

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'F' NEW DELHI

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 4065/Del/2010  
AY: 2006-07

ACIT,  
Circle -14(1),  
C.R. Building,  
I.P. Estate,  
New Delhi.  
(Appellant)

vs M/s Padmini Infrastrucutre (P) Ltd.,  
LG, 1 & 3, R-23,  
Nehru Enclave,  
New Delhi.  
(Respondent)

Appellant by: Shri Atiq Ahmad, Sr. DR

Respondent by: Shri Ashwani Taneja,  
Dr. Rakesh Gupta, Advocates

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

This appeal has been preferred by the Department against the order passed by the Ld. Commissioner of Income Tax (Appeals) – XVII, New Delhi for assessment year 2006 – 07 wherein vide order dated 08/06/2010 the Ld. first appellate authority has allowed the assessee's claim for deduction under section 80-IB of the Income Tax Act, 1961 (hereinafter called "the Act").

2. The brief facts of the case are that the assessee company is engaged in the business of developing and building housing projects. The return of income was

filed declaring an income of Rs. 19,59,220/- and book profit under section 115 JB at nil. The assessee had claimed deduction of Rs. 3,64,15,637/- under section 80-IB of the Act. The AO was of the view that the assessee company was not eligible for such deduction and he proceeded to assess the company on a total income of Rs. 3,64,15,637/-. The AO observed that for deduction under section 80-IB of the Act, the undertaking must commence the housing project on or after the 1<sup>st</sup> day of October 1998 whereas, as per the AO, the assessee had commenced project before 01/10/1998. The AO, in the assessment order, stated that since the Noida Development Authority accepted the tender including the earnest money on 03/09/1998, the assessee had failed to comply with the first condition i.e. the housing project was started before 01/10/1998. The AO denied the assessee the benefit of section 80 IB (10) of the Act.

2.1 The AO also opined that the other necessary condition of the residential unit having a maximum built up area of 1000 ft.<sup>2</sup> was also not fulfilled. The AO collected drawings of the project from Noida Development Authority and on the basis of such drawings, calculated the built up area. According to the AO, the built up area in respect of Kingston project and Monarch project came to 1292.2 and 1409.2 ft.<sup>2</sup> respectively. During the assessment proceedings, the AO required the assessee to file copies of sale deeds which were filed showing the built up area of less than 1000 ft.<sup>2</sup> but this also did not find favour with the AO. The AO denied the assessee the benefit of section 80 IB (10) of the Act on this ground also.

2.2 Aggrieved, the assessee preferred an appeal before the first appellate authority who, on facts, directed the AO to allow the benefit of deduction under section 80 IB (10) of the Act to the assessee.

2.3 Now, the Department has approached the ITAT and has challenged the adjudication of the Ld. CIT (Appeals) and has raised the following grounds of appeal –

*“1. That on the facts and circumstances of the case and in law the Ld. CIT(A) erred in deleting the addition of Rs.3,44,56,419/- made on account of disallowance of deduction u/s 80-1B of the Income Tax Act, 1961.*

*2. That on the facts and circumstances of the case and in law the Ld. CIT(A) erred in accepting the assessee plea that development and construction of the project was commenced after 01.10.1998 in the assessee’s case.*

*3. That on the facts and circumstances of the case, the Ld.CIT(A) erred in accepting the assessee plea that built up area of residential units of the project was less than 1000 sq. ft.*

*4. That on the facts and circumstances of the case and in law the Ld. CIT(A) erred in accepting the assessee’s plea that amendment to section 80-1B defining built up area is not retrospective and will not apply to projects already completed as is the assessee’s case.*

*5. That on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in not correctly appreciating the fact that the deduction u/s 80-1B of the Act was disallowed in the assessee’s case in AY 2002-03, 2003-04, 2004-05, 2005-06 and 2007-08 also.*

*6. The Appellant craves to be allowed to add or amend any other grounds of appeal”.*

3. The Ld. Departmental Representative referred to the assessment order at length and submitted that the assessee had failed to fulfil the mandatory conditions for the purpose of claiming deduction under section 80-IB (10) and, therefore, the AO was justified in denying the benefit of deduction to the assessee. The Ld. Senior DR vehemently argued that the AO had made enquiries from the Noida Development Authority and based on such information had concluded that the project had built up area exceeding the maximum prescribed area. It was also submitted that the project was commenced before the prescribed date and as such the benefit of deduction was not available to the assessee. It was submitted that the order of the Ld. CIT (Appeals) be set-aside and that of the AO restored.

4. In response, the Ld. Authorised Representative read out the relevant portions from the order of the Ld. CIT (Appeals) and submitted that the Ld. CIT (Appeals) had recorded factual findings which were not disputed. The Ld. Authorised Representative submitted that the Ld. CIT (Appeals) has recorded a factual finding that the assessee had not carried out any change in land prior to 1<sup>st</sup> of October 1998. It was submitted that there was no development in the land and the construction was started only after 1<sup>st</sup> day of October 1998. It was also submitted that the assessee was granted deduction in preceding assessment years 2000-01, 2001-02, 2002-03, 2003-04, 2004-05 and 2005-06 and subsequent assessment year 2007-08. The Ld. Authorised Representative also submitted that the date of approval to the project by Noida Development

Authority prior to 01/10/1998 cannot be taken as commencement of development and construction activities. The Ld. Authorised Representative placed reliance on the order of the ITAT Pune Bench in the case of Nimriti Construction *versus* DCIT reported in 95 TTJ 1117. Reliance was also placed in the case of Shipra Estates Ltd reported in 35 SOT 256 wherein ITAT Delhi had allowed relief to the assessee on similar facts.

4.1 On the second issue, i.e. the dispute regarding the built up area, the Ld. Authorised Representative submitted that the built up area was less than 1000 ft.<sup>2</sup> as per the sales deeds. It was further submitted that the definition of “built up area” which was introduced by the Finance Act, 2004 w.e.f. 01/04/2005 to include balcony, etc. cannot be applied to a project which stood completed in 2001. It was also submitted that the deduction had already been allowed in earlier and subsequent years and, therefore, the rule of consistency should be applied and the deduction be allowed to the assessee in this year as well. It was also submitted that the amendment which inserted the definition of “built up area” was only prospective in nature and, therefore, prior to 01/04/2005, in calculating the area of a residential unit, area covered by a balcony was to be excluded. Reliance was placed on the judgment of the Hon’ble High Court of Allahabad in the case of Commissioner of Income Tax *versus* Arif Industries Ltd reported in (2017) 80 Taxmann.com 374 (Allahabad) for the proposition that prior to 01/04/2005, the definition of built up area would exclude area covered

by a balcony. The Ld. authorised representative placed extensive reliance on the order of the Ld. CIT (Appeals) and argued that the deduction had been rightly allowed by the Ld. First Appellate Authority on both the counts.

5. We have heard the rival submissions and have also perused the material on record. As far as the issue of date of commencement of the project is concerned, the Ld. first appellate authority has recorded a finding that no development activity was carried on by the assessee prior to the appointed date, that is, 01/10/1998. A perusal of the assessment order shows that the AO has treated the date of approval of the project by the Noida authority, i.e., 03/09/1998 as the date of commencement of project. However, this reasoning of the AO seems illogical as grant of approval does not necessarily mean commencement of development and building activities. The AO has not demonstrated with concrete evidence that the assessee had in fact commenced operations relating to development and construction prior to 01/10/1998. Even in the proceedings before us, the Department could not demonstrate that the assessee had commenced the development and construction before the appointed date. In such a circumstance we are unable to concur with the interpretation of the AO on this issue. The ITAT Pune Bench in the case of *Nimriti Construction versus DCIT* in ITA No. 1389/PN/2003 reported in 95 TTJ 1117 has held that activities like approval of the plan, marketing for booking the residential units, availing of finance, receipt of advance booking money, etc

cannot be construed to mean commencement of development and construction of housing project. The Ld. CIT (Appeals) has taken note of this order of the ITAT Pune Bench while allowing relief to the assessee on this issue. Accordingly, we do not find any reason to interfere with the adjudication of the Ld. CIT (Appeals) on this issue and we dismiss the Department's challenge on this issue.

5.1 As far as the second issue before us is concerned, it is undisputed that the basis for calculation of built up area has been inserted in the Act w.e.f. 01/04/2005 and prior to this the built up area was to be considered as per the general terms of the agreements and certificates issued by the architects. It is undisputed that the project was completed in the year 2001 and at that point of time, the definition of built up area was not in the Act. The assessee had furnished sale deeds before the AO where in the built up area was less than 1000 ft.<sup>2</sup>. These sale deeds were not found to be incorrect or fabricated. The sale deeds have been signed both by the buyers as well as by the seller and have been duly witnessed. The assessee has also submitted certificates from the architects regarding the two projects "Kingston" and "Monarch" with respect to the built up area. The AO was called upon by the Ld. CIT (Appeals) to furnish remand report in respect of the certificates relating to these two projects and the Ld. CIT (Appeals) has noted that in the remand report the AO has not doubted the genuineness of these certificates. It is also a fact on record that the assessee has been granted deduction under section 80-IB (10) of the

Act for assessment years 2000–01 to 2005–06 and assessment year 2007–08. There has been no change in facts and circumstances in the year under consideration and there being no evidence to the contrary, the rule of consistency requires that the settled position should not be disturbed. The Hon'ble High Court of Allahabad in the case of CIT *versus* Arif industries Ltd (supra) has also held that the insertion of the definition of "built up area" was prospective in nature. While doing so, the Hon'ble High Court of Allahabad referred to the judgment of the Hon'ble Apex Court rendered in CIT *versus* Sarkar Builders (2015) 7 SCC 579 wherein the Hon'ble Apex Court was considering the applicability of section 80-IB (14) in respect of projects which were approved before 01/04/2005. The Hon'ble Allahabad High Court has noted that the Hon'ble Apex Court has opined in paragraph 25 of the judgment in the case of Sarkar Builders (supra) that one cannot expect an assessee to comply with the condition that was not a part of the statute when the housing project was approved. The Hon'ble Apex Court further held that holding contrary would lead to absurd results and that the only way to resolve the issue would be to hold that clause (d) was to be treated as being inextricably linked with the approval and construction of the housing project and that an assessee cannot be called upon to comply with the said condition when it was not in contemplation either of the assessee or even the Legislature when the housing project was accorded approval by the local authorities.

5.2 Therefore, respectfully following the ratio of the judgments of the Hon'ble Apex court in the case of Sarkar Builders (supra) as well as of the Hon'ble Allahabad High Court in the case of Arif Industries Ltd (supra) we find no reason to interfere with the adjudication of the Ld. CIT (Appeals) on this issue also.

5.3 Ground No. 5 of the appeal mentions that the deduction under section 80-IB of the Act was disallowed in the assessee's case in assessment year 2002-03, 2003-04, 2004-05, 2005-06 and 2007-08. However, this assertion is factually incorrect and the same is dismissed as invalid.

6. In the final result, the appeal of the Department is dismissed.

Order pronounced in the open court on 25<sup>th</sup> October, 2017

Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Sd/-  
(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER

DT. 25th OCTOBER, 2017

'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By Order

Asstt. Registrar

I.T.A. No. 4065/Del/2010  
Assessment year: 2006-07