

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

(Conducted Through Virtual Court)

BEFORE WASEEM AHMED, ACCOUNTANT MEMBER
AND
T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.2125/Ahd/2018
Assessment Year : 2012-13

ACIT, Cir.5(2) Ahmedabad.	Vs	M/s.West Wing Infra Projects 1, Dhaval Society, Part-I Opp: St. Zavier's School Navrangpura Ahmedabad. PAN : AAAFW 7956 P
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri Rupesh Shah, AR
Revenue by :		Shri Urjit Shah, Sr.DR

सुनवाई की तारीख/**Date of Hearing** : **15/02/2022**
घोषणा की तारीख /**Date of Pronouncement**: **18/02/2022**

आदेश/O R D E R

PER T.R. SENTHIL KUMAR, JUDICIAL MEMBER:

This appeal is filed by the Revenue against order dated 16.07.2018 in appeal no. CIT(A)-5/ITO, Wd.5(2)(4)/135/2015-16 passed by the Ld.Commissioner of Income-tax (Appeals)-5, Ahmedabad [for short "Ld.CIT(A)] relating to the assessment year 2012-13.

2. Sole issue raised by the Revenue is that the ld.CIT(A) has erred in law and on facts in restricting addition at Rs.1,81,06,445/- made u/s.80IB(10) of the Income Tax Act, 1961 [hereinafter referred to the Act] to Rs.11,83,663/-.

3. Brief facts of the case is that the assessee is engaged in the business of development and building infrastructure housing projects. For the Asstt.Year 2012-13, the assessee filed its return of income on 20.7.2012 declaring total income at Rs.2,440/- after claiming deduction under section 80IB(10) of the Act of Rs.1,81,06,445/-. The assessment was completed by the AO on the ground that one of the unit sold by the assessee is above 1500 square feet and therefore the entire claim of deduction under section 80IB was rejected by the AO.

4. Aggrieved against this assessment order, the assessee filed an appeal before the Ld.CIT(A). The Ld.CIT(A) vide his detailed order held as under:

Decision:

4.5. I have considered the facts of the case, written submission filed by the appellant and remand report received from the AO. The AO has made an addition of Rs. 1,81,06,445/- u/s 143(3) of the Act stating that the appellant is not entitled for deduction claimed u/s 80IB(10) of the Act, as it has not proved that built area of the each unit of the bungalows sold are not more than 1500Sq Ft, which is one of the main condition laid down for the purpose of granting deduction in the provisions of Section 801B(10) of the Act. The A.O. therefore approached to the Departmental Valuation Officer during course of assessment proceeding directing him to ascertain verify and report the area of each unit sold by the assessee on which 801B(10) is claimed. However as the matter was getting time barred and no report from DVO was received till 31st March,2015, the AO passed the order on 31.03.2015 by making disallowance of deduction claimed u/s 80IB(10) of the Act of Rs 1,81,06,445/-. The appellant thereafter received DVO's report on 25.05.2015 and filed the same before me along with written submission. The report of DVO is clear as it is mentioned that all the units sold are of less than 1500 Sq Ft except one Unit A/57-58. As the DVO's report was not on record at the time of passing the order u/s 143(3) of the Act and this being a fresh document/ evidence, a remand report way called from the AO. The AO in his remand report dated 25.04.2018, accepted the fact that except one unit, all the units sold are of less than 1500 Sq Ft. and thus DVO's report as an additional evidences may be considered in

view of natural justice. The AO in his Remand report has mentioned as under:

" As the scrutiny assessment was time barring on 31,03.2015 and the Report of DVO was not received, the AO has no other option and order u/s. 143(3) of the Act was passed on 31.03.2015 determining the income at Rs.1,81,08,885/- after making addition of Rs. 1,18,06,445/- (incorrectly stated Rs. 1,18,06,445/- instead of Rs. 1,81,06,445/~) on the account of the disallowances u/s.80IB(10) of the Act. "

The AO stated that " Thereafter, Valuation report from DVO was received in this office on 25.03.2015 vide letter No. 8(5)/DVO/2014-15 dated 19.05.2015 in respect of premises named "Samtva" situated near Sahara City, Shela, Ahmedabad, same is enclosed herewith which self explanatory for your kind consideration. On verification of DVO Report, it was noticed that the DVO had measured ail units, only unit A/ 57-58 was found the be above 1500 square feet.

As the assessee should not be deprived of its legitimate right and looking to the law of natural justice, the additional evidences put forth may be considered as this evidence in the report of DVO and the case was referred to DVO during the assessment proceeding and the appeal may be decided on merits, if deemed fit."

The Appellant has also submitted that it agrees with DVO's Report and voluntarily submitted that, addition to the extent one unit (in excess of 1500 Sq Ft) of Rs 11,31,663/- be confirmed , out of total addition made by AO of RS 1,81,06,455/- .

Ongoing through the facts of the case and documents / evidences filed before me, I am of the view that the appellant is clearly eligible for deduction u/s. 80IB(10) of the Act as it fulfils all the conditions prescribed for claiming such deduction. Further all the residential units sold by the appellant have been found of less than 1500 Sq Ft as provided under the Act except one unit i.e. A/ 57- 58 which is of 1508.41 Sq Ft. This fact has also been confirmed under DVO's Report as well as remand report. Merely because one unit is in excess of 1500 SqFt, the deduction u/s 80IB(10) cannot be denied on the entire project as held by Higher Authorities in following cases -

- Bengal Ambuja Housing Development Ltd. vs. DCIT, 1TA No.1595/Kol/ 2005, vide order dated 24th March 2006
- * Saroj Sales Organisation vs Income Tax Officer (ITAT Mumbai) (2008) 8(5 TTJ Mum 485

1 all earlier years, similar deduction u/s.80IB(10) of the Act has been allowed. The appellant has furnished the copies of assessment orders from A.Yrs.2008-09 to 2010-11. hi view-of tins, the disallowance

made by AO invoking the provisions of Section 80IB(10) of the Act is restricted to one unit found in excess of 1500 Sq Ft, which comes to Rs 11,31,663/- (Rs 1,81,06,455/- - Rs 1,69,74,792/-) and the remaining disallowance of Rs.1,69,74,792/- is hereby deleted. The AO is directed to give the effect accordingly. In view of the above , the Appeal is partly allowed.”

5. Aggrieved against this order, Revenue is in appeal before us.
6. The Ld.DR appearing for the Revenue contended that Ld.CIT(A) erred in granting deduction under section 80IB(10) of the Act when the assessee has not fully complied with provisions of section 80IB(10) of the Act, and therefore, order of the Ld.CIT(A) is to be modified.
7. Per contra, the ld.counsel for the assessee stated that deduction under section 80IB(10) relating to the same project was allowed by the Department in its entirety in favour of the assessee for the Asst.Years 2008-09 to 2010-11, and therefore, Ld.CIT(A) has rightly allowed similar claim of the assessee in this year as well. The ld.AR also relied upon the judgment of Hon'ble Madras High Court in the case of Viswas Promoters P.Ltd. Vs. ACIT, (2013) 29 taxmann.com 19 wherein it is categorically held that the assessee is entitled to claim of deduction under section 80IB(10) of the Act proportionately if the conditions contained in that provision are satisfied by the assessee.
8. We have given our thoughtful consideration in the above matter. As rightly pointed out by the ld.DR only one unit in the project i.e. A/57-58 which is admeasuring 1508.41 square feet. This fact has also been confirmed by the Department Valuation Officer. The assessee cannot be denied of entire remaining housing projects under this provision just because one unit is in excess of 1500 square feet. In this connection, judgment in the case of Viswas

Promoters P.Ltd (supra) supports the case of the assessee. The relevant paragraphs of the judgment are para-14 and 15, which are as follows:

“14. On the facts admitted by the Revenue, in the projects "Agrini" and "Vajra", there are number of flats which are below 1500 sq.ft., and the relevant built-up area requirement is specified under Section 80IB(10)(c) of the Income Tax Act. Thus, the built-up area in some of the flats in both these projects are in excess of 1500 sq.ft., i.e., 32 flats in Agrini and only one flat in Vajra and that the assessee had not claimed any deduction on this. We hold that the Tribunal is not correct in its view, that by reason of these Units being in excess of 1500 sq.ft., the entire claim of the assessee in respect of these two projects would stand rejected under Section 80IB(10) of the Income Tax Act. Thus, going by the definition of "housing project" under Explanation to Section 80HHBA of the Act as referred to above as the construction of "any building" and the wordings in Section 80IB(10) of the Act, the question of rejection in entirety of the project on account of any one of the blocks not complying with the conditions, does not arise. Even in the case of each one of the blocks, wherever there are flats which satisfied the conditions particularly of the nature stated under Section 80IB(10)(c) of the Act, we have already upheld the case of the assessee in T.C. Nos.1348 and 1349 of 2007 dated 10.10.2012 for grant of relief under Section 80IB(10) of the Act on a proportionate basis, by following the decision of the Bombay High Court in CIT v. Brahma Associates [2011] 333 ITR 289/197 Taxman 459/9 taxmann.com 289. Thus applying the decision of this Court in T.C. Nos. 1348 and 1349 of 2007 dated 10.10.2012, we hold that the assessee is entitled to succeed both on the principle of proportionality as well as by reason of the construction on the meaning of the expression "housing project" as referring to construction of any building and the wordings in Section 80IB(10) of the Act. In the circumstances, we hold that the mere fact that one of the blocks have units exceeding built-up area of 1500 sq.ft, per se, would not result in nullifying the claim of the assessee for the entire projects. Consequently, in respect of each of the blocks, the assessee is entitled to have the benefit of deduction in respect of residential units satisfying the requirement under Section 80IB(10)(c) of the Act. In so holding, we also agree with the decision of the Bombay High Court in CIT v. Vandana Properties [2012] 206 Taxman 584/19 taxmann.com 316, which was decided by the Bombay High Court on similar lines as in the assessee's case before us.

15. In the light of the above reasoning, we have no hesitation in allowing the cases filed by the assessee in respect of assessment years 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09, thereby answering the substantial questions of law in favour of the assessee, that the assessee is entitled to the claim of deduction in respect of all

the blocks forming part of the projects called Agrini and Vajra, but to the extent of each of the blocks satisfying the conditions under Section 80IB(10) of the Act, the assessee would be entitled to the relief on a proportionate basis.

9. On similar issue, jurisdictional High Court in the case of Pr.CIT Vs. Shreenath Buildcon, reported in (2019) 110 taxmann.com 390 allowed the claim of the assessee. Against which, SLP filed by the Department before Hon'ble Apex Court was dismissed by holding that Tribunal's order allowing assessee's claim for deduction under section 80-IB by taking a view that simply because out of several units included in housing project, only in one of them, constructed area exceeded upper limit; that too, by a small margin, deduction claimed could not be denied in respect of entire housing project. The judgment was reported in (2019) 110 taxmann.com 390 (SC).

10. Following the ratio of the above judgments, the ground of appeal raised by the Revenue is rejected and the order of the ld.CIT(A) allowing proportionate deduction u/s.80IB(10) ofnRs.1,69,74,792/- is hereby confirmed.

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

Order pronounced in the Court on 18th February, 2022 at Ahmedabad.

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

**Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER**

Ahmedabad, dated 18/02/2022

*vk**