

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

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 1859/MUM/2020  
(ASSESSMENT YEAR: 2012-13)

Deputy Commissioner of Income Tax-  
Central Circle-3(4), Mumbai,  
Room No. 1915, 19<sup>th</sup> Floor,  
Air India Building, Nariman Point,  
Mumbai- 400021

..... Appellant

**Vs**

M/s AHCL PEL,  
Patel Estate, Patel Estate Road,  
SV Road, Jogeshwari (W),  
Mumbai - 400102  
[PAN: AANFA5615N]

..... Respondent

ITA No. 2011/MUM/2020  
(ASSESSMENT YEAR: 2012-13)

M/s AHCL PEL,  
Patel Estate, Patel Estate Road,  
SV Road, Jogeshwari (W),  
Mumbai - 400102  
[PAN: AANFA5615N]

..... Appellant

**Vs**

Deputy Commissioner of Income Tax-  
Central Circle-3(4), Mumbai,  
Room No. 1915, 19<sup>th</sup> Floor,  
Air India Building, Nariman Point,  
Mumbai- 400021

..... Respondent

Appearances

For the Department : Shri Soumendu Kumar Dash  
For the Assessee : Shri Mayur Kisnadwala

Date of conclusion of hearing : 15.07.2022  
Date of pronouncement of order : 22.07.2022

## ORDER

**Per Rahul Chaudhary, Judicial Member:**

1. The present cross appeals filed by the Revenue and the Assessee arise from the order of Commissioner of Income Tax (Appeals)-8, Mumbai [hereinafter referred to as 'the CIT(A)'], passed on 31.07.2020 for the Assessment Year 2012-13, which in turn arose from the Assessment Order, dated 25.03.2015, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].
2. The grounds raised in cross appeals are as under:

### Revenue's Appeal : ITA No. 1859/Mum/2020

- "1. Whether on the facts and circumstances of the case and in laws, the Id. CIT(A) was justified in allowing deduction u/s 80IB of the Act, without appreciating the fact that assessee has not fulfilled the conditions prescribed under the said section in as much as certain units exceed the prescribed ceiling on builup area.*
- 2. Whether on the facts and circumstances of the case the Ld. CIT(A) was justified in arriving sale price of flat no. 1104 (with terrace) at Rs. 52,356/- per sq. feet considering premium of only 20% over per sq.ft. sale price of flats no. 1105 and 1106 (without terrace access), disregarding actual sale price of Rs. 62893/- per sq.ft. flat no. 1104 as reference to determine quantum of on money receipts in case of sale of flats no. 1105 and 1106."*

### Assessee's Appeal : ITA No. 2011/Mum/2020

- "1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the addition made by the AO to the extent of Rs. 2,66,75,360/- on account of differential prices."*

2. *On the facts and circumstances of the case and in law, the learned CIT(A) erred in not granting the enhanced deduction claimed u/s 80IB (10) of the Act on the alleged increased sales revenue of Rs. 2,66,75,360/-."*
3. The brief facts of the case are that the Assessee is a partnership firm between Ace housing construction Ltd. and Patel Engineering Ltd. (AHCL-PEL). Assessee entered into a joint development agreement with M/s Jivesh Developers & Properties (P.) Ltd. (JDPPL) for development of a slum rehabilitation project at Bandra in the name of 'Quantum Park' in respect of which the Assessee claimed deduction under Section 80IB of the Act.
  - 3.1. There was a search action in the case of one Shri Samir N. Bhojwani Group on 30.11.2010 of which M/s. Jivesh Developers & Properties P. Ltd. was one of the entities. In course of the said search action, two sets of building plans in respect of "Quantum Park Project" were found. As per one plan, there were two flats per floor having built up area of around 2000 sq. ft. whereas as per the second plan, each floor had four flats of area less than 1000 sq. ft. Keeping in view the evidences found including the plan as per which the flats had area of more than 1000 sq. ft, the statements recorded, the AO was of the view that the Assessee's claim for deduction u/s. 80IB was incorrect. Therefore, the AO disallowed the Assessee's claim of INR 11,08,40,454/- for deduction u/s. 801B. Further, during the course of assessment proceedings, the AO observed that the Assessee had sold 3 residential units on the same date for different sale consideration per sq. ft. Therefore, the AO concluded that the Assessee had indulged in on-money transactions which are not recorded in the books of accounts.

The Assessing Officer made an addition of INR 4,31,13,672/- treating the differential price as the undisclosed income of the Assessee. The Assessing Officer completed assessment under Section 143(3) of the Act at income of INR 16,06,16,890/-.

- 3.2. Being aggrieved, the Assessee preferred appeal before the CIT(A) who allowed the claim of the Assessee for deduction under Section 80IB of the Act following the decision of the Tribunal, dated 26.10.2016, in the case of the Assessee for the Assessment Years 2005-06 to 2011-12 (ITA No. 2845-2851/MUM/2016). Further, the CIT(A) also granted relief to the Assessee by restricting the disallowance of INR 4,31,13,672/- made by the Assessing Officer by treating the differential price as undisclosed income to INR 2,66,75,360/-.
- 3.3. Being aggrieved the, the Revenue is appeal before us. The Assessee was also not satisfied as the CIT(A) had confirmed the addition of INR 2,66,75,360/- and therefore, the Assessee has also filed appeal.

Ground No.1 of Revenue's Appeal

4. Ground No. 1 raised by the Revenue is directed against the order of CIT(A) allowing the claim of the Assessee for deduction under Section 80IB(10) of the Act.
  - 4.1. Learned Departmental Representative appearing before us placed reliance on the Assessment Order and submitted that the CIT(A) was not justified in granting the benefit of deduction under Section 80IB(10) of the Act. He submitted that the project was not eligible, inter alia, as the construction was not

as per municipal plan, and the flats had area of more than 1000 Sq Ft. Referring to the judgment of the Hon'ble Supreme Court in the case of Sumati Dayal Vs. CIT: 214 ITR 801 SC, he submitted that in the facts of the present case the apparent cannot be considered as real and the Assessing Officer was justified in denying deduction under Section 80IB(10) of the Act.

- 4.2. Responding to the above, the Learned Authorized Representative for the Assessee submitted that the issue has been decided in the favour of the Assessee by the Tribunal in appeal for the Assessment Years 2005-06 to 2011-12 wherein identical contentions raised by the Revenue in respect of the same project have been rejected. By way of a consolidated order, dated 26.10.2018, the appeals filed by the Revenue for the aforesaid assessment years against the order passed by CIT(A) allowing the benefit of deduction under Section 80IB(10) of the Act to the Assessee, in identical facts and circumstances, have been dismissed.
- 4.3. We have considered the rival submission and perused the material on record including the decision of the Tribunal in the case of the Assessee for the Assessment Year 2005-06 to 2011-12. We note that identical issue stands decided in favour of the Assessee. In identical facts and circumstances, the Tribunal has held that the same project (i.e., 'Quantum Park') is eligible for deduction under Section 80IB(10) of the Act as the Assessee has fulfilled all the conditions prescribed for claiming deduction under Section 80IB(10) of the Act. The construction plan has been approved by the local authority and the Assessee has constructed residential units with built-up area of less than

1000 Sq. Ft. The fact that two adjacent flats have been merged to make bigger flat is of no consequence and deduction under Section 80IB(10) of the Act would be available since prescribed conditions stand satisfied. The CIT(A) has, in paragraph 5.2 of the order, reproduced relevant extract of the aforesaid decision of the Tribunal before deciding the issues in favour of the Assessee in paragraph 5.3 of the order impugned. Since CIT(A) has granted relief to the Assessee by following the decision of the Tribunal in the case of the Assessee for the Assessment Years 2005-06 to 2011-12 in ITA No. 2845-2851/MUM/2016, dated 26.10.2018, we do not see any reason to interfere with the decision of the CIT(A) on this issue. Accordingly, Ground No. 1 raised by the Revenue is dismissed.

Ground No.2 of Revenue's Appeal and Ground No.1 & 2 of Assessee's Appeal

5. Ground No. 2 raised by the Revenue and Ground No. 1 & 2 raised by the Assessee pertain to addition made by the Assessing Officer holding difference in sale price of flats as undisclosed income, and denial of deduction under Section 80IB(10) of the Act in respect of such alleged undisclosed income.
6. During the Assessment proceedings the Assessing Officer computed per square feet sale price of flats sold by the Assessee. The Assessing Officer noted that there was huge difference in the per square feet sale price of Flat No. 1104 as compared to Flat No. 1105 & 1106 and concluded that the Assessee had indulged in on-money transactions. Accordingly, the Assessing Officer benchmarked the per square feet rate for

Flat 1105 & 1106 on the basis of per square feet rate for Flat 1104, thus, making an addition of INR 4,31,13,672/- on account of the differential prices. The Assessing Officer also denied the Assessee the benefit of deduction under Section 80IB(10) of the Act in respect of the aforesaid amount of INR 4,31,13,672/-.

7. Being aggrieved, the Assessee carried the issue in appeal before CIT(A) who restricted the addition to INR 2,66,75,360/-. The Assessee had claimed that the difference in per square feet prices was on account of extra terrace rights granted to the owner of Flat No. 1104. The CIT(A) computed per square feet rate of Flat No. 1104 (excluding premium for terrace access) at INR 52,356/- by assuming that per square feet price of INR 62,893/-, computed by the Assessing Officer for Flat No. 1104, was inclusive of premium of 20% on account of access to the terrace. Taking the per square feet price of INR 52,356/- so determined, the CIT(A) concluded that the sale price for Flat No. 1105/1106 (without terrace access) has been understated by INR 2,66,75,360/-. Thus, the CIT(A) confirmed the addition made by the Assessing Officer to the extent of INR 2,66,75,360/-. The CIT(A), however, rejected the alternative contention of the Assessee that Assessee be granted deduction under Section 80IB(10) of the Act for the above enhanced income on account of differential per square feet price of the flats.
8. Being aggrieved by the order passed by the CIT(A), both, the Assessee as well as Revenue are in appeal before us.

9. The Learned Authorised Representative of the Appellant submitted that the sales of the three flats were made to unrelated parties and was made, in each case, at a price more than the ready reckoner value adopted for stamp duty purposes. He submitted that it was explained to the CIT(A) that the difference in the sale price per square feet was on account of the facts that purchaser of Flat No.1104 got more area as he had access to terrace. In this regard, the Ld. Authorised Representative for the Assessee made reference to the floor plan at Annexure G to the Agreement, dated 28.03.2012, placed at Page 84 of the paper-book. Learned Authorised Representative further submitted that, in any case, decision to sell the Flat No. 1105/1106 at a comparatively lower price has to be examined from the point of view of a businessman and not from the perspective of the Assessing Officer. Without prejudice to the aforesaid, he submitted that the Authorities below erred in not granting benefit of deduction under Section 80IB(10) of the Act in respect of alleged undisclosed income and relied upon the Circular No. 37 of 2016, dated 02.11.2016 issued by the Central Board of Direct Taxes, decision of Pune Bench of the Tribunal in the case of M/s Surana MuthaBhansali Developers (P) Ltd Vs ACIT (ITA No. 2825/Pun/2017, 02.07.2021) and the judgment of the Hon'ble Bombay High Court in the case of CIT Vs. Sheth Developers (P.) Ltd.: 25 Taxmann.com 173.
10. Per Contra, the Learned Departmental Representative supported the Assessment Order as he submitted that the fact that sale price for the flats was above the ready reckoner value adopted for computation of stamp duty is not sufficient. There was huge difference in the per square feet price of the flats. Owner of Flat

No. 1104 only had access to and not the ownership of the extra space, i.e. the terrace. He submitted that the Assessing Officer were justified in making addition of INR 4,31,13,672/- in this regard and that the CIT(A) had erred in computing the per square feet price of Flat No. 110 at INR 52,356/- as against the actual per square feet price of INR 62,893/-. Further, claim of the Assessee for deduction under Section 80IB(10) of the Act in respect of the aforesaid enhanced income has been correctly rejected by the Assessing Officer and CIT(A) as this income has not been disclosed in the books of accounts by the Assessee and was not in the nature of business income. Reliance on Circular No. 37 of 2016 is misplaced as the said circular does not grant any benefit to an assessee in case of undisclosed income and/or unaccounted sales.

11. We have considered the rival submission on this issue and perused the material on record. The submission of the Learned Authorised Representative of the Assessee that the all sales were made at a price higher than stamp value (as per ready reckoner) to unrelated parties has not been refuted by the Revenue. The case of the Revenue is that the Assessee has indulged in on-money transaction in respect of Flat No. 1105 & 1006 as the sale price of the Flat No. 1105/1106 has been understated. The basis for this conclusion is the inference drawn by the Assessing Officer from the difference in the per square feet price charged for Flat No. 1104 (at INR 62,893) and Flat No. 1105/1106 (at INR 35,000/-). The Assessee had provided explanation for the aforesaid difference in rates by establishing, on the basis of the floor plan, that the owner of Flat No.1104 also got terrace of around 318 Square Feet which has not been

taken into account by the Assessing Officer for computing per square feet rate and this has resulted in artificial difference in the per square feet rates of the flats as computed by the Assessing Officer. The fact that the owner of Flat No. 1104 would have access to the terrace has been accepted by the Revenue. The contention of the Learned Departmental Representative is that the owner of Flat No. 1104 would not have ownership rights but only access to the terrace area and therefore, per square feet price of INR 62,893/- as computed by the Assessing Officer for Flat No. 1104 is correct and should be taken as the basis for computing uncounted on-money income earned by the Assessee by understating per square feet sale price of Flat No. 1105/1106 at INR 35,000/-. We note that the CIT(A) had restricted the addition to INR 2,66,75,360/-. While doing so the CIT(A) had accepted the contention of the Assessee that the difference in the per square feet rates for Flat 1105/1106 and 1104 was on account of access to terrace to be 'reasonable to an extent'. The relevant extract of the order of CIT(A) reads as under:

*"6.5 However, the claim the assessee the Unit had a premium rate on account of availability of the terrace is reasonable to an extent. But such a premium would not extend to the actual rate of the flats but could at best be thought to be a premium of say 10% to 20% of the normal flat rates. Assuming a 20% premium for the terrace on the rate of Unit no. 1104, the per sq ft. rate of the unit can be computed at Rs. 52,356/-. Since the assessee has charged a rate of Rs. 35,000 from other flat owners, it is clear that the rates charged from other flat owners are understated. The AO is directed to compute the additional receipts accruing to the assessee on account of such price differential." (Emphasis Supplied)*

12. Thus, the CIT(A) accepted the contention of the Assessee that on account of the additional right, being access to the terrace,

per square feet price for flats could vary. Once the CIT(A) had concluded as aforesaid, the very premise on which the Assessing Officer had proceeded to draw adverse inference was found to be incorrect by the CIT(A). In our view, the Assessing Officer had concluded that the Assessee had indulged in on-money transactions on the incorrect premise that the per square feet sale price of the flats were equal. Apart from differences in the per square feet price, there is nothing on record to show, either directly or indirectly, that the Assessee has indulged in on-money transactions. There is no basis for the additions made by the Assessing Officer. Even, the assumption of per square feet price of INR 62,893/- pertaining to Flat No. 1104 being inclusive of 20% of premium on account of terrace rights made by the CIT(A) is also without any basis. The fact that the sales have been made to unrelated third parties at price higher than value adopted for stamp duty is also not disputed. It is apparent that Flat No. 1104 which had access to the terrace would fetch a higher price than Flat No. 1105/1106. Thus, in our view, which also draws strength from the decision of the coordinate bench of the Tribunal in the case Ms/ Shah Realators Vs ACIT (ITA No. 2656/Mum/2016, dated 25.05.2018), the additions made by the Assessing Officer on account of differential price of the flats to the extent confirmed by the CIT(A) are not sustainable and therefore, we delete the same. Since the additions stand deleted as aforesaid, the alternative claim for deduction under Section 80IB of the Act in respect of additional income on account of the aforesaid addition has become infructuous.

13. In view of the above, Ground No. 1 raised by the Assessee in appeal is allowed while Ground No. 2 Raised by the Revenue in

appeal is dismissed. In view of the aforesaid, Ground No. 2 raised by the Assessee in appeal is dismissed as being infructuous.

14. In result, the appeal of the Assessee (ITA No. 2011/Mum/2020) is partly allowed and appeal of the Revenue (ITA No. 1859/Mum/2020) is dismissed.

Order pronounced on 22.07.2022.

*Sd/-*  
(Prashant Maharishi)  
Accountant Member

*Sd/-*  
(Rahul Chaudhary)  
Judicial Member

मुंबई Mumbai; दिनांक Dated : 22.07.2022  
*Alindra, 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 //(Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai