

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD 'B' BENCH, AHMEDABAD**

[Coram: Pramod Kumar AM and Mahavir Prasad JM]

ITA No.3050/Ahd/2015
Assessment Year: 2011-12

Dy. Commissioner of Income-tax
Circle-3(1)(1), Ahmedabad

..... **Appellant**

Vs.

Nila Infrastructure Limited
*1st Floor, Sambhav House,
Opp.Chief Justice Bungalow,
Bodakdev, Ahmedabad 380015
[PAN : AAACN 5059 K]*

.....**Respondent**

Appearances by:

Saurabh Singh, for the Appellant
SN Soparkar & Parin Shah - for the Respondent

Date of concluding the hearing : 28.06.2018
Date of pronouncing the order : 25.09.2018

O R D E R

Per Bench :

1. By way of this appeal, the Assessing Officer has challenged correctness of the order dated 13th August 2015 passed by the learned CIT(A)-9, Ahmedabad in the matter of assessment under section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year 2011-12.

2. In ground no. 1, the Assessing Officer has raised the following grievance:-

"1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.3,00,814/- made on account of disallowance u/s 14A of the Act r.w. Rule 8D of the I.T. Rules."

3. Learned representatives fairly agree that the issue is squarely covered by the Hon'ble jurisdictional High Court's judgment in the case of CIT Vs Corrtch Energy Pvt Ltd [(2015) 372 ITR 97 (Guj)] inasmuch as the disallowance under Section 14A cannot exceed the exempt income. This is precisely what the learned CIT(A) has held. In view of the matter and in view of the decision of the learned CIT(A) which is clearly in accordance with the law laid down by the Hon'ble jurisdictional High Court (supra), we see no reasons to interfere in the matter.

4. Ground no.1 is thus dismissed.

5. In ground nos. 2 & 3 the assessee has raised following grievances:-

"2. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.1,58,94,590/- on account of disallowance of deduction u/s 80-IB(10) of the Act.

3. The Ld. CIT(A) has erred in law and on facts by not appreciating the facts that various charges such as AEC, AUDA, legal etc received by the assessee is not part of the income eligible for deduction u/s 80-IB(10) of the Act."

6. To adjudicate on these grounds, only a few material facts need to be taken note of. During the course of scrutiny assessment proceedings, the Assessing Officer noted that during the relevant previous year the assessee has received a sum of Rs.1,58,94,590/- towards charges collected from the customers for AEC, AUDA, legal charges etc. The Assessing Officer was of the view that these receipts are not eligible for being included in the profits eligible for deduction under section 80-IB(10). Aggrieved, the assessee carried the matter in appeal before the learned CIT(A) who reverses the action of the Assessing Officer by observing as follows:-

"I have considered the observations of the A.O. with respect to disallowance of deduction u/s.80IB(10) of the I.T. Act with respect to the charges collected from the customers for Ahmedabad Electricity Company(AEC), Ahmedabad Urban Development Authority(AUDA) and legal charges. The total of such sum paid by the appellant to these three authorities was Rs. 1,58,94,590/-. The A.O. primarily is of the view that no deduction is available on these sums as it is not linked to the project activity or such sum is not derived from the main activity i.e the construction of housing complex namely Asmakam undertaken by the appellant. The A.O. is of the view that the assessee has charged a fixed sum for some specific blocks of the housing complex namely Rs. 162,500/- for Block-J, Rs.1,12,500/- on Block-K, L, M, N, O, P etc. The A.O. observes that the assessee has not been able to prove that such amount was incurred for each flat which has been received by the appellant from the flat purchasers. The A.O. observes that the nexus between the fixed sum received and the expenses, in the form of payment to AEC, AUDA and legal charges, was not evident in this case. A.O. relied on a sample sale deed executed between the appellant and one of the flat purchaser for Flat No.52 which was reproduced in support of its contention vide para 5.34 of its order. The A.O also pointed out that the relevant guidance made on accounting for real estate transaction issued by ICAI does not bind the appellant to take such charges taken from the purchasers as a part of income eligible for deduction u/s. 80IB(10).

10.1 The appellant has primarily relied on number of judgments indicating that of Hon'ble Supreme Court namely Liberty India and couple of other Tribunal decision to claim that deduction u/s.80IB(10) is allowed on charges paid to AUDA, AEC and the legal charges paid.

10.2 The appellant is drawn my attention indicating that such charges are recovered from the customers and are integral part of the sale consideration. The

appellant pointed out that A.O. has not noticed despite pointing out so the clause-19 of each of the sale deed which is reproduced as under :-

"If any amount becomes payable to AUDA, AMC, the State Government or other public authority like betterment charges or development taxes or any other charges, the same shall be reimbursed by the purchaser as may be fixed by the vendor or levied by the authority and the purchaser is liable to pay the same directly." (Emphasis supplied)

10.3 In this case the appellant has undisputedly paid these amount to AUDA, AEC and legal charges, the ledger of which have been produced before me in the Paper Book so filed. The appellant contends that such charges paid to AUDA, AMC and legal charges are essentially recovered from each of the customer as per Clause-19, crucial fact which has been omitted by the A.O. In a nutshell such amount and when received by the appellant has been received in pursuant to the sale deed, a legal document pertaining to the instant housing project and therefore it is closely related to the housing project and thus becomes eligible for deduction u/s.80IB(10) of the I.T. Act.

10.4 Further, my attention was drawn to the decision by Hon'ble Kolkata Tribunal in the case of ACIT vs North city Developer (ITA No.1307/Kolkata/2010 dated 14/7/2011] wherein the Hon'ble Tribunal has held that in construction of housing project the assessee was under obligation as per the agreement entered with various customers to provide common facilities including electricity supply and meters, transformers, electric sub-stations including provision for generator, it was held by the Hon'ble Tribunal that such facility undisputedly providing electricity supplied to the housing complex is part and parcel of the entire activity of developing and building a housing project. Without such electricity facilities the project developing cannot be said to be complete. It was also observed by the Hon'ble Tribunal that extra amount so charged while providing essential common facilities is part and parcel of the housing project and the amount received in respect there to is eligible for deduction u/s.80IB(10). The relevant portion of the judgment is reproduced below:

24. We have carefully considered the orders of the authorities below and submissions of learned representative of the parties. We agree with Id. A/R that in the construction of a housing project, the assessee was under an obligation, as per agreement/memorandum entered into, to provide all common facilities including electricity supply & meter, transformer & electric sub-station including provision for generator. It is a part and parcel of the entire activity of developing and building a housing project and without which the project developed could not be said to be complete. We observe that as per agreement, it is provided that each of the purchasers is required to pay an additional amount @ Rs.55/- per sq.ft. of super built-up area of the said flat by way of consideration for installation of generator for the common portions and for providing power to the said flats and also for providing electricity supply & meter etc. for common purposes. We agree that charging of extra amount or providing the above essential common facilities as per the agreement is in the capacity of developing and constructing the housing project by the assessee and not to act as a middleman/agent, as alleged by A.O. These activities, we are of the

considered view, are part and parcel of the entire activity of developing and completing the housing project. Hence we hold that charging of the said additional amount, i.e. @ Rs.55/- per sq. ft, of super built-up area from flat owners/purchasers is having direct nexus with the activity of developing and building housing project. We also observe on perusal of details at page 60 of the paper book that the total receipts against CESC, electricity and generator was of Rs.45,70,703/- and whereas the expenses incurred by the assessee was of Rs.63,94,341.94 and thus there was a loss of Rs. 18,23,638.94. Besides above, in respect of Rs.3,66,763/-, which is also mentioned in ground No.3 of the appeal, received by the assessee from flat owners for extra work, we observe that the said work was carried out before handing over of possession of the respective flats to the buyers and not after handing over of the possession. The department has disputed the position but there was no cogent material brought on record to dislodge the fact that the said extra work was carried out by the assessee in terms of clause (c) of Section-A of Sixth Schedule of the Sale Agreements entered into with the flat buyers. Therefore, we hold that Id. C.I.T.(A) has rightly held that the said receipt of Rs.3,66,763/- has a direct nexus with the activity of undertaking developing and building housing project and is eligible to be included while computing deduction u/s. 80-18(10) of the Act In view of above facts, we hold that there is no reason to interfere with the order of Id. C.I.T.(A). Ground No.3 of the appeal taken by the department is also rejected.

10.5 I have also considered the reliance on the judgment namely ACIT vs Vaman Estate in ITA No.7570/Mum/2011 wherein the Hon'ble Tribunal has followed the decision by a co-ordinate bench in the case of M/s. Eathare and Associates in ITA No.1211/M/2008 wherein it was pointed out that developmental charges, legal charges, water, electricity meter charges etc. are eligible for deduction u/s.80IB(10) of the I.T. Act The relevant finding of this order is given below:

13. We have carefully considered the submissions of the rival parties and perused the material available on record. We find merit in the plea of the Id. Counsel for the assessee Chat in the case of M/s Pathare & Associates (supra) the Tribunal has upheld the order of the Id. CIT(A) in allowing the deduction u/s 80IB(10) of the Act in respect of development charges, legal charges, water/electricity/meter charges etc. However, in respect of corpus fund charges, the Tribunal has set aside the issue to the file of AO. In the absence of any distinguishing feature brought on record by the Revenue, we respectfully following the order of the Tribunal (supra) hold that the assessee is entitled to deduction u/s 80IB(10) of the Act in respect of Development charges, legal charges, society formation charges, water, electricity & meter charges. As regards the deduction u/s 80IB(10) on corpus fund charges, in the absence of any relevant material available on record, we respectfully following the order of the Tribunal (supra) set aside the issue to the file of the A.O. to decide the same afresh in the light of the direction given by the Tribunal in the said case (supra) and according to law after providing reasonable opportunity of being heard to the assessee. Accordingly the ground taken by the Revenue is partly allowed for statistical purpose.

10.6 I may hastened to add that decision given by the Hon'ble Gujarat High Court in the case of CIT vs Pratham Developers (33 Taxman.com 272] wherein the Hon'ble High Court has decided that any income arising out of the developing housing project is eligible for deduction u/s.80IB(10) of the Act. The operative part of this judgment i.e. para-7 is reproduced below for ready reference :-

6. With respect to the remaining amount covered under the discussion, balance written off out of the payments to contractors and suppliers, we notice that assessee had consistently taken a stand that:

"The amounts have been generated during the course of business. In case of supplier payments sometimes the Appellant deducts some amounts and pays the bills. Since the amounts are generated during the course of business the same are eligible for deduction u/s. 80-IB(10) of the Act."

7. It would thus emerge that during the course of business in developing housing project, assessee had made payments to the suppliers towards various purchases made. On such payments, the assessee would occasionally deduct some amounts and pay the bill. Difference between the bill amount and payment actually made would be the amount generated during the course of business, Assessee therefore, contended that same should form pan of eligible deduction under section 80IB(10) of the Act. We have no hesitation in upholding the view of the CIT (Appeals) as well as Tribunal. Assessee following mercantile system of accounting may have debited claim in the bill amount raised by the suppliers or contractors. However, as is likely to happen in any business of similar nature, the supply of material may be found wanting at a later stage. They may either be defective or sometimes minor unintentional short supply. This could be the reason why assessee instead of making full payment, deducts a portion of the supplier's bill. There may be other reasons such as late supply of the material etc. why such eventuality, may arise. Essentially in all such cases, what would happen is that assessee would actually expend less amount than what the bill amount would be indicating. In essence, therefore, such margin would go to reduce the assessee's cost of acquisition of the supply. Such amount therefore, cannot be dissociated or divested from assessee's business. Such receipt therefore, cannot be stated to be not arising out of the assessee's business of development of housing project,

10.7 Considering the above including the judgments of jurisdictional High Court I am of the view that the income arising for activities which are essential part and parcel of developing of building of a housing project is eligible for deduction/s.80IB(10) of the Act. It is not disputed that such sum was paid to the respective authorities. It is also not disputed that such sum so paid to the authorities like AUDA, AEC and Legal charges were recovered from the respective customers as per the agreement clause-9 reproduced above and it is also not disputed that payment to AUDA, AEC and Legal charges is essential for development, completion and execution of a housing project. I am not inclined to agree that for providing such activities the appellant has acted as a middleman

for the customers who in turn bought flat. Speaking also in normal commercial environment of builders, on behalf of customers, interact and pay with respective authorities for development for provision of water and electricity and to complete legal formalities.

10.8 Considering the discussion above, I am of the view that the appellant is eligible for deduction u/s.80IB(10) for an amount of Rs.1,58,94,590/-, the appellant thus gets the relief. The AO is directed to delete this disallowance. This ground is therefore allowed.”

7. The Assessing Officer is aggrieved by the relief so granted by the CIT(A) and is in appeal before us.

8. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

9. We have gone through the impugned order and duly considered the facts of the case. Whatever details have been given by the learned Counsel for the assessee with regard to AUDA charges, electricity connection charges and legal charges etc., nowhere these facts have been verified by the lower authorities and the computation of Asmakam project has not been elaborately discussed by the lower authorities. Therefore, we are of the considered view that this matter needs further examination; therefore, we remit this issue back to the file of the Assessing Officer for examination afresh and call for all details pertaining to Asmakam project and thereafter will decide the matter on merits.

10. In the result, ground nos. 2 & 3 are allowed for statistical purposes.

11. In the result, the appeal is partly allowed for statistical purposes. Pronounced in the open court today on the 25th September, 2018

Sd/-

Pramod Kumar
(Accountant Member)

Ahmedabad, the 25th day of September, 2018

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Copies to: (1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

Sd/-

Mahavir Prasad
(Judicial Member)

By order

TRUE COPY

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad

