

आयकर अपीलीय अधिकरण "F" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 2457/Mum/2018

(निर्धारण वर्ष / Assessment Year 2009-10)

आयकर अपील सं./ ITA No. 2456/Mum/2018

(निर्धारण वर्ष / Assessment Year 2010-11)

Shr. Olive Builder 103/104, JK Chambers, Sector 17, Vashi Pincode-400 703	Vs.	The Dy. Commissioner of Income Tax, Central Circle 28(2), Navi Mumbai
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AABFO0746L		

आयकर अपील सं./ ITA No. 2671/Mum/2018

(निर्धारण वर्ष / Assessment Year 2009-10)

आयकर अपील सं./ ITA No. 2672/Mum/2018

(निर्धारण वर्ष / Assessment Year 2010-11)

The Dy. Commissioner of Income Tax, Central Circle 28(2), Navi Mumbai	Vs.	Shri Olive Builder 103/104, JK Chambers, Sector 17, Vashi Pincode-400 703
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Devendra Jain, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Sushil Kumar Poddar, DR

सुनवाई की तारीख / Date of hearing:	08.11.2019
घोषणा की तारीख / Date of pronouncement :	19.12.2019



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आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

These four cross appeals are arising out of the orders of the Commissioner of Income Tax (Appeals)]-26, in short CIT(A), in appeals No. CIT(A)-26/IT-29&30/2016-17 vide dated 23.01.2018 & 22-01-2018. The Assessments were framed by the Dy. Commissioner of Income Tax, Central Circle 28(2), Mumbai (in short DCIT/ITO/ AO) for the A.Ys. 2009-10 & 2010-11 vide even dated 08.03.2016, under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The first common issue in these two appeals of Revenue is as regards to the order of CIT(A) deleting the addition made by AO by disallowing the claim of deduction under section 80IB of the Act on the fact that there is no separate books of account maintained project wise and there is violation of the conditions mentioned under section 80IB(10) of the Act. For this, Revenue has raised the identically worded grounds in both the assessment years and the facts and circumstances are also exactly identical. Hence, we will take the fact from AY 2009-10 and will decide the issue. The relevant grounds raised by Revenue read as under: -

"1. On the facts and in the circumstances of the case and in law, the Id. CIT (A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:



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1) *Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in concluding that, "there is no dispute that in all projects except courtyard Kakanad Phase-I, the conditions for claiming deduction u/s 80IB were fulfilled, when this fact was never discussed in the assessment order.*

2) *Whether on the facts and circumstances of the case and in law the CIT(A) was justified in arriving at the above conclusion, after considering evidence submitted if any by the assessee, which was not before the AO, thereby violating Rule 46A(3) of the I.T. Rules."*

3) *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has grossly violated the principles of natural justice in terms of provision of 46A(3) of the IT rules ,1962, without giving an opportunity to the AO to verify additional evidence produced by the assessee before the Ld. CIT(A), based on which the IA. CIT(A) has come to his conclusion."*

3. Briefly stated, the facts are that the assessee firm is engaged in the business of construction and sale of building including housing projects and is a developer. The assessee filed its return of income declaring total income of Rs.1,59,70,830/- on 27.09.2009 for assessment year 2009-10. The Assessing Officer framed assessment under Section 143(3) of the Act on 08.11.2011 assessing the total income at Rs.33,31,87,206/- after allowing deduction under Section 80IB(10) of the Act as claimed by the assessee. Subsequently, the assessment was reopened on the basis that certain row houses in the project of the assessee, i.e. Courtyard Kakkanad Phase-I, sold by assessee consisting of lower



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and upper floor was disguised as two independent units and sold to the same person or his relatives. The assessee has shown these row houses as independent units, but when taken together as a whole, the same were inseparable units consisting of lower and upper floor and area of the units exceeded the permissible limit for claiming deduction under Section 80IB(10) of the Act. The Assessing Officer, in the reassessment proceedings, noted that the claim allowed was in relation to housing projects executed by the assessee styled as Kalloor and Kakkanad projects near Kochi and the same pertains to the project styled as Woodstock Kalloor and Courtyard Kakkanad Phase-I, II and III. The details are given by the CIT(A) in page 3 of his order. The Assessing Officer, in the reassessment proceedings, disallowed the claim of deduction under Section 80IB of the Act on the reasoning that all the conditions set out in the said section were not fulfilled by the assessee. The Assessing Officer noted the following discrepancies: -

- (i) that the assessee has not filed approved plans from the local authority and no evidence *qua* that was submitted by the assessee;
- (ii) that the approved plan of local authority clearly show the two units are inseparable and sold the same set of flats/units to the same person or set of persons being relatives;
- (iii) that the approved plan of the local authority clearly shows the two units **to be independent units having separate entrance** and hence, these are two units;



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- (iv) the Assessing Officer has taken the pictures from the website, i.e. of villas, which clearly reveal that the actual structure of the construction of villas are not two separate units, but only one which exceeds the area prescribed under Section 80IB(10) of the Act; and,
- (v) that the assessee also did not file project-wise Profit & Loss Account and has not maintained separate cost centre based project-wise books of account.

In view of these facts, the Assessing Officer disallowed the claim of deduction. Aggrieved, assessee preferred an appeal before the CIT(A).

4. However, the CIT(A) allowed the claim of deduction under Section 80IB(10) of the Act in respect to Woodstock Kalloor, Courtyard Kakkanad Phase-II and III. The CIT(A) except for Courtyard Kakkanad Phase-I stated that the conditions for claiming deduction under Section 80IB(10) of the Act were fulfilled and allowed the claim of deduction in respect of the three projects by observing in para 6.2 to 6.6 as under :-

“6.2 I have considered the facts of the case and the appellant's submissions. The appellant had four projects, namely, Woodstock Kalloor, Courtyard Kakkanad Phase I, Courtyard Kakkanad Phase II and Courtyard Kakkanad Phase III. There is no dispute that in all the projects except Courtyard Kakkanad Phase I, the conditions for claiming deduction u/s 80IB were fulfilled. There was no violation of the provision of section 80IB (10)(c) in the other projects. These projects were also independent of each other as



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separate approvals, commencement certificates and completion certificates were obtained for each of these projects. However, since the conditions for claiming deduction u/s 80IB were not fulfilled in respect of Courtyard Kakkanad Phase I due to violation of condition laid down in section 80IB(10)(c), the AO disallowed the deduction claimed u/s 80IB in respect of the other projects also on the ground that the appellant did not maintain separate accounts for each project and had claimed composite deduction u/s 80IB in respect of all the projects and that the profits of each project were not ascertainable.

6.3 Admittedly, no separate accounts were maintained for each project. However, during the course of assessment proceedings, the appellant had explained that it was maintaining books of accounts based on project wise cost for each project for all allocable expenses. Project wise Net profit was submitted wherein all the common expenses were allocated in the proportion of sale/closing WIP of each project. Perusal of the details submitted by the appellant during assessment proceedings before the AO shows that the appellant had given break up of the net profit attributable to each project by dividing the net profit in proportion of the closing WIP of each project to the total closing WIP of all the projects. Though no separate accounts were maintained for each project, the profit of each project was ascertainable from the consolidated accounts itself. There is no dispute about the eligibility of the other projects for deduction u/s 80IB of the Act. To deny the deduction simply on the ground that separate accounts were not maintained for these



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projects is not justifiable and more so when the profits attributable to each project could be worked out from the accounts maintained by the appellant.

6.4 The appellant has contended that under the provisions of section 80-IB(10), there is no statutory requirement that in order to claim deduction under this section, the assessee should be maintaining separate set of books of accounts. That the only requirement is that to facilitate the deduction, it should be possible to calculate the profits separately. That merely because there were no separate set of accounts maintained by the appellant, the A.O. cannot consider all the three Phases to be one single project. In this regard, the appellant has placed reliance on the decision of the Hon'ble Punjab High Court in the case of CIT Vs. Micro Instruments Co. (2016) 75 Taxmann.com 304. I find that in the cited case, the Hon'ble Court had discussed the issue at length and held that keeping separate books of account is not a condition precedent to a claim for deduction under section 80-IB. In view of this decision of the Hon'ble Punjab High Court, in the instant case, since the conditions for claiming deduction u/s 80IB are independently fulfilled in the other projects, the appellant will be eligible for deduction u/s 80IB for those projects even though no separate accounts were maintained for each project.

6.5 The appellant has also contended without prejudice that if at all disallowance is to be considered, it should be considered for the proportionate amount of profits which pertain to Phase I row houses, and not to the entire claim of deduction u/s 80-IB(10). For this



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proposition, reliance has been placed on the decision of the Hon'ble Delhi High Court in the case of Pr.CIT Vs Omaxe Buildhome Pvt Ltd. (2016) 76 taxmann.com 104 (Delhi) wherein it was held that the assessee would be entitled to deduction under section 80-IB on each separate housing project. The SLP filed before the Hon'ble Supreme Court in this case has been dismissed. I find that the allowability of proportionate claim of deduction u/s 80IB has also been upheld in the decision of the Hon'ble jurisdictional Tribunal in the case of ACIT Vs Ekta Sankalp Developers Mumbai (2015) 53 taxmann.com 75 (Mumbai-Trib.)

6.6 In view of the decisions of the Hon'ble Courts (supra) as discussed above that keeping separate books of account is not a condition precedent to a claim for deduction under section 80-IB and that proportionate claim of deduction u/s 80IB in respect of eligible units/project is allowable, the Assessing Officer is directed to allow deduction u/s 80IB on the other projects/phases which are eligible for deduction u/s 80IB of the Act.”

5. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the assessee has four projects namely Woodstock Kallor, Courtyard Kakkanad Phase-I, courtyard Kakkanad Phase-II, and courtyard Kakkanad Phase-III. We noted that the CIT(A) has given categorical finding that there is no violation of the provisions of section 80IB(10)(c) of the Act in regard to the other three projects except Courtyard Kakkanad Phase-I. It is a fact from the records that these projects



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are independent of each other and separate approvals, commencement certificates and completion certificates were obtained for each of these projects. The assessee has not maintained separate accounts for each of the project but it is maintained books of accounts based on project wise cost of each project for all allocable expenses. We noticed that project wise net profit is computed wherein all the common expenses were allocated in the proportion of sale/ closing work-in-progress in each project. From the details submitted by the assessee, we noted that assessee has given break-up of the net profit attributable to each project by dividing the net profit in the proportion of closing work in progress of each project to the total work-in-progress of all the projects. From the above, it is clear that profit of each project is separately ascertainable and hence, the claim of the assessee under section 80IB(10)(c) of the Act can be allowed and CIT(A) has rightly allowed the same. We confirm the order of CIT(A) on this issue. Hence, this issue of Revenue's appeal is dismissed. Identical issue was raised by Revenue in AY 2010-11 in ITA No. 2672/Mum/2018 and the facts and circumstances being identical; we dismiss the appeal of Revenue in this year also. Hence, both the appeals of the Revenue are dismissed.

6. Coming to assessee's appeal in ITA No. 2457/Mum/2018 for AY 2009-10, the assessee has also challenged the denial of claim of deduction under Section 80IB(10) of the Act in regard to Courtyard Kakkanad Phase-I on the basis that two floors of the same row houses were invariably sold to the same persons or related persons under separate agreements and, therefore, the area



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of each flat exceeds 1500 sq.ft. Against this order of CIT(A), assessee has raised the following two grounds: -

“1. The Hon'ble CIT(A) erred in confirming the total income of your appellant assessed by Ld. A.O at Rs.34,91,53,040/- as against the returned income of Rs.1,59,70,830/- as per the return of income filed on 27/09/2009.

2. The Hon'ble CIT(A) erred in partially confirming the disallowance of deduction of profit of Phase-I under section 80-IB on the ground that two floors of the same row house were invariably sold to the same person or to related persons under separate agreements, in order to give a semblance of credibility to the appellant's claim that these were two separate units and the area of each was below 1500 sq.ft.”

7. The facts and circumstances are exactly identical in both the years and the grounds raised by Revenue are also identically worded. Hence, we will take the facts from assessment year 2009-10 in ITA No. 2457/Mum/2018 and decide the issue.

8. The CIT(A), after going through the entire facts and circumstances of the case, sustained the disallowance made by the Assessing Officer in respect to the claim of deduction under Section 80IB(10) of the Act for Kakkanad Phase-I project and directed the Assessing Officer accordingly vide para 5.7 to 5.9 as under :-

“5.7. I have considered the facts of the case and the appellant's submissions. The appellant has contended that the flats sold were independent units and that each had a separate entrance and independent kitchen. That in any



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case, the restriction of selling more than a single unit to a person or related parties was brought in by way of amendment to section 80IB with effect from 01.04.2010 and that this restrictive condition inserted in section 80-IB(10) is prospective in nature, applicable from the assessment year 2010-11, prior to which the two-storied houses had been sold and agreements in respect thereof had been registered.

5.8 It is pertinent to mention here that the disallowance made by the Assessing Officer during the year under consideration was on account of violation of section 80IB(10)(c) and not of 80IB(10)(f) as sought to be contended by the appellant. The appellant's submission that clause (f) of sub-section (10) of section 80IB was inserted w.e.f. 01.04.2010 and not applicable to the year under consideration is, therefore, not relevant. These clauses were inserted to prevent the circumventions by the developers of conditions of section 80IB but they do not per se substitute the applicability of section 80IB(10)(c).

5.9 The AO has given the specific finding that there was no instance where the upper and lower floors of the same row house were sold to unrelated persons and had been used as independent dwelling units. All the four units had common entrance for both the floors and common kitchen. Not a single unit had a separate entrance. On the other hand, the two floors of the same row house were invariably sold to the same person or to related persons under separate agreements, in order to give a semblance of credibility to the appellant's claim that these were two separate units and the area of each was below 1500 sq. ft. There was no way that the two floors could have been used



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as two separate units by unconnected parties. The picture of the villa on the website indicated it as a single unit. There was no separate entrance for the first floor in any of the villas. Each villa was independent with the staircase to the second floor running from the inside. The appellant had sold the first floor and ground floor separately to related parties or to the same parties by entering into separate agreement to circumvent the condition of sec. 80IB(10)(c). The appellant had resorted to the above subterfuge since the combined area of the two floors would have exceeded 1500 sq. ft. thereby rendering the appellant ineligible for deduction u/s 80IB. Hence, what was to be considered was the area of a composite row house. As this was in excess of 1500 sq. ft., the condition of sec. 80IB(10)(c) was not fulfilled. Considering the surrounding facts and circumstances of the case, I am of the considered opinion that the AO was fully justified in holding that the appellant had violated the provisions of section 80IB and was not eligible to claim deduction under this section in respect of Kakannad Phase-I. The disallowance of claim of deduction u/s 80IB in respect of this project, is, therefore, sustained.”

9. We have heard the rival contentions on this issue and gone through the facts and circumstances of the case. We note that the fact situation is undisputed but we direct the AO to disallow only proportionate exemption in proportion to the flats which are exceeding the area of 1500 sq. ft. and for that a fresh computation need to be made in respect to this project. Hence, this issue of assessee's appeal is remanded back to the file of the AO to give effect to this order. Similar are the facts in AY 2010-11 in ITA No. 2456/Mum/2018 and taking consistent, we remand the matter back



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to the file of the AO in this year also.

10. In the result, the appeals of the assessee are allowed for statistical purposes and the appeal of Revenue are dismissed.

Order pronounced in the open court on 19.12.2019.

Sd/-

(राजेश कुमार / RAJESH KUMAR)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated 19.12.2019

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai