Court in the case of CIT vs Ittina Properties (P) Ltd in ITA No. 556 of 2013 dated 15.07.2014 wherein it was held:

6. One of the project has been sanctioned subsequent to the Act. The point of controversy is regarding the date on which the project was completed to be eligible for the benefit of the said provision. The revenue contends the completion certificate issued by the village Panchayat is not valid and therefore the assessee is not entitled to the said benefit. Admittedly the plan is sanctioned by the BDA. The BDA has not issued any completion certificate. The reasons being in the BDA Act or the Karnataka Municipal Corporation Act, there is no provision for issue of completion certificate. The provision in the Karnataka Municipal Corporation Act is for issuance of occupancy certificate. When the statute does not provide for issue of a certificate, if the authorities were insisting on such certificate, the assessee has gone to the village panchayat within whose limits the property is situated and has obtained the completion certificate and has produced the same for availing the benefit. Whether that certificate would satisfy the requirement of law need not be gone into in these proceedings because when the statute does not provide for issue of such a certificate, if the revenue insists on such certificate, the assessee would be left with no option except to get such certificate with some authority which would be called as a local authority. In the facts of this case, we are of the view that the Tribunal has recorded a finding that the building was completed within the stipulated period and therefore do hors this certificate issued by the panchayat after the building is completed the assessee is entitled to the said benefit. In that view of the matter, we do not see any merit in these appeals. Accordingly, the appeals are dismissed.

8. It is unfortunate that when the Parliament has extended the benefit of exemption from payment of Income Tax to a builder who undertakes group housing activity, the department is not willing to extend the benefit on the pretext that the production of completion certificate is a condition precedent for extending the benefit. Neither under the BDA Act nor under the Karnataka Municipal Corporation Act nor under the Karnataka Municipalities Act, there is any provision for issuance of a completion certificate. There is a provision for sanction of a plan, issue of a licence, issue of a commencement certificate and issue of an occupancy certificate. In those circumstances, if the Revenue were to insist on production of a completion certificate, they are asking the assessee to do something which is impossible and which is not proper in law. It is high time the Revenue, keeping in mind the relevant law governing the State of Karnataka would suitably amend the law or issue appropriate circulars enabling the assessee to comply with the legal requirement so that they could have the benefit extended to them by the Parliament.

4.1.6. It is also not in dispute that the project was completed within the allotted time frame and possession certificates were also duly furnished before the Learned AO. In view of the aforesaid findings and judicial precedents relied upon, it could be safely concluded that expecting the assessee to produce the completion certificate from a local authority would only result in impossibility of performance on the part of the assessee. Accordingly, the rejection of deduction u/s 80IB(10) of the Act on this ground by the Learned AO is not in order."

5. As regards the other reason given by the Assessing Officer for disallowing the claim of the assessee for deduction under section 80IB that only five phases out of the total 7 phases of the project were completed by the assessee by the stipulated date, it is observed that this aspect of the matter is also considered and decided by coordinate benches of this Tribunal in various cases cited by the learned counsel for the assessee. In want of such cases namely Vertex Homes Pvt. Ltd.

vs Dy CIT (ITA No. 12/Hyd/2015 dated August 26, 2015) decided by the Hyderabad Bench, the assessee had completed construction of three blocks out of six residential blocks of the project within the stipulated period of 5 years. In the return of income filed for the relevant year, deduction was claimed by the assessee under section 80IB(10) in respect of completed 3 blocks, but the lower authorities rejected the assessee's claim on the ground that the entire housing project had not completed by the assessee within the stipulated period. In these facts and circumstances of that case, which are similar to the facts of the present case, it was held by the Tribunal that even a single building consisting of a number of residential units could be considered to be a housing project by itself eligible for deduction under section 80IB(10). It was held that even though the assessee had not completed the construction of all blocks of housing project, that would not deprive the assessee from availing deduction under section 80IB(10) in respect of the completed blocks on standalone basis. Respectfully following the said decision of coordinate bench of this Tribunal in the case Vertex Homes Pvt. Ltd. (supra), we uphold the impugned order of the Ld. CIT (A) allowing the claim of the assessee for deduction under section 80IB subject to the verification by the AO that the five phases of the project completed by the assessee are eligible for deduction under section 80IB on standalone basis by treating the same as one project by itself. Subject to the said verification, the impugned order of the Ld. CIT (A) on this issue is upheld.

14. In the result, the appeal of the revenue is dismissed.

Order Pronounced in the Open Court on 6th October, 2017.

Sd/-
(S.S. Viswanethra Ravi)
JUDICIAL MEMBER

Sd/-
(P.M. Jagtap)
ACCOUNTANT MEMBER

Dated: 06/10/2017
Biswajit, Sr. P.S.

Copy of order forwarded to:

1. M/s. Ashiana Amar Developers, 5F, 46/C, Chowringhee Road, Kolkata – 700071.
2. ACIT, Circle – 33, Kolkata
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Sr. P.S. / H.O.O.
ITAT, Kolkata