आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 784/JP/2017
निर्धारण वर्ष/Assessment Year : 2013-14

Deputy Commissioner of Income-tax, Circle- 6, Jaipur.	बनाम Vs.	M/s Ashiana Manglam Developers, 401, 3rd floor, Apex Mall, Lal Kothi, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AANFA4297N		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri P.C. Parwal (C.A.)
राजस्व की ओर से/ Revenue by : Shri Raj Mehra (J.CIT)

सुनवाई की तारीख/ Date of Hearing : 30/11/2017
उदघोषणा की तारीख/Date of Pronouncement: 30/11/2017

आदेश/ ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the Revenue is directed against the order dated 14.08.2017 of CIT (A)-, Jaipur for the A.Y. 2013-14. The Revenue has raised the following grounds:-

"(i) Whether on the facts and in the circumstances of the case and in law, the CIT (Appeals) was justified in deleting the addition of Rs. 1,44,21,730/- made by the A.O. on account of disallowance of claim of deduction u/s 80IB(10) without appreciating the fact that the 'built up area' of the villas constructed by the assessee is 1620.81 sq. ft. that exceeds the

limit of 1500 sq. ft. thereby ignoring the definition as given in section 80IB(14)(a) of the Income Tax Act, 1961."
(ii) Whether in a villa, if a balcony is termed as terrace by the builders, the area occupied by the alleged 'terrace' will not be considered as part of the 'built up area' u/s 80IB(14)."

2. The assessee is a partnership firm and derives income from real Estate business. The assessee claimed deduction U/s 80IB(10) in respect of the various projects. The AO rejected the claim of the assessee on the ground that the 'built up area' of the residential units inclusive of terrace is more 1500 sq. ft. The AO has also relied upon the orders for the earlier assessment years. On appeal the ld. CIT(A) allowed the claim of the assessee by following order of this Tribunal in assessee's own case.

3. We have heard the ld. DR as well as ld. AR and considered the relevant material on record. There is no dispute that this issue of denial deduction U/s 80IB (10) on the ground of exceeding the built up area of units is common in this year as well as in the earlier years. The ld. CIT(A) allowed the claim of the assessee by following the decision of this Tribunal in assessee's own case for the A.Ys. 2010-11 to 2012-13. We further noted that the Revenue challenged the orders of this Tribunal for the A.Ys. 2010-11 to 2012-13 before the Hon'ble jurisdiction High Court and Hon'ble High Court vide dated 14.11.2017 in

ITA No. 67,73 and 166 of 2017 has upheld the order of this Tribunal in para 8 to 10 are as under:-

"8. We have heard counsel for the parties.

9. Before proceeding with the matter, it will not be out of place to mention that the tribunal being the last fact finding authority has observed as under:-

> *"34 From the decisions of the Madras high Court, Bombay High Court and the ITAT Ahmedabad, discussed above in para 3.3 above, it is seen that the area under considering cannot be included in the 'built up area' if it is uncovered, open to sky, and without any construction on its, notwithstanding the fact that it is a private, exclusive area of the owner, accessible only through the dwelling unit (bed room) and adjoining to it. In this case, the area under consideration is the roof of the ground floor, is uncovered, open to sky, and without any construction on it although it is accessible exclusively to the owner through the bedroom (and not a part of the common area). Therefore, following the above case laws (discussed in pafra 3.3, above), this private, open terrace, cannot be included in the 'built up area' of the residential unit, as defined in Sec 80IB(14)(a). Therefore, the built up area of the residential units is less than 1500 sq. ft. and consequently, the assessee is eligible for deduction u/s 80IB(10). These grounds are allowed."*
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> *There is no dispute with regard to the fact that the AO rejected the claim of deduction under section 80IB (10) only on the ground that a terrace is an entirely open and large space on the top most level of a building, whereas balconies are relatively smaller areas affixed to a room of the house. He further observed that balconies are assessable only through the room that they are attached with and terraces will usually have independent entrances.*

The assessee has demonstrated from the pictures of the building that the area is a terrace as it is completely open and is a roof of a room underneath. Merely because the first floor rooms of villa has an opening on the terrace, in our considered view would not make the terrace as a balcony as the balcony normally is attached with the rooms and covered by enclosure but it is not supported by the walls of the room underneath. We find that the Coordinate Bench under the identical facts in ITA No. 12/Kol/2014 in the case of M/s Ashina Amar Developers vs. ITO after considering the case law and provisions of section 80IB has decided the issue by observing as under:-

"4.2.1. We find that the Learned AO during the course of assessment proceedings asked the assessee inter alia to submit before him the copies of brochure issued by the assessee to the prospective buyers for effecting the sale of residential units during the asst year under appeal. The assessee duly made available the copies of the brochure issued in order to attract prospective buyers and also copies of original sale deeds before the Learned AO which were duly returned by the Learned AO after verification. We find that the Learned AO calculated the super built up area of each building based on the brochures by including the area of open terrace and therefrom estimated the built up area by taking 90% of the super built up area of each building as built up area. We find that the Learned AO brushed aside the argument of the assessee that the brochures are only indicative in nature and the actuals may vary from what is stated in the brochures. The assessee also tried to explain that as per the sale deed which was registered with Registrar for stamp duty purposes, the total built up area of each building was below the maximum area specified in section 80IB(10) of the Act. The Learned AO simply ignored the sale deeds that were produced

before him and placed reliance on the brochures issued by the assessee to attract prospective buyers and estimated the built up area by including the terrace area. We find that the actual built up area of residential building should not exceed the maximum area specified in the Act and there is no scope for making the assumptions and estimates.

4.2.2. *Reliance is placed on the co-ordinate bench decision of Mumbai Tribunal in the case of ACIT vs Sheth Developers reported in 33 SOT 277 (Mum)wherein it was held that the built up area has to be calculated on an actual basis and not on the basis of estimates. In that case, the AO relied on a ratio worked out from the map attached with the occupancy certificate, for arriving at the built up area from the carpet area which was turned down by the Tribunal.*

4.2.3. *We also find lot of force in the alternative arguments of the Learned AR that the term 'terrace' is not defined in the Act. However the word 'terrace' originates from a French term and is known as terrace, terrazzo in Italian and spelled as terrace in Spanish. This is an outdoor extension that can be occupied by lots of people and is beyond ground level. A terrace has more space and with an open-top. We find that the definition of built up area means inner measurement of the residential unit at the floor level including the projections and balconies as increased by the thickness of the walls but does not include the common areas shared with other residential units. Hence it could be concluded that the open terrace is not covered within the meaning of built up area as it is open to sky and would not be part of the inner measurement of the residential floor at any floor level. Reliance in this regard is made on the decision of the coordinate bench of Ahmedabad Tribunal in the case of Amaltas Associates vs ITO reported in 131 ITD*

142 (AHD.) wherein it was held that the definition of built up area is inclusive of balcony but not open terrace. It further held that DVO has considered the open terrace as analogous to balcony/ verandah without any basis. Therefore, it took the view that the authorities below were not justified in taking the open terrace as balcony / verandah rejecting the claim of the assessee.

4.2.4. Reliance in this regard is placed on the decision of Hon'ble Madras High Court in the case of CIT vs M/s Mahalakshmi Housing in Tax Case (Appeal) Nos. 583 & 584 of 2011 and 316 & 317 of 2012 dated 2.11.2012, wherein the questions raised before their Lordships and the decision rendered thereon are as under:-

Whether on the facts and circumstances of the case, the Appellate Tribunal is right in law in holding that the private terrace area should be included in the built up area of the flats for the purpose of making out statutory extent of built up area as per Clause (a) of Section 80IB(14) of the Income Tax Act ? Held:

5. It is seen from the facts narrated herein that the assessee is engaged in the business of construction. The assessee entered into an agreement of sale with one Ashok Kumar for joint development of the property. The assessee's claim for deduction under Section 80IB(10) of the Income Tax Act is rejected on the ground that the assessee was not the owner of the land. Aggrieved by the same, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who dismissed the appeal. Aggrieved by the same, the assessee went on further appeal before the Income Tax Appellate Tribunal.

6. The Tribunal considered the assessee's appeal along with two other assessees' appeals involving similar

questions of law and passed a common order. One such assessee's case came up for consideration in T.C.Nos.581, 1186 of 2008 and 136 of 2009 in the case of Ceebros Hotels P\It. Ltd. Vs. Deputy Commissioner of Income "Tax. 8y judgment dated 19.10.2012, this Court allowed the assessee's appeal, holding that the open terrace area cannot form part of the built up area; in the result, the assessee would be entitled to deduction under Section 80-IB(10) of the Act and that the assessee would be entitled to proportionate relief as regards the units having built up area not more than 1500 sq.ft.

7. Even though learned standing counsel for the Revenue raised additional grounds regarding the principle of proportionality for grant of relief, yet, we find by reason of exclusion of open terrace are from the built up area, application of proportionality theory does not arise. In the circumstances, we find no justifiable ground to accept the plea of the Revenue on this aspect.

8. As far as the Revenue's contention that for the purpose of Section 80-IB(10) deduction, the assessee should have owned the property is concerned, the same is liable to be rejected by reason of our decision rendered in T.C.Nos. 581, 1186 of 2008 and 136 of 2009 - CEEBROS HOTELS PVT LTD v. DEPUTY COMMISSIONER OF INCOME TAX dated 19.10.2012. Hence, the appeals filed by the Revenue viz., T.C. (A). Nos. 583 and 584 of 2011 stands dismissed and this portion of the Tribunal's order stands confirmed. The assessee's appeals in T.C.Nos.316 and 317 of 2012 stand allowed, holding that the terrace area. No costs."

4.2.5. Reliance is also placed on the decision of the co-ordinate bench decision of Pune Tribunal in the case of Shri Naresh T. Wadhwani vs DCIT in ITA No.s 18, 19 & 20

/PN/2013 for Asst Years 2007-08,2008-09 & 2009-10 dated 28.10.2014, wherein it was held that :-"

18. *A bare perusal of the aforesaid question of law before the Hon'ble Madras High Court would reveal that the issue related to whether open space of the terrace would fall within the expression 'built-up area'. The facts before the Hon'ble High Court were that assessee had constructed various apartment blocks and each block had 64 apartments. The apartments located at first to sixth floor were of areas less than 1500 sq.ft.. However, the flats located on the 7th floor had the advantage of exclusive open terrace. While considering the relief u/s 801B(10) of the Act, the Assessing Officer took into consideration the area of such exclusive/private open terrace as a part of the built-up area of the units located at the 7th floor. After considering the above aspect, the built-up area of the flats located at the 7th floor exceeded 1500 sq.ft. and hence the Assessing Officer held that the condition prescribed in clause (c) of section 8018(10) of the Act was not fulfilled. The said position taken by the Assessing Officer was upheld right up to the Tribunal. However, the Hon'ble High Court disagreed with the stand of the Revenue and held that such open terrace would not be includible in the calculation of 'built-up area' for the purpose of examining the condition prescribed in clause (c) of section 801B(10) of the Act. In this view of the matter, the aforesaid judgement of the Hon'ble Madras High Court and which has been further affirmed in a subsequent decision in the case of Sanghvi and Doshi Enterprise (supra), covers the issue before us.*

19. However, in the course of hearing, the learned CIT - OR attempted to distinguish the judgement of the Hon'ble High Court by pointing out that the same related to assessment year 2003-04, a period during which the

definition of 'builtup area' contained in section 801B(14)(a) of the Act was not on the statute and also the fact that the housing project under consideration of the Hon'ble High Court was approved by the concerned local authority prior to 01.04.2005 i.e. prior to the date when the definition of 'built-up area' was brought on the statute by way of section 80IB(14)(a) of the Act.

20 We have carefully perused the judgement of the Hon'ble Madras High Court and find that though the Hon'ble High Court was considering a project approved prior to 01.04.2005 yet it has taken into consideration the definition of 'built-up area' contained in section 801B(14)(a) of the Act, which was inserted w.e.f. 01.04.2005. As per the Hon'ble High Court even after assuming that such definition was to be retrospectively applied yet the area of open terrace would not fall within the meaning of the expression 'built-up area'. The Hon'ble High Court referred to the Indian Standard Method of Measurement of Plinth, Carpet and Rentable Areas of Buildings as issued of Bureau of Indian Standards and also the meaning of the aforesaid expression assigned as per the rules and regulations of the local authority and concluded that an open terrace could not be equated to a 'projection' or 'balcony' referred to in section 80IB(14)(a) of the Act.

21. Notably, the Hon'ble High Court also considered an argument from the side of the Revenue to the effect that the sale of the area of open terrace by the assessee to the respective purchaser would justify the inclusion of such terrace area into the calculation of 'built-up area'. Before us also, the learned CIT-DR has raised the said issue though she has fairly conceded that such a finding was not emerging from the orders of the lower authorities. Be that as it may, the Hon'ble High Court has noted and dealt with the said argument in the following words ;-

'29. Thus, in the face of terrace being an open area, not being a projection and hence not included in the plinth area, the question herein is as to whether the Tribunal is justified in confirming the order of assessment to include the terrace area into the built-up area solely by reason of the fact that the assessee has sold it to purchasers of the 7th floor as a private terrace.

30. We do not think, the Tribunal is justified in taking the view that open terrace would form part of the built-up area for the purpose of sub-clause (c) of section 80-IB(10). As already seen in the preceding paragraphs, an assessee having an Approved Plan project alone has the right to claim deduction under section 80-IB. Any project undertaken not approved by the Local Authority is outside the purview of the Act. Thus, when a Local Authority, endowed with the jurisdiction to grant the approval is guided in its approval by Regulation as to what constitutes the plinth area, which is the built-up area, it is difficult for us to agree with the contention of the Revenue as well as the reasoning of the Tribunal that for the purpose of considering the claim under section 80-IB, the built-up area would be different from what has been given approval by the Local Authority, on a building project. Given the fact that during 2003-04 there was no definition at all on what a built-up area is, the understanding of the Revenue, which is evidently contrary to the approval of the Local Authority based on the Rules and Regulations could not be sustained. Consequently, we have no hesitation in agreeing with the assessee's contention that open terrace area, even if be private terrace cannot form part of the built- up area"

22. As per the Hon'ble High Court, terrace area would not form part of the built-up area by the reason of the fact that assessee sold it to the purchaser as a private terrace. At this stage, we may also point out that there is nothing in

section 80IB(14)(a) of the Act to suggest that the factum of the terrace being available for exclusive use of the respective unit owner is a ground to consider it as a part of 'built-up area' for the purposes of clause (c) of section 80IB(10) of the Act. Thus, the argument of the learned CIT-OR is hereby rejected.

23. In view of the aforesaid judgment of the Hon'ble Madras High Court, we are unable to uphold the stand of the Assessing Officer to include area of terrace as a part of the 'built-up area' in a case where such terrace is a projection attached to the residential unit and there being no room under such terrace, even if the same is available exclusively for the respective unit- holders."

10. Even the judgment of Gujarat High Court in Amaltas Associates (supra) is very clear and in our considered opinion even after amendment the legislature has included the balcony and projection but not the "Terrace".

Since this issue is now covered by the decision of this Tribunal as well as the Hon'ble High Court in assessee's own case (supra). Accordingly, by following the decision of Hon'ble jurisdiction High Court we do not find any error or illegality in the impugned order of ld. CIT(A).

In the result, the Revenue appeal is dismissed.

Order pronounced in the open court on 30/11/2017

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल राव)
(Vikram Singh Yadav)	(Vijay Pal Rao)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 30/11/2017.
*Santosh.
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- DCIT, Circle-6, Jaipur.
2. प्रत्यर्थी / The Respondent- M/s Ashiana Manglam Developers, 401, 3rd floor, Apex Mall, Lal Kothi, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 784/JP/2017}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar