

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI
BEFORE SHRI AMARJIT SINGH, AM AND MS. KAVITHA RAJAGOPAL, JM

ITA Nos. 2335, 2336 & 2337/Mum/2022
(Assessment Years: 2013-14, 2011-12 & 2014-15)

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| ITO-17(2)(1) Mumbai-400 051 | Vs. | Poddar Ashish Developers 5C Court Chambers, 35 New Marine Lines, Mumbai-400 020 |
| PAN/GIR No. AAAAP 4750 D | | |
| (Appellant) | : | (Respondent) |
| Appellant by | : | Shri B. N. Rao |
| Respondent by | : | Smt. Kanupriya Damor |
| Date of Hearing | : | 08.12.2022 |
| Date of Pronouncement | : | 23.12.2022 |

ORDER

Per Kavitha Rajagopal, J. M.:

These appeals have been filed by the Revenue, challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Years ('A.Y.' for short) 2011-12, 2013-14 and 2014-15 respectively.

2. The assessee in all these appeals has challenged the following common grounds of appeal:

a. Whether on the facts and in the circumstances of the case and in law, the ld.CIT(A) was justified in holding that the assessee is entitled for deduction u/s. 80-IB(10) of the I.T. Act, 1961"

b. Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) was justified in ignoring the fact that is clearly established that the very intention and also the subsequent construction was to construct the duplex flats out of most of 1-BHK flats which are of

built up area in excess of the prescribed limit of 1000 sq. ft, which is in contravention with the provisions of section 80IB(10) of the I.T. Act, 1961.

3. As the facts are identical in all these appeals, we pass a consolidated order by taking ITA No. 2335/Mum/2022 as a lead case.

4. The brief facts are that the assessee is an Association of Persons (AOP for short) and consists of 3 members namely M/s. Bedrock Ltd., M/s. Ashish Estate and Properties Ltd. and M/s. Esvee Poddar Family Trust. The assessee is a builder and developer and has filed its return of income dated 28.09.2013, declaring total income at Rs.1,40,000/- after claiming deduction of Rs.4,09,90,505/- u/s. 80IB(10) of the Act. The assessee's case was selected for scrutiny and the assessment order dated 09.12.2016 was passed u/s. 143(3) of the Act, determining the total income at Rs.4,11,30,505/-, after making a disallowance u/s. 80IB(10) of the Act.

5. The assessee challenged the assessment order before the Id. CIT(A), who allowed the appeal by the assessee.

6. It is observed that the project undertaken by the assessee was covered u/s. 80IB(10) of the Act where the assessee company, a joint venture, took up the housing project by a name 'Garden Estate' at Goregaon (E), Mumbai, as per the agreement dated 19.06.2004 and the project was commenced on 16.12.2004 and completed before 31.09.2009. It is seen that the assessee has declared net profit of Rs.4,11,30,505/- on sale of flats from the above mentioned projects for A.Y. 2012-13 and had claimed deduction u/s. 80IB(10) of the Act, amounting to Rs.4,09,90,505. The A.O. observed that the assessee had undertaken only one project in the name of 'Garden Estate' for construction

of residential flats. The said project was completed in the A.Y. 2009-10 and has been assessed on the project completion basis in that year. It is also observed that the assessment for A.Ys. 2007-08 and 2008-09 were completed on WIP method for which the assessee was in appeal before the Id. CIT(A) on the ground that the project completion method should be adopted. The assessee's appeal was allowed by the Id. CIT(A) for both the years for which the Revenue was in appeal before the Tribunal.

7. The crux of the disallowance was that during the assessment proceedings, it was observed that each flat in the said project was below 1000 sq. ft. built up area and a total of 18 one BHK flats were converted into 9 duplex flats. The Assessing Officer (A.O. for short) taking into view this fact, stated that the combined area of these flats were more than 1000 sq. ft. built up area, thereby holding that the assessee has not complied with one of the vital condition of section 80IB(10) and rejected the deduction claimed by the assessee. The A.O. placed his reliance on the decision of Hon'ble Bombay High Court in the case of *CIT v/s Brahma Associates* (2011) 333 ITR 289 (Bom). Further to this, it is also observed that the assessee has sold 7 flats out of the closing stock and has declared profit of Rs.4,11,30,505/-. The approval was obtained on 12.01.2004, the commencement certificate dated 16.12.2004 and the occupation certificate dated 08.12.2008 in respect of 'A' wing and 30.03.2009 in respect of 'B' wing. The total area of the said project admeasures 6557 sq. mtrs, which was more than one acre. The assessee constructed 3 types of flats namely – one, two and three Bhk flats. It is said that all these flats were below 1000 sq. ft. and the built up area, pertaining to 3 BHK flat was in dispute with the DVO who then certified after inspection that the 3 BHK flats were also below 1000 sq. ft.

It is observed that during a survey operation at the site of the assessee company, a brochure with the plan of two 1 BHK flats to be combined into one flat along with staircase and other amenities were offered. When confronted with, the assessee stated that the idea of duplex flats was not there at the time of plan approved by Municipal Corporation, which was only for construction of twenty four 1 BHK independent flats. The assessee further contended that the proposal of converting these flats was by the purchasers and not by the assessee's. On this note, the assessee stated that it had not violated the condition of section 80IB(10) of the Act. The A.O. at the time of assessment proceeding for A.Y. 2009-10 issued notice to all the purchasers of 1 BHK flats, asking for clarification, whether the flats were converted and, if so, who had undertaken to combine the flats. The reply from these some of the owners stated that they owned independent 1 BHK flats and had not combined into duplex. The other 18 flats purchasers stated that they had converted their flats into duplex and it was not done by the assessee. The assessee stated that the Id. CIT(A) has allowed the claim of the assessee in A.Ys. 2009-10 and 2010-11, wherein the assessee was entitled to proportionate profits and only the profits relating to eighteen 1 BHK flats, which was combined was to be brought to tax by relying on the decision of ITAT, Mumbai in the case of *Dy. CIT vs. M/s. Ekta Housing Pvt. Ltd.* (in ITA No. 3649/Mum/2009 vide order dated 20.05.2011), which held that where, in case any project has complied with conditions of section 80IB(10) partly then the assessee was entitled to proportionate deduction of profit as per the provisions of the Act. The A.O. failed to accept the condition of the assessee on the ground that the said decision was before the Hon'ble Jurisdictional High Court in a pending appeal. The A.O. held that out of 191 flats in the said project and eighteen 1 BHK flats were combined to

form nine duplex flats, which according to the A.O. was done by the assessee and not by the purchasers, as it was sold to the purchasers with the intention to facilitate the purchasers to convert the same into duplex flats, as advertised in the brochure. The A.O. held that the assessee has availed the provisions of section 80IB(10), which was for the purpose of building housing projects for lower and middle strata of the society. The A.O. also held that the construction of the assessee's project was in such a way to facilitate the construction of staircase by having a large hole on the roof, which was unusual in such projects. Further to this, the A.O. also observed that only single kitchen was provided for two flats and also the fact that the investors Shri Vimal Kumar Poddar and Mrs. Chaula Vimal Poddar had taken two adjacent flats, shows that these flats were not meant for small and middle income groups. The A.O. on these grounds denied the claim of the deduction u/s. 80IB(10) of the Act and added the same to the income of the assessee.

8. In an appeal before the Id. CIT(A), the assessee's claim of deduction us/. 80IB(10) was allowed by the Id. CIT(A) on the ground that the Tribunal has allowed the assessee's claim for A.Ys. 2009-10 and 2010-11 in ITA Nos. 2443 & 3704/Mum/2012 vide order dated 30.09.2014 and ITA No. 4894/Mum/2013 vide order dated 10.04.2015, on the ground that the assessee's approval was for construction of 1 BHK flat and the conversion of the said flats to duplex was made by the purchasers subsequent to the sale of the flats. The Revenue has challenged the said decision of the Id. CIT(A) before us.

9. Having heard the rival submissions and perused the materials on record. It is observed that the tribunal in A.Ys. 2009-10 and 2010-11 have decided this issue in favour of the assessee. The Tribunal held that the assessee has constructed the flat well in

accordance with the approved plan and has also sold the said flats to the buyers with the same specification. The Tribunal held that mere provision of a hole for staircase to convert the flats to duplex was only a marketing strategy adopted by the assessee to enhance the sale. It was considered a minor deviation as per the approved plan. It also held that the sale of more than one flat to the members of a family is not a ground for rejecting the claim of deduction u/s. 80IB. The relevant extract of the decision in ITA No.2443 & 3704/Mum/2012 dated 30.09.2014 is extracted hereunder for ease of reference:

24.

Drawing parallel in the instant case, we find that there is iota of direct evidence to demonstrate that it is the assessee who merged the two 1-BHK flats in to duplex one with one kitchen. On the contrary there is evidence to suggest that the flat buyers have done it so to their better living in the residential units. In our opinion, mere making a provisions of hole and providing methods/design vide the brochure to the advantage of the flat buyers does not amount to construction of duplex flats by the developer, who is aware of the consequences in matters of claims of deduction one side as well as the obtaining the completion /occupancy certificates from the Authorities, who approved the project with 1 to 3 BHK flats only and not to the duplex flats.

25. *Thus, the discrepancy of mere providing a hole for intended stair case for flat buyers and supplying of the design to merge the flats into a duplex flat in our opinion constitutes a marketing strategy to boost the sale of the 1-BHK. Otherwise, the assessee Constructed the flats in accordance with the plan approved by the authorities and sold them as such to the buyers. So long as the permanent structure like pillars of flat are constructed as per the approved plan of a residential unit with built up are of less than looks like small and minor deviation made for marketing reasons must not come on the way of granting deduction. As such there is no prohibition for sale of the more flats to the members of a family. The under amendments are undisputedly inapplicable to the projects under Consideration. Therefore, we are of the opinion, the assessee is entitled to the projects deduction in respect of the profits attributable to all the 1-BHK flats of the project too. To this extent we reverse the order of the CIT(A). Accordingly, we allow the appeal of the assessee of CIT(A).*

10. By respectfully following the above said decision, we are of the considered opinion that the assessee is entitled to its claim of deduction u/s.80IB(10) of the Act.

11. In the result, the appeal filed by the Revenue in ITA No. 2335/Mum/2022 is dismissed.

12. The grounds raised by the Revenue in ITA Nos. 2336 & 2337/Mum/2022 are on identical facts and the above observation applies *mutatis mutandis* to these grounds also. Hence, all the above grounds filed by the Revenue in ITA Nos. 2336 & 2337/Mum/2022 are dismissed.

13. In the result, all the three appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 23.12.2022

Sd/-

(Amarjit Singh)

Accountant Member

Mumbai; Dated : 23.12.2022

Roshani, Sr. PS

Sd/-

(Kavitha Rajagopal)

Judicial Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)

ITAT, Mumbai