**आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "ए" पुणे में**
**IN THE INCOME TAX APPELLATE TRIBUNAL**
**PUNE BENCH "A", PUNE**

**सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष**
**BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM**

**आयकर अपील सं. / ITA No.339/PUN/2016**
**निर्धारण वर्ष / Assessment Year : 2008-09**

Pride Purple Developers,
504, Corporate Plaza,
Senapati Bapat Road,
Pune.

PAN : AAHFP4564H .... अपीलार्थी/Appellant

Vs.

DCIT, Central Circle- 1(1),
Pune. .... प्रत्यर्थी / Respondent

**आयकर अपील सं. / ITA No.427/PUN/2016**
**निर्धारण वर्ष / Assessment Year : 2008-09**

DCIT, Central Circle- 1(1),
Pune. .... अपीलार्थी/Appellant

Vs.

Pride Purple Developers,
504, Corporate Plaza,
Next to Chaturshingi Temple,
Pune.

PAN : AAHFP4564H .... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Nikhil Pathak
Shri Suhash P. Bora
प्रत्यर्थी की ओर से / Respondent by : Shri Shashibhushan Prasad

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| सुनवाई की तारीख / **Date of Hearing : 12.12.2018** | | घोषणा की तारीख / **Date of Pronouncement: 11.02.2019** |

## आदेश / ORDER

**PER D. KARUNAKARA RAO, AM :**

These are cross-appeals filed by the assessee and the Revenue against the order of CIT(A)-13, Pune dated 31.12.2015 for the Assessment Year 2008-09.

2. The grounds raised by the assessee in ITA No.339/PUN/2016 are as under :-

> *"1. The ld. CIT(A) erred in confirming the disallowance of the claim of deduction U/Sec 80IB(10) made by A.O. by holding that the amount collected as MSEB recovery is not eligible for deduction U/Sec 80IB(10) on the ground that there is no element of profit in this collection.*
> *2. The ld. CIT(A) erred in not appreciating the contention of the appellant that collection of MSEB charges are a part of profit derived from housing project and are entitled for deduction U/sec. 80IB(10).*
> *3. The appellant may kindly be permitted to add to or alter any of grounds of appeal, if deemed necessary.*

3. The grounds raised by the Revenue in ITA No.427/PUN/2016 are as under :-

> *"1. On the facts and the circumstances of the case and in law, the Ld. CIT(A) was not justified in allowing the deduction u/s 80IB(10) of the Income Tax Act 1961 by holding that the receipts from sale of "parking space" and recovery from MSEB are eligible for deduction u/s 80IB(10) as income derived from sale of units of Housing Project.*
> *2. On the fact and the circumstances of the case and in law, the Ld. CIT(A) was not justified in allowing the deduction u/s 80IB(10) of the Income Tax Act, 1961 as the assessee was in violation of the provisions of clause (f) of Section 80IB(10) of the Act, by allotting 4 flats to the two sets of the members of same family.*
> *3. On the facts and the circumstances of the case and in law, the Ld. CIT(A) was not justified in allowing the appeal of the assessee when it was factually confirmed during valuation by registered valuer that the assessee had not complied with the provisions of clause (d) of Sec.80IB(10) of the Income Tax Act 1961.*
> *4. The order of the Ld. CIT(A) may be vacated and the assessing officer be restored.*
> *5. The appellant craves leave to add, alter amend and modify any of the above grounds of appeal."*

4. From the above, it is evident that the assessee claimed deduction u/s 80IB(10) of the Act amounting to Rs.19.28 crores (rounded off) and Assessing Officer denied the said claim of deduction fully on the grounds of certain violations of the provisions. The CIT(A) partly allowed appeal of the assessee.

5. Aggrieved with the order of the CIT(A), both assessee and Revenue filed the appeals. While the assessee is aggrieved with the manner of computing the allowable deduction u/s 80IB(10) of the Act after exclusion

of MSEB recoveries from the purview of deduction. The Revenue is aggrieved with reference to the relief granted by the CIT(A) to the assessee on accounts of (i) parking space receipts and (ii) MSEB recovery on one side. Revenue is also aggrieved with the relief of deduction when the housing project includes the flats with the violation with respect to the specified sq.ft. of the flat size. The Revenue is also aggrieved with the relief granted by the CIT(A) with reference to clause (d) of section 80IB(10) of the Act.

6. We shall now take up the assessee's appeal (ITA No.339/PUN/2016).

**ITA No.339/PUN/2016 – By Assessee**

7. The only issue, in the appeal of the assessee, relates to the decision of the CIT(A) regarding the exclusion of MSEB recovery in computing the allowable deduction u/s 80IB(10) of the Act. The relevant facts include that the assessee incurred the expenditure relating to the power supply/electricity to the flats connected to the housing project. The assessee reported receiving the MSEB receipts of Rs.2,98,65,000/- from the House-buyers (Page 11 of Schedule 6 of the Paper Book/Page 73 to 82 of the Paper Book). No details are available on the records on the expenditure details on account of the MSEB expenditure incurred by the assessee. Assessee claims that the MSEB receipts constitute the eligible profits of the assessee and claimed deduction u/s 80IB(10) of the Act. *Per contra*, the Revenue held that the said MSEB receipt is basically constitutes reimbursement of the expenditure already incurred by the assessee on the Housing Project. There is no eligible profit element involved in such receipts. Therefore, the same is out of from the scope of deduction 80IB(10) of the Act. On this aspect of deduction, the CIT(A) confirmed the same

giving following findings in para 2.2.11 of his order. For the sake of completeness, the said para is extracted hereunder :-

> *"2.2.11 As far as denial of the deduction of MSEB recovery is concerned, I agree with the learned AO. According to me, use of the word 'recovery' suggests that it is in* ***nature of reimbursement****. It is obvious that the Appellant would have paid electricity and other charges to the MSEB on behalf of the flat purchasers and recovered the same from the flat purchasers. Accordingly, there is* ***no element of profit in this recovery*** *on which, dispute would arise as to whether deduction u/s 80IB(10) would be available on such receipts or not. Accordingly, I confirm the decision of the learned AO to* ***deny the deduction claimed by the Appellant*** *u/s 80IB(10) on MSEB recovery charges."*

8. Before us, on this issue, ld. AR for the assessee submitted that the MSEB expenditure is part of the work-in-progress. Further, ld. AR submitted that the MSEB receipts are closely derived from the Housing Project of the assessee and are quantitatively more than the MSEB expenditure incurred by the assessee. Further, Ld. AR argued that these receipts are derived from the Housing Project. Therefore, the assessee is entitled to deduction u/s 80IB(10) of the Act in respect of the gross MSEB recoveries. Without prejudice, Ld. AR submitted for grant of deduction in respect of excess recoveries over and above the MSEB expenditure.

9. On the other hand, Ld. DR relied heavily on the order of the Assessing Officer/CIT(A). According to Ld. DR, the MSEB recoveries are not the eligible profits of the assessee. On the alternate submission of Ld. AR, Ld. DR submitted that this argument is raised for the first time before the Tribunal. Hence, this argument needs to visit the file of the Assessing Officer.

10. We have heard both parties on the issue of allowing deduction u/s 80IB(10) of the Act in respect of the MSEB recoveries in general and the excess recoveries in particular. So far as eligibility of MSEB recoveries are concerned, we find the assessee incurred the expenditure first and collected

the same from the flat buyers. Therefore, the same constitutes the 'reimbursement' by the Homebuyers. In principle, there cannot be accrual of income on these recoveries to the assessee in respect to the MSEB receipts. Hence, on this reasoning, we agree with the conclusions drawn by the Assessing Officer and the CIT(A). Thus, the MSEB receipts do not constitute the 'eligible profits' of the project. Regarding the excess recoveries over and above the MSEB expenditure, whose details are not readily available before us, we find that assessee reported excess recoveries. There is no dispute on the same. There is no finding of facts on these excess recoveries from the Assessing Officer/CIT(A). In our view, considering the principle of natural justice, the Assessing Officer needs to examine the facts relating to the said excess recoveries. After quantifying the same, Assessing Officer also required to examine the allowability of the deduction u/s 80IB(10) of the Act on the said excess recoveries. Assessing Officer shall examine the circumstances leading to such excess recoveries and if the same falls within the scope of the 'eligible profits' for claim of deduction u/s 80IB(10) of the Act. Assessing Officer shall grant reasonable opportunity of being heard to the assessee. With these comments/directions, we remand this issue of alternate submission to the file of the Assessing Officer for want of his decision on facts. Accordingly, the ground raised by the assessee is partly allowed for statistical purposes.

11. In the result, the appeal of the assessee is partly allowed for statistical purposes.

**ITA No.427/PUN/2016 – By Revenue**

12. Coming to the appeal of the Revenue (ITA No.427/PUN/2016), the Revenue is aggrieved with the decision of the CIT(A) in granting deduction

u/s 80IB(10) of the Act in respect of parking space receipts; the allegation of violation of flat size of the housing project; and also the alleged violations of provisions relating to the commercial areas specified in clause (d) of the said section 80IB(10) of the Act. The decision of the CIT(A) on these issues are discussed in para 2.2.6 & 2.2.7 relating to commercial areas and para 2.2.8 relating to four flats of the housing project and para 2.2.10 relating to car parking spaces. For the sake completeness, the said paragraphs are extracted as follows :-

> *"**Commercial Areas :***
> *2.2.6 On disallowance of the deduction on account of the existence of the commercial units, I agree with the learned AO on his observation that the Appellant from the beginning wanted to have 25 commercial units in the project. However, I do not agree with the learned AO's conclusion that the deduction u/s 80IB(10) can be denied on this ground. This is for the reason that there is no provision in the law to consider 'intention' of the Appellant while getting the project approved. The project was approved by the local authority as residential project. Unless there is a case of fraud or misrepresentation on part of the Appellant, approval granted by the competent authority – local authority – would be taken as correct. The Income Tax authorities are neither superior authority nor appellate authority to the local authority. Therefore, I do not agree with the learned AO that the deduction should be disallowed merely because the project had provision of the commercial units from the beginning.*
> *2.2.7 It is matter of fact that the project including impugned 25 units was approved as residential project and completion certificate was also granted for the residential use. The valuer appointed by the Department in 2009 has also noted there was no commercial area in the project. This is supported by the fact that application was filed for the change in usage by the users, for which, necessary fee was paid by one of the Appellant group's company and indemnity was signed by the CMD of the Appellant group. These facts are enough to prove that the Appellant wanted to have 25 units as commercial units from the beginning. However, it does not take away the fact that when project was approved and occupation certificate was granted according its plan of residential use. Commercial unit did not exist when the local authority granted it completion certificate. Local authority would not have granted completion certificate to the project if commercial units were existing at the time of the project because the project was approved as a residential project. Therefore, the deduction u/s 80IB(10) cannot be denied on this ground. There is no provision in the section 80IB(10) to withdraw the deduction, if at the later stage usage is changed from the residential to commercial. It may be mentioned that such provisions exist in section 54, 54B etc of the Income Tax Act allowing the AO to withdraw the deduction. However, in absence of the similar provision in section 80IB, I hold that the deduction u/s 80IB(10) is available to the Appellant.*
>
> ***Members of four flats of the housing project :***
> *2.2.8 With regard to the denial of the deduction because certain flat areas allotted to one family exceeded 1,500 sq.ft., I find that the learned AO did not find any such violation in the original assessment Order, and had allowed the deduction u/s 80IB(10). This violation was noticed in the report of the*

*second valuer. Therefore, it would be logical to presume that joining of flats took place after the first report of the valuer. It is obvious that the developer or a builder cannot be penalised for the joining of flats done by the flat owners. I do not find any evidence on record to establish that joining of flats was done by the Appellant at the time of handing over possession to the purchasers. In absence of any such evidence, it would not be proper to deny the deduction u/s 80IB(10) to the Appellant. Accordingly, I hold that deduction u/s 80IB(10) is available to the Appellant.*

***Car Parking Spaces :***

*2.2.10 However, I finds that Section 80IB(10) provides the deduction on the profits earned from the 'housing project'. The term 'housing project' in my view, encompasses other streams of receipts apart from income earned from sale of houses. I find that honourable Mumbai bench of the ITAT in the case of ACIT v.* ***Vaman Estates*** *ITA No.7570/Mum/2011 dated 19.10.2012 has allowed the deduction u/s 80IB(10) on receipt on account of sale of car parking spaces. Therefore, I am of the view that the deduction u/s 80IB(10) be granted on receipts from sale of parking. I direct the learned AO to grant the deduction u/s 80IB(10) on receipts from sale of parking."*

13. From the above, we find that the CIT(A) held that the car parking receipts/rents are eligible for deduction and in this regard, CIT(A) relied on the order of the Tribunal in case of Vaman Estates (supra). No contrary judgement/order is brought to our notice by the Revenue. Therefore, we find the order of the CIT(A) vide para 2.2.10 above is fair and reasonable. Hence, it does not call for our interference.

14. Regarding the allegation of violations of flat-size exceeding the specified limits, it is the finding of the CIT(A) that the act of merger of flats, leading to exceeding of the limits, is done by the flat-buyers and not by the assessee. Accordingly, the CIT(A) decided the issue in favour of the assessee. On perusal of records, we find that four flats were allotted to one family i.e. one flat to mother & daughter and second to father & daughter. The combined area of both the flats was more than 1500 sq.ft.. Maybe two flats were not merged; but were allotted to husband-wife for conjoint living. When one flat is to wife and second to husband, then as family, it exceeds 1500 sq.ft. and because of this violation of provisions of Section 80IB(10) of the Act, the assessee is not entitled to deduction on profits of sale of these flats. However, assessee is entitled to pro rata deduction on balance flats.

Thus, we direct the Assessing Officer to compute pro rata deduction u/s.80IB(10) of the Act.

15. Finally, regarding the issue of commercial area also, we find that project "Housing Project" was approved well prior to the amendment to section 80IB(10) of the Act by the Finance (No.2) Act, 2004. In our view, the decision taken by the CIT(A) in para 2.2.6 extracted above (supra) is fair and reasonable. Hence, it does not call for our interference. Thus, the order of the CIT(A) is fair and reasonable and does not call for any interference. Accordingly, the grounds raised by the Revenue are dismissed.

16. In the result, the appeal of the Revenue is partly allowed.

17. Resultantly, the appeal of the assessee is partly allowed for statistical purposes and the appeal of the Revenue is partly allowed.

Order pronounced on this 11th day of February, 2019.

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| **Sd/-** | **Sd/-** |
| **(SUSHMA CHOWLA)** | **(D. KARUNAKARA RAO)** |
| **न्यायिक सदस्य / JUDICIAL MEMBER** | **लेखा सदस्य / ACCOUNTANT MEMBER** |

पुणे / Pune; दिनांक Dated : 11th February, 2019.
*Sujeet*

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune;
4. The CCIT (IT), Mumbai;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**ए**" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

**आदेशानुसार**/ BY ORDER,

सत्यापित प्रति //True Copy//

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