

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA NO.3654/MUM/2017(A.Y. 2011-12)

M/s. Bhoomi Realtors,
106, Shreepal Industrial Estate,
S.V.Road, Jogeshwari(West),
Mumbai 400 095
PAN: AAAAB33440J

..... Appellant

Vs.

ACIT-15(3), R.No.122,
1st Floor, Matru Mandir,
Mumbai 400 007

..... Respondent

ITA NO.4114/MUM/2017(A.Y. 2011-12)

DCIT, Cen.Cir.6(2),
R.No.1903, 19th Floor,
Air India Building, Nariman Point,
Mumbai 400 021.

.... Appellant

Vs.

M/s. Bhoomi Realtors,
106, Shreepal Industrial Estate,
S.V.Road, Jogeshwari(West),
Mumbai 400 095
PAN: AAAAB33440J

..... Respondent

Assessee by : Shri Mahaveer Jain
Revenue by : Shri Ajay Mallik

Date of hearing : 11/09/2019

Date of pronouncement : 31/10/2019

ORDER

PER VIKAS AWASTHY, JM:

These cross appeals by the assessee and Revenue are directed against the order of CIT(A) -41, Mumbai dated 29/03/2017 for the assessment year 2011-12.

2. In brief, the facts of the case as available from records are:

The assessee is a builder and developer. The assessee(AOP) filed its return of income for the impugned assessment year on 30/09/2011 declaring total income of Rs.32,01,092/-. The assessee claimed deduction under section 80 IB(10) of the Income Tax Act, 1961 (in short "the Act") of Rs.5,92,49,118/- in respect of its residential project "Bhoomi Park" at Marve Road, Malad(W), Mumbai. In scrutiny assessment proceedings, the Assessing Officer disallowed assessee's entire claim of deduction under section 80 IB(10) of the Act on account of certain violations and further made additions on account of undisclosed interest income Rs.18,82,023/-. The Assessing Officer while disallowing assessee's claim of deduction under section 80 IB (10) of the Act observed that the assessee is not eligible for claiming deduction in respect of sale of car parking and also on resale of flat.

2.1 Aggrieved by the assessment order dated 18/03/2014 passed under section 143(3) of the Act, the assessee filed an appeal before the CIT(A). The CIT(A) allowed prorata deduction under section 80 IB(10) of

the Act to the extent there were no violations in the residential building. The CIT(A) further held that the assessee is eligible for claiming deduction in respect of sale of car parking as well as on alleged resale of flat. However, CIT(A) upheld the findings of Assessing Officer qua addition in respect of undisclosed interest income earned by the assessee on fixed deposits from corpus fund, purportedly held by the assessee on behalf of the proposed residents Co-operative society. Against the aforesaid findings of the CIT(A), both, the assessee and the Revenue are in appeal before the Tribunal.

3. For the sake of convenience, we will first take up the appeal by the assessee for adjudication.

ITA NO.3654/MUM/2017(A.Y. 2011-12)-ASSESSEE'S APPEAL:

4. The assessee in its appeal has assailed the findings of first appellate authority on following grounds:-

"1. Addition on account of undisclosed Interest Income: Rs. 18,82,023/-

a. The Ld. CIT Appeals erred in treating interest income of society as interest income of appellant,

b. He failed to appreciate that appellant was holding that amount on behalf of proposed society and in fact that amount was paid to society after formation."

5. Shri Mahavir Jain appearing on behalf of the assessee submitted that the fixed deposits on which interest was earned in fact belongs to the Co-operative society of the residents. The corpus funds of the society were deposited in the bank on which interest had accrued. The assessee was to handed over the funds to the society. The assessee was only holdings funds in fiduciary capacity. Neither the fixed deposits nor the

interest thereon belongs to the assessee. Hence, the same were neither reflected in the books of account of the assessee nor the interest income on fixed deposits of Society's corpus funds was declared in the return of income. The Id. Authorized Representative of the assessee further pointed that similar addition on account of interest income was made in assessment year 2012-13. The addition was sustained by the CIT(A). The assessee carried the issue in appeal before the Tribunal in ITA No.2315/Mum/2018. The Tribunal vide order dated 12/04/2019 deleted the addition after placing reliance on the order in the case of ACIT vs. Evershine Builders Pvt. in ITA No.2827/Mum/2008 decided on 01/02/2010

5. On the other hand, Shri Ajay Malik, representing the Department vehemently defended the impugned order confirming the addition of Rs.18,82,023/- in respect of undisclosed interest income. The Id. Departmental Representative submitted that the residents Co-operative Society had not come into existence till the end of 31/03/2011. The fixed deposits in the bank were made in the name of the assessee. TDS on interest on said fixed deposits were deducted and credited to the PAN of the assessee. Thus, the claim of the assessee that fixed deposits were made out of corpus fund of the society and the said funds were held by the assessee in fiduciary capacity is an after thought.

6. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The solitary issue raised by the assessee in appeal is against the addition of Rs.18,82,023/-

on account of undisclosed interest income. The contention of the assessee is that interest was generated on fixed deposits made from corpus fund of residents Co-operative society. Hence, the interest income is income of the society and not of the assessee. We do not find merit in the contentions raised by the Id. Authorized Representative of the assessee. It is an un rebutted fact that till the end of the previous year, the residents Co-operative society had not come into existence. The alleged corpus fund were deposited in the bank in the name of the assessee. The TDS on the interest on the said fixed deposits were deducted and credited to the PAN of the assessee.

7. Before we proceed to decide this issue, it would be relevant to refer to the dictionary mention of expression "fiduciary relationship".

The Black's Law Dictionary defines fiduciary relationship as under:-

"A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship."

As per Merriam Webster dictionary fiduciary relationship mean:-

"A relationship in which one party places special trust, confidence, and reliance in and is influenced by another who has a fiduciary duty to act for the benefit of the party."

From the reading of meaning of fiduciary relationship as defined in legal dictionaries referred above, it can be safely construed that it is a relationship between the two parties. Thus, existence of two parties whether real or juristic is a pre-condition to have fiduciary relationship. In the absence of second party, there cannot be any fiduciary relationship.

In the instant case it is an undisputed position that Co-operative society had not come into existence till the end of relevant previous year. Therefore, the assessee cannot hold the amount in fiduciary capacity of a non-existent entity. The argument of assessee, 'holding funds of society in fiduciary capacity, thus fails.

8. We are of further view that if arguments forwarded by Id.Authorized Representative of the assessee are accepted, then the interest income on fixed deposits would escape taxnet. If it is held that the interest is not income of the assessee, the same would obviously not be taxable in the hands of the assessee. Since, residents Co-operative society has not come into existence during the previous year when the interest income had accrued, the interest income cannot be taxed in the hands of non-existent entity. Hence, interest income would neither be taxable in the hands of the assessee nor in the hands of Co-operative society. The proposition put-forth by the Id.Authorized Representative of the assessee is hence, unacceptable. Income could not be earned in vacuum and it should accrue to certain beneficiary.

9. In so far assessee's reliance on the order of Tribunal in assessee's own case for assessment year 2012-13 is concerned, we find that the Tribunal has allowed the appeal of assessee by following the decision rendered in the case of ACIT vs. M/s. Evershine Builders Pvt. Ltd.(supra). The facts in the subsequent assessment year are at variance and distinguishable. In the case of M/s. Evershine Builders Pvt. Ltd.(supra), the issue was taxability of corpus fund. The assessee therein at the time

of sale of flats had collected contribution from buyers of flats towards corpus fund. The assessee earned interest on corpus fund and offered the same to tax. The Assessing Officer held contribution towards corpus fund collected at time of sale as part of sale consideration of the flat. The assessee had collected the corpus fund in accordance with the provisions of Maharashtra Ownership of Flats Act, 1963 and had kept the same in separate account. The Tribunal in the backdrop of facts narrated above held that corpus fund is not income of the assessee. In the present case, it is not the collection of corpus fund but the interest on alleged corpus fund, which is subject matter of dispute. Corpus fund and interest on corpus fund are on different footing. Corpus fund is capital in nature, whereas, interest earned on corpus fund is revenue receipt. Therefore, the ratio laid down in the case of Evershine Builders Pvt. Ltd.(supra) cannot be applied in the case of assessee in assessment year under appeal.

10. We concur with the findings of the CIT(A) in confirming the addition on account of undisclosed interest income in the hands of assessee. The grounds raised by the assessee in appeal are de-void of any merit and, hence, the same are dismissed.

ITA No.4114/Mum/2017- Revenue's Appeal:

11. The Revenue in its appeal has challenged the finding of CIT(A) by raising following grounds:

1. *"On the facts and in circumstances of the case and in law, the Ld.CIT(A) erred in deleting the disallowance OF Rs, 28,00,000/- u/s 80IB(10) on sale of car parking without appreciating the reliance placed by Ld. AO on the decision of Hon'ble SC in the case of Nahalchand*

Laloochand Pvt. Ltd. Vs. Panchali Co-operative housing Society in the context of the case and provisions of section 80IB(10) of the Income Tax Act, 1961 in its right perspective and true meaning."

2. *"On the facts and in circumstances of the case and in law, the Ld.CIT(A) erred in appreciating the facts that buy-back and re-sale is a trading activity in the context of the case and provisions of section 80IB(10) of the Income Tax Act, 1961 in its right perspective and true meaning."*

3. *"On the facts and in circumstances of the case and in law, the Ld.CIT(A) erred in appreciating the violation of provisions of clause (e) and (f) of section 80IB(10) of the Income Tax Act, 1961 in its right perspective and true meaning."*

11. The Id.Authorized Representative of the assessee vehemently defended the finding of CIT(A) in allowing deduction under section 80 IB(10) of the Act on pro-rata basis and also allowing the said deduction in respect of sale of car parking and resale of flat. The Id. Authorized Representative for the assessee submitted that the issue of allowing deduction under section 80 IB(10) of the Act on car parking is squarely covered by the decision of Hon'ble Bombay High Court in the case of Puravankara Projects Ltd. in Income Tax Appeal No.4975 of 2010 decided on 25/07/2011.

11.1 The other issue raised in the appeal by the Revenue is in respect of assessee's claim of deduction under section 80- IB(10) on resold flat. The Assessing Officer had disallowed deduction on wrong appreciation of facts. The CIT(A) after examining the facts in right perspective came to the conclusion that the assessee is eligible for claiming deduction under section 80 IB(10) of the Act in respect of flat which was resold after cancelling the first allotment. The Id. Authorized Representative for the assessee submitted that one flat K/1204 was initially booked by Shri Jailesh Oberoi and Smt. Vimla Oberoi. The total consideration of the flat

was agreed at Rs.46,66,000/-. The vendees paid initial booking amount of Rs.2,50,000/- only and they failed to make payment of the remaining sale consideration. Therefore, the booking was cancelled. The said flat was subsequently sold for Rs.75,50,000/- on which the assessee claimed deduction under section 80 IB(10) of the Act . Thus, it is not the case of claim of deduction under section 80 IB(10) of the Act twice on resale of flat.

11.2 The Id. Authorized Representative for the assessee further submitted that as regards allowability of pro-rata deduction under section 80 IB(10) of the Act is concerned, the Hon'ble Bombay High Court in the case of Vandana Properties, 353 ITR 36 and the Hon'ble Madras High Court in the case of Viswas Promoters, 214 Taxman 524(Mad) has approved the same..

12. On the other hand, Id. Departmental Representative vehemently defended the order of Assessing Officer in rejecting assessee's claim of deduction under section 80 IB(10) of the Act and prayed for reversing the findings of CIT(A) on this issue.

13. Both sides heard. Ground No.1 of the appeal by the Revenue is against allowing deduction under section 80 IB(10) of the Act in respect of sale of car parking . We find that this issue is squarely covered in favour of the assessee by various decisions of the Tribunal. The Hon'ble Jurisdictional High Court in the case of Puravankara Projects Ltd.(supra) has affirmed the findings of Tribunal in holding that car parking space

forms part & parcel of housing project and the assessee is entitled to deduction under section 80 IB(10) in respect of sale of parking area. The CIT(A) granted relief to the assessee by following the decisions of the Tribunal and the Hon'ble High Court. We find no reason to interfere with the well reasoned finding of CIT(A). Thus, ground No.1 of the appeal of Revenue is dismissed.

14. In ground No.2 of the appeal, Revenue has assailed allowing of deduction under section 80 IB(10) of the Act in respect of flat which has been allegedly resold. A perusal of records reveal that Flat No.K/1204 on which Revenue is disputing the claim of deduction under section 80 IB(10) was initially sold to Shri Jailesh Oebroi & Smt. Vimla Oberoi. They had paid initial token amount of Rs.2,50,000/- at the time of booking flat. Thereafter, they defaulted the terms of payment and the assessee had to cancel the booking. After cancellation of the initial sale agreement, the flat was resold to other party. The assessee claimed deduction under section 80 IB(10) of the Act in respect of profits arising from resale of said flat. It is not a case where the assessee has indulged in any trading/broking of the same flat twice. It was under peculiar facts that the first agreement was cancelled and the flat was resold. We do not find any error in the findings of CIT(A) in allowing deduction under section 80 IB(10) of the Act on the profits arising from sale of said flat.

15. We find no infirmity in the findings of CIT(A) in allowing proportionate deduction on the eligible flats of the housing project. The

concept of allowing proportionate deduction on eligible flats have been approved by Hon'ble Jurisdictional High Court in the case of Vandana Properties (supra). The ground No.3 of the appeal is dismissed being devoid of any merit.

16. In the result, appeal of the Revenue is dismissed.

17. **To sum up, appeal of the assessee and appeal of the Revenue are dismissed.**

Order pronounced in the open court on Thursday, the 31st day of October, 2019.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Dated 31/10/2019
Vm, Sr. PS(O/S)

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai

	Details	Date	Initials	Designation
1	Draft dictated on	17/09/2019		Sr.PS/PS
2	Draft Placed before author	17/09/2019		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			

Fiduciary relationship – Black’s Law Dictionary

A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship.

A relationship in which one party places special trust, confidence, and reliance in and is influenced by another who has a fiduciary duty to act for the benefit of the party.