

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI**

**BEFORE SHRI C. N. PRASAD, JM &
SHRI SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 2703/Mum/2014
(निर्धारणवर्ष / Assessment Year: 2009-10)

M/s Neelkanth Palm Realty, Fine House, Anandji Lane, 5 th floor, M. G. Road, Ghatkopar(E), Mumbai-400 077	बनाम/ Vs.	ACIT Circle 15(3), Matru Mandir, Tardeo, Mumbai.
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAEFN5224B		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Nitesh Joshi & Shri Gyneshwar Katarm, ARs
प्रत्यर्थीकीओरसे/ Respondentby	:	Ms. Kavita P. Kaushik, DR
Virtual Date of Hearing	:	21.10.2020
Date of Pronouncement	:	08.12.2020

आदेश / ORDER

Per S. Rifaur Rahman, Accountant Member:

The present appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals) - 26 in short referred as ‘Ld. CIT(A)’, Mumbai dated 25.02.2014 for Assessment Year (in short AY) 2009-10.

2. The brief facts of the case are, assessee is engaged in the business of development of real estate. During this assessment year, assessee has taken up construction projects by the names 'Classique Project' and 'Royal Project'. The Assessee maintained Separate Books/Financial Records for 2 Projects and as far as Project Classique is concerned, the assessee has already completed the construction of the project and only few flats were pending for sale, these were sold during this assessment year. The project Classique profits were eligible to claim deduction under section 80 IB (10) of the Act. The Project Royal is a normal project and Assessee was not claiming any benefit under Section 80 IB. Accordingly, Assessee submitted separate Profit and Loss Account for each project and declared Gross Profit of ₹ 29,48,020/- in Project Classique and ₹ 69,14,987/- in the case of Royal Project and it also declared receipts of Rs. 4,99,09,782/- towards sale of TDR, the Assessee claimed the profit declared in Classique Project as deduction under Section 80 IB(10).

3. During Assessment Proceedings, Assessing Officer observed that Assessee has claimed various common expenditure during this year which includes Employee Cost, Professional and

Consultancy Fees, Marketing Expenses and other Administrative Expenses. Since assessee has not allocated any common administration expenses incurred in claiming the deduction under Section 80IB(10) of the Act. Therefore, Assessing Officer considering the status of the project completion, he estimated @ 15% of the common expenses attributable to the project Classique. Accordingly reduced the deduction under section 80 IB to the extent of ₹ 14,12,375/-.

4. Aggrieved with the above order, assessee preferred an appeal before CIT(A) and filed a detailed submission. After considering the submissions of the assessee and grounds of appeal, Ld CIT(A) issued enhancement notice vide letter dated 13.11.2013. In response, assessee has filed its submission vide letter dated 6.1.2013. For the sake of clarity, it is reproduced below:-

"1. Please refer to your enhancement notice dated 13.11.2013 received on 20.11.2013 fixing hearing on 20.11.2013. Please refer to the adjournment application in the matter when the hearing was adjourned to 10.01.2014 and further adjournment application where the hearing is adjourned to 29.01.2014. We are grateful to Your Honour for granting us adjournment in the

matter due to circumstance beyond our control.

2. Your Honour has requested us to show cause why the expenses should not be allocated between Classique Project and Royale Project in proportion to their sales during the year and that no allocation should be made to TDR sale.

3. We request your Honour not to enhance the assessment due to the following reasons which are without prejudice to each other and independent of each officer and further Your Honour to allow our appeal and not to allocate or reduce the allocation of expenses to Classique Project and consequently direct the Assessing Officer to grant more deduction u/s.80IB(10) in respect of Classique Project.

(a) (i) It is the matter of record that the flats of Classique project (in respect of which deduction u/s.80IB has been claimed) have been booked years ago i.e. the parties to whom flats have been sold have been identified and the terms and conditions agreed. The sales have been accounted in the current year on account of completion of sale and registration of sale documents. It is further pertinent to note that the completion and registration of sale of these flats in Classique project were completed in the month of April and mid May 2008 and since no stock remained after mid May 2008, no portion of expenses incurred during the year can be attributable to Classique project after mid May 2008 since no work or stock remained in Classique Project. It is a matter of record that the said flats were ready for occupation the Classique project completed and that since the complete payment was

not received in the earlier years, no sale was accounted. Therefore, nothing had to be done by the administrative staff or marketing staff etc. in this respect. In this view of the matter, only minimal or negligible amount of expenses can be attributed to the Classique project. It would be wholly unjust to allocate expenses of Rs.14,82,375/- as pertaining to the Classique project or any higher amount when there was not/dug left to be done in the respect of this project.

- (ii) *The ledger account of the initial amount received from the identified purchaser is enclosed herewith from which it is evident that the booking of the unsold flats as on 01.04.2008 has been made in earlier years.*

- b.** *Without prejudice to the above, it would be wholly unjust to the assessee to allocate the administrative, marketing and other expenses to the two projects only i.e. Royale and Classique project and not to allocate the same to the TDR sale. The said administrative, marketing expenses and other general expenses additional evidence incurred in the normal course of business comprising of various components and therefore allocating the same to only two components would give a distorted figure and therefore unjust. In the circumstances, administrative, marketing and other expenses had to be allocated to various components of business including TDR sale.*

4. *In view of the conclusive evidence submitted hereinabove, we*

most earnestly request Your Honour not to allocate expenses to Classique Project and if Your Honour is of the opinion that there could be some expenses allocable to Classique Project, only a negligible or token part of the said expenses be allocated.

5. *It is humbly prayed that no administrative, marketing expenses and general expenses be attributable to the Classique Project and consequently the deduction u/s.80IB(10) be granted at Rs.29,48,0201- ('without reducing the administrative and marketing expenses) or alternatively consider only 2% of the administrative and marketing expenses attributable to Classique Project and accordingly rework the deduction u/s.80IB in respect of Classique project.*
6. *The assessee most humbly request Your Honour to allow the appeal for which kind act of Your Honour, the assessee shall be gratefull"*

5. Subsequently, assessee filed another letter dated 17.02.2014, for clarity it is reproduced below:-

- "1. *Please refer to the hearing done in the matter from time to time and the written submission handed over to Your Honour on 28.09.2013, 03.10.2013 & 29.01.2014.*
2. *Your Honour in the course of the hearing held on 29.01.2014 requested us to substantiate our written submission handed over to you on 29.01.2014.*

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M/s Neelkanth Palm Realty

3. *We are endosing herewith our additional submission in the matter along with details and documentary evidence to substantiate our written submission handed over to Your Honour on 29.01.2014. We are of the opinion that the details enclosed herewith along with the bills clearly shows that the said expenses are either directly relatable to the Royale project in respect of which no deduction u/s. 801B has been claimed or are directly relatable to sale of TDR. The balance expenses are pure routine and general expenses incurred in the ordinary course of business. We have already submitted details and evidence to show that the classique Project s done with and sale of al flats completed by mid of May 2008 and therefore only a very nominal amount of expenses need to be allocated to Classique Project,*
4. *We shall be grateful to Your Honour to allocate a negligible or token amount of the said general expenses (that to only for the period upto May 2008) to Classique Project and direct the Assessing Officer to rework the deduction allowable u/s. 801B in respect of Classique Project,*
5. *The assessee request Your Honour to dispose the appeal on the basis of this written submission and the other submission on record. The assessee most humbly requests Your Honour to allow the appeal for which kind act of Your Honour, the assessee shall be grateful."*
6. After considering the above said letters, Ld CIT(A) rejected the submissions of the assessee and enhanced the disallowance of common expenditure with the observation that the assessee has failed to demonstrate why the general expenses claimed by it of ₹ 94.15 lakhs would not be allocated to every

project and Royal housing project. He observed that the major expenses of the assessee are salary of ₹ 28.06 lakhs, professional charges of ₹ 9.21 lakhs, marketing expenses of ₹ 11.79 lakhs, administrative expenses of ₹ 10.95 lakhs and insurance, depreciation, office and repairs and maintenance. All these are general expenses which does not have any direct nexus on any of the projects of the assessee. No such expenses can be allocated to the sale of TDR since TDR sale is a sundry activity and cannot be regarded as business of the assessee. The business of assessee is construction and sale of building project. Therefore, all these expenses have to be allocated to all the projects for parity and also increase in work in progress during the year. In absence of separate records and books of accounts maintained, sale proceeds of the project is a good yardstick for allocating such expenses. Accordingly he directed AO to allocate the general expenses to the projects of the assessee and also increase in work in progress during the year, in proportionate to their turnover and enhance the assessment accordingly.

7. Aggrieved with the above order, assessee is in appeal before us raising following grounds of appeal:-

1. *In the circumstances and facts of our case, the Ld. CIT (A) has erred in directing to allocate the expenses debited to the general profit and loss account to the two projects and work in progress in proportionate to their turnover and enhance the assessment which is unwarranted and unjust considering the facts and circumstances explained by the assessee.*
 2. *In the circumstances and facts of our case, the learned CIT(A) has erred in not directing to grant duly claimed deduction u/s. 80IB(10) at Rs.29,48,020/- in respect of Classique Project particularly keeping in view the fact that the said project was already completed in the earlier year and only sale of three flats was completed during the year in April / May 2008 which flats were hooked years ago and therefore no expenses or only negligible expenses can be attributed to the said Classique Project.*
 3. *Your Petitioner reserves the right to add, alter, delete and substantiate the grounds of appeal at the time of hearing.*
8. Before us, Ld AR brought to our notice the brief facts of the case with reference to para 4 of assessment order and para 5.4 of CIT (A) order. He submitted that assessee has claimed deduction under section 80 IB (10) and submitted that assessee has already completed the construction of the flats in the Project Classique, and all the flats were sold in the previous assessment year itself and only 3 flats were sold during this assessment year. With reference to page 30 of the paper book submitted before us,

he submitted that out of 3 flats sold during the year which were sold prior to this assessment year. The assessee has only completed the sales process and accordingly declared the sales during this year. Further he brought to our notice page 31 and 32 of the paper book in which assessee has given detailed submissions of the common expenditure incurred by the assessee during this year. He submitted that all these common expenditure is incurred for the purpose of business and most of the expenses were incurred for the new project as well as for sale of TDR. Further he submitted that the profit to be claimed as deduction under section 80 IB (10) should be derived from the project only after considering direct income and direct expenses. For that purpose, he relied on the case of Zandu Pharma – 350 ITR 366. In the said decision, the Hon'ble Court held that head office expenses not to be considered for deduction under section 80 IB. Further he relied in the case of Hindustan Unilever Ltd – 394 ITR 73. He brought to our notice page 77 of the said order in which the Hon'ble Court referred to the above case i.e., Zandu Pharma case (supra).

9. He further submitted alternative submissions:-

- a. Expenses not to be considered for tax calculation should be excluded, with reference to page 31 and 32 of the paper book
- b. Expenses should be considered prorata basis, for the Classique Project only 2 months expenses should be considered, not for the whole year
- c. Common expenses should be allocated for all the gross receipts of the business including sale of TDR.

10. On the other hand, learned DR objected to the submissions of the Ld AR and with reference to page 30 of the paper book, he submitted that for recognizing the revenue, what is important is the registration date i.e. relevant for booking the sale of flat. Therefore he supported the findings of Ld CIT(A) with regard to allocation of expenses between the 2 projects.

11. Considered the rival submissions and material placed on record. We notice that the assessee is in business of real estate which includes construction of flats and selling the TDR (transferable development rights). During this year assessee has sold 3 flats of project Classique, which comes under provisions

of section 80 IB (10), the profit earned in this project is eligible to claim as deduction under section 80 IB (10). The assessee has declared net profit after reducing direct expenses of the project without considering common administration expenses and claimed deduction under section 80 IB. We notice that Ld. AO considered the status of the project and estimated the portion of common expenditure allocable to this project @15%. However Ld CIT(A) rejected the proposition of the AO and enhanced the allocable expenses to the project Classique by observing that the common expenses has to be allocated based on the ratio of sales. After considering the submissions and material on record, we notice that assessee is into construction of flats and also sale of TDR. Ld CIT(A) treated the activity of sale of TDR as sundry activity and cannot be regarded as business of the assessee. We notice from the details submitted by the assessee that some of the expenses incurred by the assessee relating to sale of TDR. In our considered view, assessee is in real estate business and any sale of transferable development rights will fall within the activity of real estate business. Therefore, all the expenses relevant for the

business is eligible to be apportioned between all the activities carried on by the assessee.

12. With reference to the case law relied by the assessee, Zandu Pharma (supra), the Hon'ble High Court observed that while computing the profits and gains of the concerned undertaking, only expenses relating thereto can be deducted. In other words, the expenses must be incurred, for and on behalf of the concerned undertaking. The expenses attributable to any other unit or the head office expenses which have no relevance to the industrial undertaking, cannot be deducted in respect of the said undertaking while computing the profits and gains of the undertaking. From the above, the expenses attributable to the industrial unit or profit centre should have relevance to such industrial unit or profit centre. In the given case, the expenses of administrative and other common expenditure have direct relevance to the respective profit centres i.e., 2 projects and other activities of sale of TDR. We notice that the administrative functions carried on by the assessee are common to all the projects and activities carried on by the assessee. The expenses can be direct to the ongoing project, allocable or reasonably

estimated with relevance to the respective projects carried on by the assessee. Since all the administrative expenses cannot be linked to the activities reasonably, it can be allocated reasonably to all the activities carried on by the assessee. We notice that assessee is currently carrying on 2 projects by name Classique and Royal and other activities i.e., sale of TDR. In our considered view, the common administrative expenses must be allocated on all the activities carried on by the assessee therefore allocated based on gross revenue. Accordingly we direct AO to allocate the expenses relevant for the project Classique in the ratio of gross revenue and closing WIP i.e. total common expenses divided by total gross revenue including closing WIP multiplied by revenue from Classique Project. ($\text{₹ } 94,15,838 / \text{₹ } 7,11,46,685 * \text{₹ } 29,48,020$) = ₹ 3,90,153/-. For the sake of clarity, details are as under:-

Gross Revenue	
Royal	Rs. 69,14,987/-
Classique	Rs. 29,48,020/-
WIP Royal	Rs. 21,666,729/-
TDR	Rs. 3,96,13,949/-
Total	Rs. 7,11,46,685

13. In the net result, appeal filed by the assessee is **partly allowed.**

Order pronounced in the open court on 08/12/2020.

<p><i>Sd/-</i> (C. N. Prasad) न्यायिकसदस्य / Judicial Member मुंबई Mumbai;दिनांकDated : Sr.PS. Dhananjay</p>	<p><i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member 08.12.2020</p>
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai