

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

BEFORE SHRI ANIL CHATURVEDI, AM AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं / ITA Nos.430 & 431/PUN/2017
निर्धारण वर्ष / Assessment Years : 2007-08 and 2012-13

The Dy. Commissioner of Income Tax,
Circle – 7, Pune.

..... अपीलार्थी /
Appellant

बनाम v/s

M/s. Kumar Builder Construction,
10th Floor, KBC, CTS-29,
Bund Garden Road, Camp,
Pune – 411001.

..... प्रत्यर्थी /
Respondent

PAN : AAHFK7992A.

Assessee by : Shri Nikhil Pathak.

Revenue by : Ms. Nandita Kanchan

सुनवाई की तारीख / Date of Hearing : 27.02.2019	घोषणा की तारीख / Date of Pronouncement: 26.03.2019
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आदेश / **ORDER**

PER ANIL CHATURVEDI, AM :

These two appeals filed by the Revenue are emanating out of a consolidated order of Commissioner of Income Tax (A), Pune-5, Pune dated 12.10.2016 for the assessment years 2007-08 and 2012-13, respectively.

2. Before us at the outset, both the parties submitted that though the appeals filed by the Revenue are for two different assessment years but the facts and issues involved in both the appeals are identical except for the assessment year and the amounts involved and the

Ld.CIT(A) has also passed a consolidated order and therefore the submissions made by them while arguing one appeal would be equally applicable to the other appeal also and thus, both the appeals can be heard together. In view of the aforesaid submissions of both the parties, we, for the sake of convenience, proceed to dispose of both the appeals by a consolidated order.

3. The relevant facts as culled out from the material on record are as under :-

Assessee is a partnership firm stated to be engaged in the business of Promoter and Builders. Assessee electronically filed its original return of income for A.Y. 2007-08 on 31.10.2007 declaring total income of Rs.1,13,50,042/-. The assessment was initially processed u/s 143(3) of the Act on 30.12.2009 by denying the claim of deduction u/s 80IB(10) of Rs.6,85,84,507/-. Subsequently, the case was re-opened by issuing notice u/s 148 of the Act on 29.03.2014 which was served on the assessee. Thereafter, the case was taken up for scrutiny and assessment was framed u/s 143 r.w.s. 147 of the Act vide order dt.13.03.2015 and the total income was determined at Rs.21,97,74,320/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide consolidated order dated 12.10.2016 for A.Ys. 2007-08 and 2012-13, granted substantial relief to the assessee. Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us and has raised the following effective ground :

“Whether on the facts and circumstances of the case, the Ld.CIT(A) was right in allowing the deduction u/s 80IB(10) of the Act, 1961 on pro rata basis in respect of “Kumar Shantiniketan” projects.”

3.1. Similar ground has been raised by the Revenue in ITA No.431/PUN/2017 for A.Y. 2012-13.

4. During the course of re-assessment proceedings, AO noticed that assessee had claimed deduction u/s 80IB(10) of the Act for the project "Kumar Shantinekatan" wherein two flats in "D" Building having garden area of 236.03 sq.ft was not included and counted while measuring built up area of those said two flats. He noted that if the garden area was included in the built up area, the total built up area of the two flats would exceed the stipulated area of 1500 sq.ft thereby violating the provisions of Sec.80IB(10) of the Act. The assessee was therefore show caused as to why the claim of deduction should not be disallowed. The assessee made submissions which were not found acceptable to the AO. AO was of the view that for claiming deduction, all the conditions stipulated in Sec.80IB(10) of the Act has to be followed in toto. In the present case, he noted that since two flats were having more than 1500 sq.ft, there was violation of the condition. He also noted that in A.Y. 2008-09, similar issue was involved in assessee's case and AO has disallowed the claim of deduction. He therefore following the order of his predecessor denied the entire claim of deduction of Rs.13,98,39,769/- u/s 80IB(10) of the Act. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who noted that the Tribunal in assessee's own case in A.Y. 2008-09 and 2009-10 vide order dt.15.04.2013 has directed to allow the deduction u/s 80IB(10) of the Act on pro rata basis with reference to the qualifying residential units and the disallowance be restricted only to those residential units where the built up area exceeds the prescribed

limit. He thus decided the issue in assessee's favour by observing as under :

"4.3 I have carefully perused the material on record and submission made by the Appellant and the ITAT Pune's order dated 15.04.2013 in Appellant's case. The issue at hand has been decided by the Hon'ble ITAT in Appellant's case vide order ITA No. 1164/PN/2012-A.Y.2008-09 and ITA No.2210/PN/2012- A.Y. 2009-10 where in the following paragraphs it has been held as under:-

"9. After going through the above submission and material on record, we find that the assessee has claimed deduction u/s. 80IB(10) in respect of project Kumar Shantiniketan. According to the Assessing Officer, built up area of two flats (Flats No.3 and 4 in building 'D' exceeded 1500 sq. ft. which is not in dispute. Now the alternate contention before us is whether deduction should be allowed on proportionate basis in respect of units whose built up area is less than 1500 sq. ft. We find that ITAT, Pune "A" Bench in Rohan Homes in ITA. No. 423/PN/2011 dated 31.03.2013 wherein Tribunal has held as under:

"11. We have carefully considered the aforesaid plea set up by the learned CIT-DR. On a careful reading of that the entire judgment of Bombay high Court in the case of Vandana Properties (supra), we do not find any - support to the proposition that proportionate deduction u/s 80IB(10) of the

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13 The Calcutta Bench of the Tribunal in the case of Bengal Ambuja Housing development Ltd. (supra) held as under:-

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Nothing contrary was brought to our knowledge and above decision in Rohan Homes (supra) laid down that assessee will not be eligible for deduction in respect to the units exceeding prescribed limit, but he' will be entitled for balance residential units which are within the prescribed limits of size of 1500 sq. ft. as applicable to the Pune Municipal Corporation. We find that the ITAT Pune 'A' Bench in the case of Ankit Enterprises Vs. ITO and others, ITA No.156/PN/2011, has also held as under :-

"16. Respectfully following the decision of the Tribunal in the case of D. S. Kulkarni Developers Ltd. (supra).....

17. So far as the decision relied on by the learned DR we find those are distinguishable and not applicable to the facts of the present case.....

18. So far as the decision of the jurisdictional High Court in the case of Vandana Properties (supra) is concerned we

19. In the result, the appeal filed by the revenue is dismissed and the appeal filed by the assessee is partly allowed.”

9.1 In view of above, we find that the ITAT Pune Bench in the case of Rohan Homes (supra) considered all the decision and held that prorata deduction is to be allowed. In the said case, Tribunal has discussed the decision of Hon'ble Bombay High Court in the case of Vandana Properties which was relied upon by the Ld. Departmental Representative, inter alia observed that the said decision of Hon'ble Bombay High Court in Vandana Properties is not applicable to the issue of prorata deduction since question involved was entirely different. In Para 11 of Rohan Homes (supra), the only issued before the Hon'ble High Court was as to whether construction of one building containing multiple residential units can be considered as project by itself. So the decision of Vandana Properties does not help the Revenue. This view is fortified by the decision of the ITAT Mumbai Bench in Ekta Promoters Pvt. Ltd. 3649/Mum/2009 dated 25.05.2011 pertaining to AY. 2004-05 relying upon ITAT Kolkata Bench has as also the decision in the case of Brigade Enterprises, it has been held that deduction u/s 80IB(10) was to be allowed on prorata basis with reference to qualifying residential units and assessee would not be denied claim for deduction u/s 80IB(10) if some of its residential units are of built up area exceeding prescribed limit in clause (c) of section 80IB(10) of the Act.

“.....”

It is also clarified that Madras High Court in the case of Vishwas Promoters 81 DTR 68 has held that even if built up area of few units exceed 1500 sq. ft. assessee would not lose deduction in entirely and prorata deduction would be allowed. This takes care of the objection of the Ld. Departmental Representative in this regard. In view of above discussion we set aside the order of the CIT(A) on the issue and direct the Assessing Officer to re-work and allow deduction u/s 80IB(10) of the Act to the Assessee.”

4.4 In view of the above facts and following the decision of the Hon'ble Pune ITAT in this regard for A.Yrs. 2008-09 & 2009-10 in Appellant's own case, the Assessing Officer is directed to rework the deduction in respect of the Appellant's project 'Kumar Shantiniketan' as per directions issued by the Hon'ble ITAT in its order dated 15.04.2013. Ground of Appeal No.1 raised by the Appellant is therefore, held to be allowed. The Appellant succeeds in Ground No.1 for both the years.”

4.1. As far as A.Y. 2012-13 is concerned, AO noted that assessee had claimed deduction of Rs.2,82,89,304/- u/s 80IB(10) of the Act for the project “Kumar Shantiniketan”. It was noticed that the flats bearing Nos.3 and 4 at “D” Building with garden area of 236.03 sq.ft and the garden area was not considered in that built up area of the flats. AO had observed that if the garden area was included in the built up area then the maximum permissible built up area would exceed the mandatory requirement prescribed u/s 80IB(10) of the Act. He

accordingly denied the claim of deduction u/s 80IB(10) of the Act for the entire project. He also noted that assessee has claimed Rs.12,91,69,257/- u/s 80IB(10) of the Act for the project "Kumar Kruti" which comprises of 5 buildings. He noticed that in A.Y. 2008-09, AO had observed that the project of "Kumar Kruti" was found to be part of one bigger project "Kumar City" which was sanctioned on 08.03.2003. The original plan was subsequently revised several times and the revised plan was sanctioned on 02.03.2005 and there were 12 buildings from A-1 to A-12. AO thus noted that the project of "Kumar Kruti" was part of bigger project of "Kumar City" which was sanctioned on 08.08.2003 which should have been completed by 31.03.2008 but the same was not completed till 31.03.2008 resulting into violation of clause (a) of Sec.80IB(10) of the Act. It was further noticed that in the project of "Kumar Kruti", 8 flats were found to be having area of more than maximum permissible area of 1500 sq.ft if garden area was included in the flat. It was noted that if the garden area was included in the permissible area of flat, it was resulted into the area being more than 1500 sq. ft. being the prescribed maximum permissible area resulting into violation of clause (c) of Sec. 80IB(10) of the Act. In view of the aforesaid violations, the AO had denied the claim of deduction for the entire project.

With respect to A.Y. 2012-13, Ld.CIT(A) had allowed the claim of the assessee by observing as under :

"5.3 I have perused the material on record and submission made by the Appellant carefully and the ITAT Pune's common order dated 15.04.2013 in Appellant's case for A.Yrs. 2008-09 and 2009-10 has been perused. The issue at hand has been decided by the Hon'ble ITAT in Appellant's case vide order ITA. No. 1164/PN/2012 - A.Y.2008-09 and ITA No.2210/PN/ 2012 - A.Y. 2009-10 where in the following paragraphs it has been held as under:-

“17. After going through the above submission and material on record, we find that the assessee has disallowed the claim of the assessee on three account viz., the project Kuamr Kruti is part of larger project named Kumar City project, assessee should have completed the project by 31.03.2008. Further, the commercial area in Kumar City project is more than limits prescribed, the said condition has also been violated and lastly built up area of eight flats exceed 1500 sq. ft. which is also violation of conditions prescribed u/s. 80IB(10). As discussed above, following the reasoning in project Kumar Shantiniketan, we have allowed deduction on prorates basis with regard to completed eligible flats vide pars 9 of this order. Accordingly Assessing Officer is directed to rework deduction of claim u/s. 80IB(10) on eligible flats after excluding eight flats whose area exceed prescribed limit of area.

18. Regarding two remaining issues we find no dispute that project Kumar Kruti is a part of Kumar City project as far as layout dated 08.08.2003 is concerned. There is no dispute that there are common layout for project Kumar Kruti and Kumar City project. The stand of the assessee has been that project Kumar Kruti is an independent project and not part of Kumar City project. Simply because project Kurnar Kruti is a part of Kumar city project in the layout, it is not justified in holding that project Kumar Kruti is part of Kumar City project. It is obviously clear from building plan of Kumar City project dated 13.10.2003 as enclosed on page 5 of the Paperbook wherein area on which Kumar Kruti project was to be constructed had been shown blank. It makes abundantly clear that the assessee has not conceived the building plant for project Kumar Kruti prior to 01.04.2004. In fact building plan for project Kumar Kruti was sanctioned on 26.07.2006 for the first time which is evident from building plan sanction placed on page 8 of the Paperbook. Thus, project Kumar Kruti has been independently sanctioned vide building plan dated 26.07.2006. In this situation, the Assessing Officer was not justified in holding that, since layout plan is common, project Kumar Kruti is a part of Kumar City project. Even if there is a common layout plan, but buildings plans are obtained independently/ separately for various projects, it cannot be held that all projects are one and part of same project. As per Explanation to clause (a) of section 80IB(10), the date of approval of housing project means the date on which building plan was approved by the local authority. It makes clear that building plan and layout plan are two different sanctions. It is not in dispute that building plan for project Kumar Kruti was sanctioned independently on 26.07.2006. Even then, the Assessing Officer has denied deduction on the ground that there is a common layout for the both the projects, i.e., project Kumar and Kumar City project, as we have clarified above layout should not be confused with the building plan. Layout plan is only a conceptual plan giving general idea of development of the land. However, building plan is the plan as per which construction is promoted as per details sanctions as per relevant building bye laws applicable to the area. Even authorities for sanction of layout plan and building plan are different. As building plan for project Kumar Kruti was sanctioned on 26.07.2006, authorities below were not justified in holding that this project is a part of Kumar City project. Even if there is a common layout plan but independent building plan, the project approved under separate building plans is to be considered as independent project and not part of larger project. We find that ITAT Pune 'A' Bench in Apoorva Properties and Estates Pvt. Ltd. vs. DCIT dated 21.08.2009.....

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20. Our finding is fortified by the ratio laid down by the ITAT Pune Bench in Adiya Developers discussed above. We also find that ITAT

Pune Bench in DCIT vs. Ankit Enterprises had occasion to decide similar issue and taking all facts and circumstances into consideration, decided the similar issue in favour of assessee wherein sanction of building plan has been made basis for holding independent project for the purpose of claiming deduction u/s. 80IB(10). We find that ITAT Pune Bench in P.V. Mahadkar & Associates in ITAT No. 1117/PN/2010 has discussed and decided similar issue in favour of assessee by observing as under:-

21. In view of above, project Kumar Kruti was independent project since building plan of the said project was sanctioned independently on 26.07.2006. In these facts and circumstances, Revenue authorities below were not justified in holding that project Kumar Kruti is part of Kumar City project other point on which the Assessing officer has denied the deduction is that commercial area in said project exceeded the limits prescribed u/s 80IB(10). Since we have held that project Kumar Kruti independent of Kumar City project, and there is no commercial area in project Kumar Kruti then there is no question of violating the limits of commercial area as prescribed u/s. 80IB(10) with regard to deduction of claim u/s. 80IB(10) in respect of project Kumar Kruti in question. Regarding prorata deduction u/s. 80IB(10) of the Act, we have already held that the assessee is eligible for deduction in respect of eligible flats not exceeding prescribed limit of 1500 sq. ft. after excluding flats exceeding 1500 sq. ft. and the Assessing Officer has been directed to rework deduction accordingly. In view of above, the Assessing Officer is directed to allow the claim of assessee in respect of project Kumar Kruti for the reasons discussed above.

22. As a result, this appeal of the assessee is partly allowed.

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The first issue is with regard to prorata claim of deduction u/s 80IB(10) in respect of eligible flats in the project Kumar Kruti while few flats exceeded the prescribed limit of 1500 sq.ft. The issue of prorata deduction has been allowed by us in A.Y. 2008-09 vide para 16 of this order. Facts being similar the Assessing Officer is directed to rework the deduction in respect of eligible flats as discussed above.”

5.4 In view of the above facts and following the decision of Hon'ble Pune ITAT in this regard for the AYrs. 2008-09 and 2009-10 in Appellants own case, the Assessing Officer is directed to rework the deduction in respect of the Appellant's project 'Kumar Kruti' as per the directions issued by the Hon'ble ITAT in its order dated 15.04.2013. Ground of Appeal No.2 for AY 2012-13 raised by the Appellant is therefore, held to be allowed. The Appellant succeeds in this Ground of Appeal.”

Aggrieved by the order of Ld.CIT(A), Revenue is now before us.

5. Before us, Ld.D.R. supported the order of lower authorities. Ld.A.R. on the other hand, reiterated the submissions made before AO and Ld.CIT(A). He further submitted that even in A.Y. 2011-12, the Co-ordinate Bench of the Tribunal has allowed the claim of proportionate deduction in ITA No.2002/PUN/2014 vide order

dt.13.01.2017. He placed on record the copy of the aforesaid decision. He thus, supported the order of Ld.CIT(A).

6. We have heard the rival submissions and perused the material on record. The issue in both these appeals are with respect to the proportionate deduction u/s 80IB(10) of the Act. We find that Ld.CIT(A) has followed the decisions of Co-ordinate Bench of the Tribunal in assessee's own case in ITA No.1164/PN/2012 & ITA No.2210/PN/2012 dated 15.04.2013 and also the decision of Tribunal in ITA No.2002/PUN/2014 order dt.13.01.2017. Before us, no material has been placed on record by the Revenue to demonstrate that the decisions of Tribunal that were followed by the Ld.CIT(A) while dismissing the appeals of Revenue have been set aside / stayed or overruled by the higher Judicial Authorities. Before us, Revenue has not placed any material on record to point out any distinguishing feature in the facts of the case for the year under consideration and that of earlier years nor has placed any contrary binding decision in its support. In view of the aforesaid facts, we find no reason to interfere with the order of Ld.CIT(A). **Thus, the grounds of Revenue in both the appeals are dismissed.**

7. **In the result, both the appeals of the Revenue are dismissed.**

Order pronounced on 26th day of March, 2019.

Sd/-
(PARTHA SARATHI CHAUDHURY)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 26th March, 2019.

Yamini

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

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

आदेशानुसार/ BY ORDER,

// TRUE COPY //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.