

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'B', NEW DELHI**

**Before Sh. H. S. Sidhu, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 3451/Del/2017 : Asstt. Year : 2011-12**

Deputy Commissioner of Income Tax, Circle-1(1), Gurgaon	Vs	M/s DLF Cyber City Developers Ltd., 3 <sup>rd</sup> Floor, Shopping Mall Complex, Arjun Marg, DLF Phase-1, Gurgaon
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AACCD3572H</b>		

**Assessee by : Sh. R. S. Singhvi, CA**

**Revenue by : Ms. Nidhi Srivastava, CIT DR**

**Date of Hearing: 12.12.2019**

**Date of Pronouncement: 12.12.2019**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the revenue against the order dated 31.03.2017 of the Id. CIT (A)-1, Gurgaon.

2. Following grounds have been raised by the revenue:

*"1. Ld. CIT(A) has erred on facts and in law 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. *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. *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. *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. *Ld. CIT(A) has erred in law and on facts in ignoring that even the 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. *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 80IAB 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. *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 Ld. 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. *Ld. CIT(A) has erred in law 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 transaction 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, 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. *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 is 12%.*

13. *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. 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."*

3. At the outset, the Id. AR brought to our notice that this is the issue wherein the similar additions has been continuously made by the revenue from the assessment year 2008-09, 2009-10 and 2010-11 onwards and the matter stands adjudicated by the order of the Co-ordinate Bench of ITAT for the earlier years in favour of the assessee. He has submitted the copy of the order of the Co-ordinate Bench in ITA No. 4742/Del/2015 for the assessment year 2010-11 which in turn has relied on the order of the ITAT in assessee's own case in assessment year 2008-09 in ITA No. 5469/Del/2012 and ITA No. 5366/Del/2012 for the assessment year 2009-10.

4. These facts have not been controverted by the revenue.

5. Since, the factual matrix remain same, in the absence of any material change we, relying on the decisions of the Co-ordinate Bench of ITAT in assessee's own case for the earlier years hereby allow the appeal of the assessee. For the sake of ready reference the relevant portion of the order of the ITAT is reproduced below:

*"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 'Codeveloper 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 Id. Counsel. Thus as per specific clarifications by BOA the transfer of bare shell building on long term lease to approved codeveloper 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. CITs 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); 10 ITA No.4742/Del./2015*

*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."*

6. In the result, the appeal of the revenue is dismissed

Order Pronounced in the Open Court on 12/12/2019.

Sd/-

**(H. S. Sidhu)**  
**Judicial Member**

**Dated: 12/12/2019**

\*Subodh\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**