

**आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JM AND SHRI MANOJ KUMAR  
AGGARWAL, AM**

आयकर अपील सं./I.T.A. Nos.4890/Mum/2016  
(निर्धारण वर्ष / Assessment Years: 2011-12)

M/s. Pebble Bay Developers P. Ltd. Raheja Chambers, Linking Road, Main Avenue, Santacruz (West) Mumbai – 400054	<b>बनाम/</b> Vs.	DCIT 13(1)(2) 2 <sup>nd</sup> Floor, Aayakar Bhavan, Mumbai
स्थायी लेखा सं./जीआइआर सं . /PAN/GIR No. AACCG1645E		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Nishit Gandhi
प्रत्यर्थी की ओर से/Respondent by	:	Shri Rajeev Gubgotra

सुनवाई की तारीख / <b>Date of Hearing</b>	:	08.08.2018
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	31.10.2018

**आदेश / ORDER**

Per Saktijit Dey, J. M.:

The aforesaid appeal by the assessee is against order dated 24.05.2016, of the learned Commissioner of Income Tax (Appeals)-21, Mumbai for the assessment year 2011-12.

2. The issue of challenge in the present appeal as per the concise grounds of appeal is confined to the addition / disallowance of ₹.2,31,76,750/- made on protective basis.

3. Briefly the facts relating to the issue in dispute are, the assessee company is engaged in the business of Builder and Real Estate Developer. For the assessment year under dispute the assessee filed its return of income on 08.02.2012 declaring total income of ₹.25,99,76,112/-.

4. During the assessment proceeding while verifying the computation of total income filed by the assessee along with the return of income, the Assessing Officer noticed that the assessee has claimed deduction of an amount of ₹.2,35,62,535/- towards amount disallowed under section 43B of the Income Tax Act, 1961 (in short "the Act") in the preceding year but allowable in this year. When the Assessing Officer called upon the assessee to justify its claim of deduction, the assessee submitted its explanation justifying the deduction. The Assessing Officer found that out of the total deduction claimed by the assessee an amount of ₹2,76,544/- was on account of bonus. Since, the assessee could not furnish any evidence to demonstrate that the amount has actually paid, the Assessing Officer disallowed the amount of ₹2,76,544/-. As regards the amount of ₹.2,31,76,750/-, the assessee submitted that the amount was paid to Brihat Bangalore Mahanagar Palika (BBMP) on 26.10.2010 towards modification of planned section and occupancy certificate which are part of project expenses at Bangalore. The Assessing Officer after considering the

submissions of the assessee in the context of facts and material on records observed that the assessee has not brought any evidence to prove that the said amount was disallowed in any of the previous years. Further, the Assessing Officer observed that the assessee has not furnished any cogent reason or justification for allowability of the aforesaid amount. Therefore, he again called upon the assessee to justify why the deduction claimed should not be disallowed under section 43B of the Act. In response to the query raised by the Assessing Officer, the assessee vide letter dated 29.01.2014, though, submitted that the deduction was wrongly claimed under section 43B of the Act, however, the assessee justified the deduction claimed by stating that it is allowable u/s.36 of the Act. It was submitted by the assessee, since the aforesaid amount was paid to BBMP as per the direction of Hon'ble High Court of Karnataka and it relates to construction business, it is an allowable expenditure. Further, the assessee submitted that as per the final order of the Hon'ble High Court the assessee would be receiving back the amount paid to BBMP in A.Y.2014–15 and on receipt of the said amount it will be offered as income in the said assessment year. The Assessing Officer however did not find merit in the submission of the assessee. He observed, since the assessee has not treated the amount in dispute as an expenditure in the Profit and Loss Account but has shown it in the asset side of the balance sheet under the head advance receivable in cash and kind, the claim of deduction cannot be allowed. As regards assessee's contention that the amount in question will be offered in A.Y.2014–15 the Assessing Officer observed that the claim of the assessee being

premature cannot be accepted. Accordingly, he disallowed and added back the amount of ₹.2,31,76,750/- on protective basis.

5. After receiving the aforesaid assessment order the assessee filed an application for rectification under section 154 of the Act seeking allowance of deduction claimed of ₹.2,31,76,750/-. The aforesaid application filed by the assessee was rejected by the Assessing Officer on the reasoning that there is no mistake apparent on record within the meaning section 154 of the Act. Against the aforesaid order of the Assessing Officer assessee preferred an appeal before the first appellate authority. Learned CIT(A) while deciding the appeal of the assessee held that the issue raised by the assessee in the application under section 154 of the Act does not come within the purview of mistake apparent on the face of record cannot be entertained. Accordingly, he dismissed the appeal of the assessee.

6. The learned Authorized Representative submitted, the only reason on which the Assessing Officer disallowed claim of assessee is, the payment made to BBMP must have been shown in the P&L account. The learned Authorized Representative submitted, the entries made in the books of account are not conclusive and assessee's claim of deduction has to be examined keeping in view the provision of law. The learned Authorized Representative submitted, the Departmental Authorities have not disputed the fact that the assessee has paid an amount of ₹.2,31,76,750/- as per the direction of Hon'ble High Court of Karnataka. He submitted, the assessee has brought evidence on record to demonstrate that the liability to make the payment to BBMP

accrued in the impugned assessment year and the amount was also paid during the relevant previous year. Thus, he submitted, the payment being made to BBMP being related to construction business is allowable as business expenses under section 36 of the Act. The learned Authorized Representative submitted, by virtue of final order of Hon'ble Karnataka High Court, the assessee received back the amount paid to BBMP on 18.03.2014 and on receiving the said amount assessee offered it as income in the A.Y. 2014-15. In support of his contention the learned Authorized Representative drew our attention to copies of computation of income and return of income filed for the A.Y. 2014-15. He submitted, assessment for A.Y.2014-15 was also completed under section 143(3) of the Act assessing such income. In this context he drew our attention to copy of the assessment order dated 29.12.2016 for the A.Y.2014-15. The learned Authorized Representative submitted, when the income has been assessed on substantive basis in A.Y.2014-15, the addition made on protective basis in the impugned assessment year cannot survive. Without prejudice to aforesaid submission, the learned Authorized Representative submitted that the amount paid to BBMP, since, is related to the construction business, is allowable as business expenditure. In support of his contention the learned Authorized Representative relied upon following decisions.

1. Kedarnath Jute Manufacturing Co. Ltd V/s. CIT. 1971, 82 ITR 363 (SC)
2. CIT V/s. Bharat Carbon and Ribban Mfg. Co. P. Ltd., 1999 239 ITR 505 (SC).

3. Mema Engineers and Contractors Pvt. Ltd. V/s. ACIT ITA no. 654/Mum/2011 dated 13.06.2016.

7. The learned Departmental Representative strongly relied upon the observations of the CIT(A) and Assessing Officer.

8. We have considered rival submissions and perused material on record. We have also applied to the mind to the decisions relied upon. The dispute in the present appeal is confined to allowability of the amount of ₹.2,31,76,750/- paid to BBMP towards modification of planned section and occupancy certificate of the building project developed by the assessee. It is also relevant to observe, the aforesaid amount was paid by the assessee to BBMP in the previous year relevant to the assessment year under dispute as per the direction of the Hon'ble Karnataka High Court. It could be seen from the facts of record, in the return of income filed for the impugned assessment year the assessee claimed the amount paid to BBMP as an allowable deduction under section 43B. However, in course of the assessment proceeding the assessee modified its stand by claiming deduction on account of payment made to BBMP as business expenditure under section 36 of the Act. The Assessing Officer while completing the assessment disallowed the payment made to BBMP primarily on the ground that it was not routed through the Profit and Loss Account. Of course, the Assessing Officer made the disallowance / addition on protective basis. It is evident, though, subsequently the assessee made an application under section 154 of the Act stating that the amount has already been as income for A.Y.2014-15, therefore,

seeking deletion of the disallowance made in impugned assessment order. However, the application filed by the assessee was rejected. It is evident from the assessment order, during the assessment proceeding the assessee had contended that by virtue of final order passed by the Hon'ble Karnataka High Court, the BBMP is directed to refund back the amount of ₹.2,31,75,750/- to the assessee. The assessee had also submitted before the Assessing Officer that after receiving back the amount would offer it as income in A.Y.2014-15. From the computation of income filed along with the return of income for A.Y.2014-15, a copy of which is placed in the paper book, prima facie, it appears that after receiving back the amount of ₹.2,31,76,750/- from BBMP assessee has offered it as income. It is also seen that assessment for A.Y. 2014-15 has also been completed under section 143(3) of the Act. It is settled legal principle that a particular item of income cannot be brought to tax at the hands of the assessee twice. Therefore, if the amount of ₹.2,31,75,750/- has been offered as income in the assessment year 2014-15 and has also been assessed to tax by the Assessing Officer it cannot be brought to tax again in the impugned assessment year. Moreover, there is no dispute that in the impugned assessment year the Assessing Officer has added the amount of ₹.2,31,76,750/- on protective basis, meaning thereby, that the Assessing Officer wanted to safeguard the interest of Revenue by ensuring that the amount in dispute is assessed to tax on substantive basis in any one assessment year. If the assessee can demonstrate that the amount of ₹.2,31,76,750/- has been assessed to tax on substantive basis in A.Y.2014-15, the addition made on

protective basis in the impugned assessment year cannot survive. In view of the aforesaid, we direct the Assessing Officer to verify assessee's claim that the amount of ₹.2,31,76,750/- paid to BBMP on being refunded was offered as income in A.Y.2014-15. In case the aforesaid claim of the assessee is found to be correct, the addition made of ₹.2,31,76,750/- on protective basis in the impugned assessment year should be deleted. With the aforesaid observations, grounds raised are allowed for statistical purposes.

9. In the result, the appeal is allowed for statistical purposes.

*Order pronounced in the open court on 31.10.2018*

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 31.10.2018

MP

Sd/-

(Saktijit Dey)

न्यायिक सदस्य / Judicial Member

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**