

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.4742/Del./2015
(ASSESSMENT YEAR : 2010-11)**

DCIT, Circle 1 (1), vs. M/s. DLF Cyber City Developers Ltd.,
Gurgaon. 3rd Floor, Shopping Mall,
Arjun Marg, DLF City, Phase – 1,
Gurgaon.

(PAN : AACCD3572H)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri R.S. Singhvi & Satyajeet Goel, CAs
REVENUE BY : Shri Shailesh Kumar, Senior DR

Date of Hearing : 06.12.2018

Date of Order : 02.01.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

The appellant, DCIT, Circle 1 (1), Gurgaon (hereinafter referred to as 'the Revenue') by filing the present appeal, sought to set aside the impugned order dated 05.05.2015 passed by Ld. CIT (Appeals)-1, Gurgaon qua the Assessment Year 2010-11 on the grounds inter alia that :-

“1. Whether the ld. CIT(A) has erred in law and on facts of the case in taking cognizance of clarifications dated 18.1.2011 & 20.1.2011 issued by Ministry of Commerce for holding that

transfer of bare shell buildings by assessee to its co developer was a authorized operation ignoring the fact that as per sec 9(2) only Board of Approval is empowered to grant approval of SEZ or authorized operations in the SEZ and not the Ministry of Commerce and that the above clarifications/ letters have no legal sanctity as these were not issued by the competent authority of Board of Approval but by the Under Secretary and J. S, Ministry of Commerce respectively, who were not competent to issue any such clarification as per provision of sec 8(8) of the SEZ Act.

2. Whether the Ld. CIT(A) has failed to appreciate that Ministry of Commerce could not have issued clarification regarding approval given by BOA and whether such a clarification issued by an authority other than BOA has any legal sanctity or evidentiary value particularly when relevant activities mentioned in the clarification are not mentioned in the approval given by BOA to the assessee or to its co developer, and such a clarification is also in contravention of spirit of SEZ Act.

3. Whether the Ld. CIT(A) is justified in relying upon the clarifications issued by the Ministry of Commerce (SEZ section) without verifying that the same have been issued by the Board of Approval by following proper procedure and also whether CBDT was consulted before issue of such clarifications because it had the effect of diluting the disclaimer clause which was added on behest of CBDT.

4. Whether the Ld. CIT(A) has erred in law and facts of the case in holding the transfer of bare shells by assessee to co-developer was an authorized operation ignoring the fact that such transfer was not an authorized operation as per Notification No SO 1846 E dated 27 10.2006

5. Whether the Ld. CIT(A) has erred in law and facts of the case in holding the transfer of bare shells by assessee to co-developer was an authorized operation ignoring the fact that the BoA had only allowed such transfer subject to the condition that taxability of such transaction would be examined by IT authorities

6. Whether the Ld. CIT(A) has erred In law and on facts in Ignoring that even he clarification dated 20.01.11 only states that transfer of bare shells by assessee to its co-developers is allowed

and it no where says that it was an authorized operation eligible for benefits under the SEZ Act.

7. Whether the Ld CIT(A) has erred in law and on facts of the case in holding that the assessee is eligible for claim of deduction u/s 80IAS in respect of profits derived from transfer of built up space (bare shells buildings) completely ignoring that as per provisions of proviso to sec 80IAB (2) only income from transfer of operation and maintenance of SEZ IS eligible for deduction and not the profits derived from transfer of built up space(bare shells buildings) and such transfer of built up space is a violation of provisions of Rule 11 (5) of the SEZ Act which expressly prohibits sale of land or built up area In an SEZ.

8. Whether the Ld. CIT(A) has erred in law and on facts of the case in treating the act of construction of bare shell/ cold shell/ warm shell buildings and transfer thereof as a business of developing, operating and maintaining of SEZ and thereby holding the assessee eligible for deduction u/s 80IAB.

9. In doing so, the d. CIT(A) has failed to appreciate the spirit of proviso to sec. 80IAB (2) that the moment the developer transfers the operation & maintenance of SEZ to the co-developer, the deduction u/s 80IAB would be available to the co-developer for the remaining period in 10 consecutive years meaning thereby right of developer to claim benefits of SEZ would cease on transfer of operation & maintenance of SEZ to co-developer.

10. Whether the Ld. CIT(A) has erred in la and on facts in holding that AO has no jurisdiction to challenge the validity of approval given by Ministry of Commerce ignoring the fact that approval given by BOA or Ministry of Commerce was not absolute but subject to condition that the treatment of income arising out of transact on of transfer of bare shells by assessee to co-developer would be decided as per relevant provisions of IT Act.

11. Without prejudice to the above grounds, whether the Ld. CIT(A) has erred in law and on facts of the case in accepting the development consideration received by the assessee as being at market value. The Ld. CIT(A) has erred in summarily accepting rent capitalization method for determining development consideration of bare shells Ignoring the relevant

considerations/factors such as other methods of determination of sale consideration, prevalent rate of such type of commercial properties in the area etc.

12. Whether the Ld. CIT(A) has erred in law & on facts in holding capitalization rate of 9% as reasonable ignoring the fact that normal capitalization rate in the area of NCR 'S 12%

13. Whether the Ld CIT(A) has erred in law & on facts in holding that the bare shell buildings transferred to CO-developer was stock in trade as against capital asset.

14. Whether the Ld. CIT(A) has erred in law & on facts in Ignoring the alternate observation given by the AO in the assessment order that even if income from transfer of assets is to be considered as development income, the entire consideration cannot be treated as exempt u/s 80IAB, as it actually is rent for a period of 49 years and rent corresponding to the year under consideration is 1/49 of the total development consideration. Thus, the total deduction u/s 80IAB in the year under consideration can in no case exceed 1/49 of the total development consideration.

15. Whether the Ld. CIT(A) has erred in law, on facts and in circumstances of the case in holding that the signage income received from tenants is not income from other sources but is in the nature of Income from house property and allowed the standard deduction u/s 24(a) of the IT Act.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessee company is engaged in the business of leasing and sale of constructed property as explained in Form 3CD of audit report. During the year under assessment, assessee has shown development income of Rs.110.37 crores and the cost of development has been shown at Rs.17.21 crores in the profit & loss account. Assessee has also received lease rent of

constructed properties and income from land lease rent. Assessee company claimed deduction under section 80IAB of the Income-tax Act, 1961 (for short 'the Act') to the tune of Rs.93.09 crores on the development income earned during the year under assessment. Assessee claimed that development income has accrued to it on account of agreement entered into between assessee company and its co-developer, M/s. DLF Assets Private Limited (DAPL). The claim of the assessee is based upon the approval granted to the assessee by the Board of Approvals of Special Economic Zone (SEZ) to the co-developer agreement with the aforesaid DAPL. Declining the contentions raised by the assessee, AO, by following the earlier assessment years 2008-09 & 2009-10, observed that deduction u/s 80IAB of the Act is not admissible qua the profit derived from SEZ project at Gurgaon as the assessee had merely sold the bare shell building to the co-developer, M/s. DAPL, which is not an authorized operation under the Special Economic Zone Act, 2005 and the Special Economic Zone Rules, 2006. AO also held that signage income of Rs.3,79,04,198/- was assessable under the head 'income from other sources' rather than 'income from house property' and thereby made a disallowance of 30% of the annual value u/s 24(s) of the Act and thereby assessed the total

income at Rs.2,84,69,73,320/- as against the returned income of Rs.190,46,46,860/-.

3. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has allowed the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1 TO 14

5. Undisputedly, the AO has declined the deduction u/s 80IAB of the Act by following the AYs 2008-09 & 2009-10. It is also not in dispute that the assessee company is entitled for deduction u/s 80IAB for a period of 10 years and it is the third year of claiming deduction. It is also not in dispute that the assessee has claimed deduction u/s 80IAB on the basis of agreement entered into between the assessee company and its co-developer, M/s. DAPL with regard to DLF IT Park, Gurgaon developed by M/s. DAPL. It is also not in dispute that the assessee company has based its claim on the basis of approval granted to the assessee by the Board of

Approvals of Special Economic Zones to the co-developer agreement with aforesaid M/s. DAPL.

6. In the backdrop of the aforesaid undisputed fact, the Id. AR for the assessee contended that the identical issue has already been decided in its favour of the assessee by the *coordinate Bench of the Tribunal in assessee's own case in AY 2008-09 in ITA Nos.5469 & 5366/Del/2012* which fact has not been controverted by the Id. DR for the Revenue.

7. AO in order to decline the deduction u/s 80IAB proceeded on the premise that the claim of deduction of Rs.93,09,55,202/- is actually a profit accruing to the assessee from the sale of asset and not income and the sale of such nature is not authorized activities under the SEZ Act and as such, not eligible u/s 80IAB. However, this issue has been decided by the coordinate Bench of the Tribunal in assessee's own case for AY 2008-09 (supra).

8. The coordinate Bench of the Tribunal in assessee's own case for AY 2008-09 (supra), after discussing the relevant provisions of SEZ Act as well as relevant para of Board of Approvals according approval, proceeded to decide the issue in favour of the assessee by making following observations :-

“38. Thus, it is clear from the above that the provisions of SEZ Act shall have over riding effect even if anything inconsistent is contained in the Income Tax Act. The SEZ Act has been enacted

containing the specific legislation to be brought in other statutes. When the terms like SEZ, authorized operations, developers etc have been specifically defined under the SEZ Act, it is not open to any authority to relook at the meaning of terms already defined under the SEZ Act. In this regard, we also find support from the decision of the Tribunal in the case of assessee group itself for the A.Y 2007-08, the relevant paragraphs thereof is being reproduced hereunder :-

“page 17 para 5.3 The SEZ Act 2005, as well as, Income Tax Act, 1961 have placed ‘Developer’ and the ‘Co-developer at the same level i.e for Development (creating infrastructure facilities), maintenance and operations. It was in this context that SEZ BOA, under the aegis of Ministry of Commerce, approved conversion of ‘bare shell’ into ‘warm shell by the Co-Developer as ‘Authorized Operations’ Page 21 para 5.15 Assessee received clarification from BOA/Government of India, Ministry of Commerce and Industry, Deptt of Commerce (SEZ Section), Udyog Bhawan, New Delhi dated 18/1/2011 & 20/1/2011 BOA in exercise of its statutory powers approved business model of the Assessee clarified that under Rule 11(9) ‘sale of land’ is not permissible in a SEZ. However Co- Developer can take land on lease from Developer for definite period. Further SEZ buildings i.e. bare shell/cold shell can be transferred and handed over to the Co-developer on payment of consideration to Developer, this transfer is permissible and authorized as per SEZ Act and Rules. The correspondence with the SEZ Authorities on this issue is placed on the P.B at Pages 122 to 130 and its contents are referred to by the ld. Counsel. Thus as per specific clarifications by BOA the transfer of bare shell building on long term lease to approved co-developer are authorized activities under SEZ Act & Rules. Thus these clarifications also dispel the findings of CIT revising the assessment order and setting aside the same. 263 order and findings therein being contrary to legal provisions is liable to be quashed. The assessment order being in conformity with SEZ Act, Rules and provisions of Section 80IAB can neither be termed as erroneous or prejudicial to the interest or revenue.

Page 28 Para 6.9 Ld. Counsel contends that Ld. CIT's proposition to tax it as capital gains is against the basic principle of taxation as large scale real estate business activities continuously carried on by assessee and bare shell buildings declared as stock-in-trade in its books of accounts, as per its objects clause in its Memorandum and Articles of Association can be taxed only under the head Business Income.

Page 35 para 6.16 The letter of approval is issued by the Board by a statutory process of law and once it has been issued by the exclusive sanctioning authority, the consequential benefits that are available to a Developer cannot be denied. The Assessing Officer or the Commissioner of Income-tax exercising the power of revision under the Act cannot have any jurisdiction to question the validity of the legality of the authorized operations which have been approved by the Regulatory body of the Central Government i.e. BOA and attempt to dispute the same is contrary to the statutory provisions of the SEZ Act.

Para 6.17 BOA are appointed by the Central Government in various fields of giving benefits like SEZ, Customs and various other fiscal legislation, the income tax authorities cannot sit over the judgment of the BOA. By catena of judgments the courts have held that the approval accorded by such regulatory boards in development schemes cannot be questioned by tax authorities. Reline in this behalf is placed on:

-ApolloTyres Vs. CIT (2002) 9 SCC 1(SC)

-Malayala Manorama Co. Ltd Vs. CIT (2008) 12 SCC 612 (SC)

-CIT Vs. HCL Commet System & Service Ltd. 305 ITR 409 (SC)

-Marmo Classic Vs. Commissioner of Customs [2002 (143) ELT 153(Trib.--Mumbai)] affirmed by Hon'ble Supreme Court in [2003 (152) ELT A85(SC)];

-Lokash Chemical Works Vs. M. S. Mehta 1981 (8) ELT 235;

-Tital Medical System Pvt. Ltd. Vs. Collector 2003 (151) ELT 254 (SC)

-CESTAT Judgment in Hico Enterprises Vs. Commissioner 2005-(189)ELT 135 (Trib. LB) approved by Hon'ble Supreme Court in 2008 (228) ELT161 (SC);

-Atul Commodities Pvt. Ltd. Vs. Commissioner of Customs Cochin 2009 (235) ELT 385 (SC);

-M.J. Exports Ltd. vs. CEGAT 1992 (60) ELT 161 (SC);

The assessee has not sold any land but only transferred the bare shell buildings on lease. Therefore, there is no error as pointed out by Ld. CIT. Page 42 Para 9 The condition mentioned in Notification dated 27/10/2006 giving to assessing officer the right to examine the taxability of issue of 80IAB in the spirit of SEZ provision stands vindicated. Besides, we may hasten to add that apparently this rider appear to be made while approving the codeveloper agreement. This is possible applicable to co-developer and not the assessee as the condition was put during the course of approval of the agreement between assessee and the co-developer.

Page 46 para 9.5 Apropos the issue of sale of bare shell buildings being authorized activity, it is amply clear that the SEZ Act authorizes activities include construction of bare shell/cold shell/warm shell buildings and transfer thereof, BOA has approved it and clarified the same. There is enough material on the record to hold that the transfer of bare shell buildings to co-developers constitute authorized activity. Thus, we see no error on any count as held by CIT in the order of assessing officer allowing deduction u/s 80IAB."

39. *We thus find that assessee is a developer under the SEZ Act and is in the business of developing a SEZ, the SEZ has been notified on the first day of April 2005 under the Special Economic Zone Act 2005 ; and the profits have been derived from the business of development, operation and maintenance of SEZ. We thus fully agree with the finding of the Ld. CIT(A) that all the conditions as required to be specified under the SEZ Act/Rules are fulfilled and the assessee is approved developer for all the intent and purposes of Section 80 IAB I.T of the Act. Consequent upon approval granted by the BOA for transfer of bare shell to the co-developer, the profits arising to the assessee from such an authorized transaction are eligible for deduction u/s 80IAB of the Act. For a ready reference provisions laid down u/s 80IAB (1) of the Act are being reproduced hereunder:-*

"80IAB(1)- Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zone Act, 2 there shall, in accordance with and subject to the provisions of this sect' be allowed, in computing the total income of the assessee, a deduction of amount equal to one hundred per cent, of the profits and gains derived from such business for ten consecutive assessment years."

9. Following the decision rendered by the coordinate Bench of the Tribunal in assessee's own case for AY 2008-09 (supra) and in view of the fact that the year under assessment is third year of claiming deduction, it is proved on file that assessee company is a developer under the SEZ Act and the SEZ is duly notified and all the profits derived by the assessee company from the business of development operation and maintenance of SEZ. Consequently, on the basis of approval given by the Board of Approvals for the transfer of bare shell to the co-developer as per agreement, the profit arising to the assessee from the aforesaid authorized transactions is eligible for deduction u/s 80IAB of the Act. So, we find no illegality or perversity in the findings returned by Id. CIT (A), hence grounds no.1 to 14 are determined against the Revenue.

GROUND NO.15

10. AO treated the signage income received by the assessee company from tenants as 'income from other sources' rather than 'income from house property' and thereby made disallowance of deduction u/s 24(a) of the Act to the tune of Rs.1,13,71,259/-. It is the case of the assessee that signage income of Rs.3,79,04,198/- has been received from tenants to whom the buildings have been

given on rent and not to any outside parties. The lessee was allowed to put signage on the location where their offices are situated which are not advertisement hoardings and the assessee company has not received signage income from any outside party other than the tenants for putting the signage in the company's buildings. Assessee company also relied upon Memorandum of Understanding dated 21.05.2007 entered into between the assessee company and one of the tenants, M/s. Global Space Pvt. Ltd.. The Id. CIT (A) extracted the relevant portion of MoU in the impugned order and the same is reproduced for ready perusal as under :-

“Subject to all local laws applicable, Lessor shall through its architect identify the locations and provide space for signage at the atrium/floor occupied by the LESSEE, as approved by the architect and the LESSEE will be allowed to put signage on such location. All taxes including service tax, duties, rates, cesses, costs and charges relating to the signage payable to the concerned authorities shall be borne and paid by LESSEE.”

11. The Id. CIT (A) also relied upon the decision rendered by the Delhi Bench of the Tribunal in case cited as ***Manpreet Singh vs. ITO – (2015) 53 taxmann.com 244 (ITAT Delhi)*** wherein it was held that, *“the income earned by the assessee for renting of terrace for installation of mobile antenna was taxable as ‘income from*

house property' and as such deduction u/s 24(a) @ 30% of the annual value was allowable."

12. Keeping in view the aforesaid facts and circumstances of the case, we are of the considered view that when it is not in dispute that the assessee company has derived the signage income from the tenants from the space owned by the assessee company and not from the outsiders as it allowed tenants to use the space at the atrium/ different floors for putting signage, the signage income has to be treated as 'income from house property' and as such is eligible for deduction u/s 24(a) of the Act @ 30% of such income. So, finding no illegality or perversity in the findings returned by Id. CIT (A) on this issue, this ground is determined against the Revenue.

13. Resultantly, the appeal filed by the Revenue is dismissed.

Order pronounced in open court on this 2nd day of January, 2019.

**Sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 2nd day of January, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-1, Gurgaon.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.