

आयकर अपीलीय अधिकरण, पुणे न्यायपीठ “बी” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1317/PUN/2016
निर्धारण वर्ष / Assessment Year : 2012-13

DCIT, Circle-5,
Pune

.... अपीलार्थी/ Appellant

Vs.

Shri Sudhir K. Bothara,
210, Landmark Centre,
Pune Satara Road,
Pune – 411009
PAN : ABCPB6444J

.... प्रत्यर्थी / Respondent

Appellant by : Shri Mukesh Jha, JCIT
Respondent by : Shri Rajeev Thakkar

सुनवाई की तारीख / Date of Hearing : 03.04.2018	घोषणा की तारीख / Date of Pronouncement: 11.04.2018
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आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

This appeal is filed by the Revenue against the order of CIT(A)-2,
Pune, dated 12-02-2016 for the Assessment Year 2012-13.

2. Grounds raised by the Revenue read as under :

“1. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) is justified in holding that after considering the **area of transformer, the area of open space/amenity space, the size of the plot of land in respect of Housing Project developed by the assessee is more than one acre**, when the actual plot size of the housing project is less than one acre.

2. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) is justified in holding that assessee fulfilled the basic condition of section 80IB(10) of the I.T. Act, 1961 and thereby directing the Assessing Officer to delete the addition of Rs.5,31,73,220/- on account of disallowance of deduction claimed u/s.80IB(10) of the I.T. Act, 1961.

3. The Ld.CIT(A) erred in not following the ratio laid down by Hon’ble ITAT in the case of Om Engineers and Builders Vs. ITO 109 ITD 235.”

3. Briefly stated relevant facts are that the assessee is an individual and is engaged in the business of Promoters and Builders. Assessee filed the return of income on 21-09-2012 declaring total income of Rs.46,79,003/-. Assessee undertook a residential house project named "Swagat Enclave, situated at S.No.8/2/1 located at Ambegaon Khurd, Jambhulwadi, Pune - 46 and claimed deduction of Rs.5,31,73,220/- u/s.80IB(10) of the Act for the year under consideration. In the assessment proceedings u/s.143(3) of the Act, dated 28-02-2015, AO relying on the earlier assessment orders for the A.Yrs. 2009-10 to 2011-12 (Para Nos. 3.1 to 3.3 of the assessment order) rejected the assessee's claim and made addition of Rs.5,31,73,220/-. Eventually, AO determined the income at Rs.5,78,57,220/-. AO held that the assessee failed to qualify the condition relating to 'one acre' of the plot of land. AO excluded certain areas meant for common amenities.

4. During the First Appellate proceedings, the CIT(A) allowed the claim of the assessee relying on the order of his predecessor in assessee's own case for the A.Y. 2009-10. Aggrieved with the order of CIT(A), Revenue is in appeal before us with the grounds mentioned above.

5. Before us, Ld. Counsel for the assessee brought our attention to various orders of Pune Bench of the Tribunal and submitted that the issue now stands covered in favour of the assessee by virtue of the said decisions of the Tribunal. Narrating the facts, he submitted that these decisions are relevant for the proposition that the common areas, amenities, common roads, area meant for transformer etc., are required to be included within the scope of 'one acre' for claiming of deduction u/s.80IB(10) of the Act. In the instant case, AO excluded certain areas, such as common road, area of transformer, amenity space etc. and

denied the benefit of deduction u/s.80IB(10) of the Act. If these excluded areas are considered, the condition relating to area of one acre stands met. In this regard, Ld. Counsel submitted that assessee has been claiming the area of the plot of land as one acre including such excluded areas and the Revenue has been consistently allowing the claim of the assessee in the past. Further, Ld. Counsel brought our attention to Para No.5 of the order of CIT(A) and submitted that the same constitutes a speaking order and therefore need not be disturbed. In support of his case, Ld. Counsel relied on the following decisions :

1. *Bunty Builders Vs. ITO 56 DTR 0300*
2. *M/s.B.K. Pate Enterprises Vs. ACIT – ITA No.736/PN/2010, dated 08-07-2011*
3. *DCIT Vs. Mahesh Pandurang Bhagwat – ITA No.824/PN/2011, dated 28-08-2012*
4. *ITO Vs. Yash Promoters and Builders – ITA No.498/PN/2012, dated 17-04-2013*
5. *ITO Vs. Namrata Construction Co.– ITA Nos. 503 & 504/PN/2011, dated 22-06-2012*
6. *Moti Udharam Panjabi Vs. ACIT – ITA Nos. 442 & 443/PN/2009, dated 29-07-2011*
7. *ITO Vs.Satyanarayan Ramswaroop Agarwal 50 taxmann.com 111*

6. On the other hand, Ld. DR for the Revenue relied heavily on the order of the AO.

7. We heard both the parties, perused the orders of the Revenue on this issue. It is undisputed fact that the solitary reason for denial of claim of deduction u/s.80IB(10) of the Act by the AO is with regard to fulfilment of the conditions relating to area of plot of one acre. AO excluded certain areas as mentioned above for bringing down to the area below one acre and thereby denied the claim of the assessee. For the sake of completeness, we proceed to extract Para Nos.5 & 5.1 of the order of CIT(A) as follows :

“5.1 I have gone through the grounds of appeal, statement of facts and submission filed by the assessee as well as contents of the assessment order. The various case laws relied upon by the Ld. Counsel have been

*perused. In the aforesaid cases, the Hon'ble ITAT has held that **open space, transformer and amenity space should be considered for the purpose of computation of size of the plot** on which the housing project is construction u/s.80IB(10) of the Act. Further, it is pertinent to note that the appellant claimed deduction u/s.80IB(10) for the first time in the Asst. Yr. 2009-10 and the same was disallowed by the A.O. Aggrieved against the same, he preferred appeal before CIT(A)-4, Pune. The appeal has been decided in the favour of the appellant vide appellate order No.PN/CIT(A)-4/ACIT/DCIT, Circle-11(2)/147/2011-12/298, dated 30-12-2015 following the aforesaid decisions of Hon'ble Jurisdictional Tribunal by making following observations :*

5.1 In the light of the above and respectfully following the decisions of the Hon'ble ITAT, Pune in the abovementioned cases, I am in agreement with the stand taken by CIT(A)-4 in A.Y. 2009-10 in the assessee's own case. The AO is accordingly directed to delete the disallowance of Rs.5,31,73,220/- claimed u/s.80IB(10) of the Act."

From the above, it is evident that the CIT(A) relied heavily on the decisions of Coordinate Bench of the Tribunal including that of Bunty Builders (supra). We find the decision of the Tribunal in the case of Bunty Builders (supra) is relevant for the proposition that area of amenity space is compulsorily required to be handed over the Municipal authorities by the assessee and therefore, the same constitutes an integral part of the housing project. The area of common roads, area of transformer etc. obviously fall within the meaning of amenity space compulsorily required for the housing project.

Further, we also do not appreciate the fact that the revenue officers are selectively denying the claim of deduction u/s.80IB(10) of the Act in a particular assessment year when similar claim is allowed in the housing projects of the assessee.

Further, we find in the case of ITO Vs. Satyanarayan Ramswaroop Agarwal, 50 taxmann.com 111 the Tribunal held that area of one acre as prescribed in clause (b) of section 80IB means area of one acre available for housing project inclusive of amenities as per norms of concerned municipal corporation or local body.

Therefore, on facts, the total area of the plot of land is 4500 sq.mtrs which includes the area meant for open space of 445.16 sq.mtrs and area for transformer of 36. sq.mtr, area for amenity space of 667.74 sq.mtrs and area for DP road widening of 48.40 sq,mtrs. This issue of inclusion of areas for the purpose of 'one acre' is already settled by the decision of this Bench of the Tribunal (supra). Therefore, in view of the above discussion on this solitary issue, we are of the opinion that the order of CIT(A) is fair and reasonable and it does not call for any interference.

8. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this 11th day of April, 2018.

Sd/-

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य / JUDICIAL MEMBER

(D. KARUNAKARA RAO)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 11th April, 2018
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-2, Pune
4. CIT-2, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B Bench" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune