

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

BEFORE SHRI ABY T VARKEY (JUDICIAL MEMBER)

AND

SHRI AMARJIT SINGH (ACCOUNTANT MEMBER)

ITA No. 5631/Mum/2014- A.Y. 2010-11
 ITA No. 2822/Mum/2019- A.Y. 2012-13
 ITA No. 1946/Mum/2022- A.Y. 2007-08

Jt.CIT (OSD), CC-2(4), Mumbai / Deputy Commissioner of Income-tax, Central Circle 2(4), Mumbai, Pratishtha Bhavan, Room No.802, 8 th Floor, M.K. Road, Mumbai-400 020	vs	M/s Keystone Realtors Pvt Ltd, 702, Natraj, M.V. Road Junction Western Express Highway, Andheri East, Mumbai-400 069 PAN : AAACK2499Q
APPELLANT		RESPONDENT

ITA No. 3003/Mum/2019- A.Y. 2012-13

M/s Keystone Realtors Pvt Ltd, 702, Natraj, M.V. Road Junction Western Express Highway, Andheri East, Mumbai-400 069 PAN : AAACK2499Q	vs	Deputy Commissioner of Income-tax, Central Circle 2(4), Mumbai, Pratishtha Bhavan, Room No.802, 8 th Floor, M.K. Road, Mumbai-400 020
APPELLANT		RESPONDENT

C.O. No. 175/Mum/2018

(Arising out of ITA No. 5631/Mum/2014)

(Assessment year 2010-11)

&

C.O. No. 17/Mum/2022

(Arising out of ITA No. 1946/Mum/2022)

(Assessment year 2007-08)

M/s Keystone Realtors Pvt Ltd, 702,	vs	Deputy Commissioner of Income-
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Natraj, M.V. Road Junction Western Express Highway, Andheri East, Mumbai-400 069 PAN : AAACK2499Q		tax, Central Circle 2(4), Mumbai, Pratishtha Bhavan, Room No.802, 8 th Floor, M.K. Road, Mumbai-400 020
CROSS OBJECTOR		RESPONDENT

Assessee represented by	Shri Naresh Kumar
Department represented by	Shri Nimesh Yadav, CIT DR

Date of hearing	09/02/2023
Date of pronouncement	27/03/2023

ORDER

PER : Shri Amarjit Singh (Accountant Member):

These four appeals filed by the Revenue and assessee and two cross objections filed by the assessee are arising from the common order of Ld.CIT(A)-37, Mumbai dated 25/06/2014, based on common issue and on identical facts. Therefore, for the sake of convenience, all these appeals and cross objections are adjudicated together by taking ITA No.5631/Mum/2014 as lead case and its finding will be applied mutatis mutandis to other appeals, wherever these are applicable.

ITA No.5631/Mum/2014 (Revenue's Appeal) & CO No.175/Mum/2018 A.Y. 2010-11

2. Facts in brief are that return of income declaring total income at Nil after claiming set off of brought forward loss amounting to Rs.44,11,03,164/- was filed on 01/10/2010. A search and seizure action

under section 132(1) of the Act was conducted in the case of Rustomjee – Evershine group on 21/10/2010 and assessee's case was also covered in the said search action. The assessee was engaged in the business of builders and developers during previous year under consideration. The assessee has filed revised return of income on 26/10/2011 declaring Nil income after claiming set off of brought forward loss amounting to Rs.44,54,72,764/-. A notice under section 153A of the Act was issued on 27/09/2011. Thereafter, notice under section 143(2) of the Act was issued on 11/02/2013. Further facts of the case are discussed while adjudicating the grounds of appeal filed by the Revenue.

GROUND 1 & 2 OF REVENUE'S APPEL & GROUND 1 & 2 & ADDITIONAL GROUND OF CROSS OBJECTION FILED BY THE ASSESSEE.

3. There is a delay of 843 days in filing cross objection by the assessee has been reported. The assessee submitted an affidavit dated 22/01/2020 alongwith application stating that there was delay in filing the cross objection because of wrong advice by the tax advisor. Before us, it is also contended that thereafter, counsel, Shri Naresh Kumar, who represent before the ITAT advised the assessee to file the cross objection against the departmental appeal.

4. Heard both sides. After considering the facts reported by the assessee in the affidavit that there was delay in filing the cross objection because of wrong advice given by the tax advisor. Vide affidavit the assessee submitted that its Tax Advisor at the time when department filed appeal had advised not to file cross objection as it was a departmental appeal. However, its counsel as referred above has advised

the assessee to file a cross objection, who represent before the ITAT. We have also considered the judgement of Hon'ble Supreme Court in the case of Collector, Land Acquisition vs MST Kattiji & Others – Civil Appeal No.460 of 1987 dated 19/02/1987 wherein it was held “sufficient cause for the purpose of condonation of delay should be interpreted with a view to do even handed justice on merit in preference to the approach which scuttles a decision on merit”. We are of the considered opinion that there is a bonafide reason for not filing the cross objection in time. Accordingly, we condone the delay and admit the cross objection to decide the issues on merit.

5. The facts in brief are that during the course of assessment, the Assessing Officer noticed that assessee has claimed dividend income of Rs.20,19,580/- as exempt income. On query, the assessee explained that it has suo motu disallowed an amount of Rs.2,501/- under section 14A pertaining to expenditure incurred for earning the exempt income. The assessee also submitted that no question arose to make any further disallowance under section 14A of the Act. However, the Assessing Officer has not agreed with the submission of the assessee and he has computed the disallowance under section 14A alongwith provisions of Rule 8D of the I.T. Rules, 1962 to the amount of R.40,25,86,078/- and added to the total income of the assessee. Aggrieved, assessee filed appeal before the Ld.CIT(A). The Ld.CIT(A) has restricted the disallowance to the extent of Rs.4,23,20,580/-. In the additional ground of cross objection filed by the assessee it has contended that the disallowance ought to have been restricted to the extent of exempt income earned during the year.

6. Heard both the sides and perused the material on record on this issue. It is undisputed fact that as per para 4.1 of the order of the Assessing Officer passed under section 143(3) read with section 153A of the Act on 31/03/2013 that assessee company itself had made only disallowance of Rs.2,501/- under section 14A of the Act. However, the Assessing Officer, after taking into consideration the revaluation made in the investments, computed the disallowance under section 14A as per provisions of Rule 8D to the amount of Rs.40,25,86,078/-. The Ld.CIT(A) after excluding the revaluation of the investment re-worked the disallowance to the extent of Rs.4,23,20,580/-. However, the material fact in the case of the assessee is that it had suo motu only made disallowance under section 14A of the Act to the extent of Rs.2,501/-. However, the assessee had earned exempt income during the year under consideration to the amount of R.20,19,580/- only. Under the circumstances, the assessee itself had only made disallowance of Rs.2,501/- and it had earned exempt income of R.20,19,580/-, after following the decision of Hon'ble Supreme Court in the case of State Bank of Patiala (2018) 99 Taxmann 286 (SC) and the decision of the Hon'ble Delhi High Court in the case of CIT vs Joint Investments Pvt Ltd (2015) 372 ITR 69 (Del). It is settled that the disallowance is to be restricted to the extent of exempt income earned by the assessee. Following the decision of the Hon'ble Apex Court and High Court (supra), we direct the Assessing Officer to restrict the disallowance to the extent of exempt income earned by the assessee, since assessee itself had not made disallowance more than the exempt income earned by it. Therefore, the ground of appeal of the Revenue stands dismissed and the cross objection filed by the assessee is partly allowed.

GROUND 3 & 4 OF THE REVENUE

7. The fact in brief are that during the course of assessment, the Assessing Officer noticed that assessee has claimed deduction under section 80IB(10) amounting to Rs.24,11,13,795/-. The Assessing Officer observed that assessee had claimed this deduction in respect of profit earned by it from the project 'Rustomjee Elanza Project' located at Malad, Mumbai. However, the Assessing Officer considered that the area of the flat was exceeding more than 1000 sq.ft., therefore, the assessee was not entitled to claim deduction under section 80IB(10) of the Act. The assessee, in its computation has shown built up area of the 2.5 BHK flat at 978.67 sq.ft. and for 2BHK flat it was shown at 840.67 sq.ft. In this regard, the Assessing Officer noticed that assessee had not included the area of the balconies as falling within the definition of 'built up' area. On query, the assessee explained that the area of the balcony were excluded from the built up area as per the Development Control Rules of the BMC and also taking into consideration the fact that the floor level of the balcony was 0.3 metres which is one feet below the level of the floor of the room in the flat were not at the same level as stipulated in the definition of built up area under section 80IB(10) of the Act. The assessee further submitted that only if the floor level of the balconies was same as with the flat, then it can be considered as part of the built up area. However, the Assessing Officer has not agreed with the submission of the assessee and determined the area of the flats after including the built up area of the balconies as under:-

Flat	Built up area of flat	Built up area of balconies / Projections	Total built up area
2BHK	840.67 sq.ft.	125 sq.ft.	965.67 sq.ft.
2.5 BHK	978.23 sq.ft.	122 sq.ft.	1100.23 sq.ft.

8. The Assessing Officer considered that built up area as per section 80IB(10) means the inner measurements of the residential units at the floor level including the projections and balconies as increased by the thickness of the walls, but does not include the common area shared with other residential units. The Assessing Officer has also not accepted the submission of the assessee that since the level of balconies was slightly lesser than the floor level, than the rest of the flat, the same should not be considered in computing the built up area. In view of the above facts and circumstances, the Assessing Officer observed that assessee has violated the condition for claiming deduction under section 80IB(10) of the Act in respect of the said project since built up area of the flat was exceeding 1000 sq.ft. However, the Assessing Officer has disallowed his claim of deduction under section 80IB(10) of the Act on the ground that all the conditions of the said section were not fulfilled. Aggrieved, assessee filed appeal before the Ld.CIT(A). In its alternative contention, the assessee submitted that since the area of 2BHK flats even after including the built up area of the balconies was less than 1000 sq.ft., therefore, 80IB(10) deduction should be allowed on prorate basis.

9. The Ld.CIT(A), however, has allowed the alternative contention of the assessee and allowed deduction under section 80IB(10) in respect of eligible units comprising of 2BHK units, whose area was less than 1,000 sq.ft. even after including the area of balconies. The relevant part of the decision of Ld.CIT(A) is as under:-

“19.5.9. I have examined this alternative argument and judicial decisions relevant to this contention. In the case of Viswas Promoters P Ltd vs ACIT (2013) 259 CTR (Mad) 149, the Hon'ble High Court reversed the decision of the ITAT and allowed the appeal of the appellant. The

appellant had claimed deduction in respect of profits of residential units which did not exceed 1500 sq ft, which the AO rejected. Appellant succeeded before the CIT(A) but the ITAT held that if area of some residential units exceed 1500 sq ft, the project is no longer eligible for any deduction under 80IB(10). This decision was reversed by the High Court and pro rata claim was allowed.

19.5.10. In CIT vs Arun Excello Foundations P Ltd. (2013) 259 CTR (Mad) 362, in a slightly different context of a project, with a part of the project comprising of commercial area and balance residential area, the Hon'ble court allowed pro rata deduction in respect of profits from residential units out of the profits earned from the project

19.5.11. In ITO vs AIR Developers (2010) 122 ITD 125 (Nag), the Hon'ble ITAT held that the profits pertaining to residential units whose built up area exceeded 1500 sq ft will be excluded for the quantification of deduction u/s 80IB(10) and thereby allowed pro rata deduction for profits from eligible residential units. Similar view was taken by ITAT in the case of S J R Builder vs ACIT (2010) 3 ITR (Trib) 569 (Bang).

19.5.12. The alternative argument of the AR is supported by the decisions referred above. I therefore direct the assessing officer to allow deduction u/s 80IB(10) in respect of eligible units comprising of 2 BHK units whose area is less than 1000 sq ft even after including the area of balconies. The quantum of deduction allowable on prorata basis as per appellant's computation is Rs 12,08,36,323/- The assessing officer is directed to allow the deduction after verifying the computation."

10. During the course of appellate proceedings before us, the Ld.DR has supported the order of Assessing Officer and also referred to the decision of Hon'ble Supreme Court in the case of Mettur Chemical & Industrial Corporation Ltd vs CIT (1996) 86 Taxmann 157 (SC).

11. On the other hand, the Ld.Counsel supported the order of Ld.CIT(A) and relied on the order of jurisdictional High Court in the case of Models Construction Pvt Ltd vs DCIT 429 ITR 605 (Bom).

12. Heard both sides and perused the materials on record. Without reiterating the facts elaborated above, the Ld.CIT(A) has allowed the claim of deduction under section 80IB(10) on prorata basis after following the decision of Hon'ble Madras High Court in the case of CIT vs Arun Excello Foundations P Ltd (2013) 259 CTR (Mad) 362 and after following the decision of various ITAT as elaborated in his

finding (supra). In this regard, we further notice that the judicial pronouncements referred by the Ld.DR in the case of Mettur Chemical & Industrial Corporation Ltd vs CIT (supra). However, we find that the aforesaid decision was pertaining to the issue of allowing the relief for arriving at the business income of the new industrial unit and we consider that that case law is not applicable to the facts and circumstances of the case as para materia contained in that case is different from the para material contained in the case of the assessee. In this regard, we have perused the decision of Hon'ble jurisdictional High Court in the case of Models Construction Pvt Ltd (supra) wherein allowing of deduction under section 80IB(10) on prorata basis was upheld. The relevant part of the decision is reproduced as under:-

"4. By Order dated 31.03.2014 the Assessing Officer (AO) disallowed deductions to the assessee in respect of its housing project "Models Legacy" inter alia on the ground of breach of the provisions of Section 80IB(10)(e) of the Income Tax Act, 1961 (said Act) in respect of 5 of the residential units in the said project, which otherwise comprised of a total of 352 residential units.

5. The assessee's appeal before the Commissioner (Appeals) was partly allowed by order dated 26.08.2015. The Commissioner (Appeals) held that the assessee was entitled to pro-rata deductions under Section 80IB(10)(e) of the Income Tax Act, 1961. The Revenue appealed to the Income Tax Appellate Tribunal (ITAT) against the Commissioner (Appeals)' order dated 26.08.2015. The assessee also filed cross-objections urging that deductions in respect of all the 352 residential units ought to have been granted.

6. The ITAT, by the impugned order dated 20.01.2016 has set aside the Commissioner (Appeals)' order dated 26.08.2015 and restored the AO's order dated 31.03.2014. Hence the present appeal by the assessee on the aforesaid substantial questions of law.

*7. Mr. Pangam, the learned counsel for the appellants submits that the substantial question of law at (B) is required to be answered in favour of the assessee and against the Revenue because of the decision of this Court in **CIT v. Bramha Associates— (2019) 414 ITR 47 (BOM)**. He pointed out that the decision in **Bramha Associates (supra)** was followed by another Division Bench of this Court in Tax Appeal No.13/2014 concerning this very assessee, which was disposed of by Judgment and Order dated 20.03.2014.*

8. Mr. Pangam submits that in any case, the pro-rata deduct/on, as was granted by the Commissioner (Appeals) by his order dated 26.08.2015 could not have been disturbed by the

ITAT. He submits that the High Courts of Madras, Delhi, and Karnataka have held that such pro-rata deduction is required to be granted in the following decisions:

(i) Viswas Promoters Pvt. Ltd. v. Assistant CIT, Circle I, Madras- (2013) 29 TaxMan.Com 19 (Madras);

(ii) CIT Chennai v. Arun Excello Foundations Pvt.Ltd.- (2013) 29 TaxMan.Com 149 (Madras);

(Hi) CIT v. S.G. Estates Pvt. Ltd.- (2015) ITMI 1302 (Delhi); and

(iv) CIT & Anr. v. M/s. Brigade Enterprises Limited- ITA No.54 of 2012 decided on 22.09.2020 by the Karnataka High Court.

9. Mr. Pangam, based on instructions, and without prejudice submits that in case the assessee is granted the benefit of pro-rata deductions, the assessee, will not press the contention that there is no breach whatsoever of Section 80JB(10) of the said Act, even though, the legal position is in favour of the assessee. He, however, submits that such not pressing ought not to come in the way of the assessee in raising such contention in any collateral proceedings i.e. proceedings for penalty, etc.

10. Ms. Linhares, the learned counsel for the Revenue defends the impugned order of the ITAT based on the reasoning reflected therein. She submits that the provisions of Section 80IB(10) of the said Act do not contemplate grant of any pro-rata deductions. She also submits that the provisions of Section 80IB(10)(e) of the said Act being procedural can be given retroactive effect and she relies upon the explanatory note of the Finance (2) Act, 2009 by which such provision was introduced in the said Act. She relies on the decisions of this Court in **CIT v. Vandana Properties- (2013) 353 ITR 36 (BOM), Bramha Associates (supra) and Britannia Industries Ltd. v. CIT- (2005) 148 TaxMan.Com 468 SC** in support of her contentions.

11. The rival contentions now fall for our determination.

12. The reasoning of the ITAT that the exclusion of the 5 residential units from out of the 352 residential units in the entire housing project might affect the condition about the size of the plot which is required to have a minimum area of 1 Acre deserves no acceptance. Even if the area proportionate to the 5 residential units is excluded, the size of the plot which admeasures 28,014 sq. meters, i.e. almost about 7 Acres or thereabouts, will, in no manner, stand reduced to below 1 Acre. Therefore, this could not have been a ground to deny pro-rata deduction as was granted by the Commissioner (Appeals) in his Order dated 26.08.2015.

13. Since, Mr. Pangam, the learned counsel for the assessee on instructions has made a statement that the assessee would be satisfied with pro-rata deductions, we frame the following additional substantial question of law, which, according to us, arises in this appeal:

"Whether, in the facts and circumstances of the present case and given the law laid down by various High Courts, the ITAT was justified in denying even pro-rata deductions to the assessee under Section 80IB(10) of the said Act?"

14. It is necessary to note that in the appeal memo, grounds to the aforesaid effect were raised by the assessee as ground Nos. (M), (N) and (O). However, such a question was not framed at the time of admission of this appeal. Such a question undoubtedly arises in this matter and therefore, taking into consideration the provisions in Section 260A(4) read with the provisions in

Section 260A(7) of the said Act, we frame the aforesaid additional substantial question of law which is involved in this appeal.

15. This appeal was taken up along with connected Tax Appeal Nos.4 to 8 of 2016 and Tax Appeal Nos.49 and 52 of 2016, in which the issue of pro-rata deductions under Section 80IB(10) of the said Act was involved. In the said connected appeals as well, Ms. Linhares, relying upon the very same decisions had urged that Section 80IB(10) of the said Act does not contemplate grant of any pro-rata deduction.

16. Upon consideration of the rival contentions in the aforesaid connected tax appeals, we have held that pro-rata deductions can be granted under Section 80IB(10) of the said Act. In our decision in Tax Appeal Nos.4 to 8 of 2016 and Tax Appeal Nos.49 and 52 of 2016 decided on 26.11.2020, we answered the substantial question of law as to the allowability of pro-rata deduction in favour of the assessee and against the Revenue after distinguishing the decisions relied upon by Ms. Linhares in those appeals as well as in this appeal.

17. Accordingly, by adopting our reasoning in the Judgment and Order by which we/ disposed of the aforesaid connected Appeals, we answer the additional substantial question of law in favour of the assessee and against the Revenue.

18. This appeal is therefore disposed of by making the following order:

(a) The appeal is partly allowed and the additional substantial question of law referred to in para 13 above, is answered in favour of the assessee and against the Revenue;

(b) As a consequence, the impugned Order dated 20.01.2016 made by the ITAT is set aside to the extent it denies the benefit of pro-rata deductions to the assessee and the order of the Commissioner (Appeals) dated 26.08.2015 to the extent it grants pro-rata deductions under Section 80IB(10) of the said Act to the assessee, is hereby restored;

(c) The other substantial questions of law involved in this appeal are not answered since, the same are not pressed by the assessee without prejudice to the right of the assessee to raise "all such issues in any collateral proceedings i.e. penalty proceedings, etc."

13. Respectfully following the decision of the Hon'ble jurisdictional High Court referred (supra), we do not find any infirmity in the decision of Ld.CIT(a). Accordingly, grounds 3 & 4 of the Revenue are dismissed.

14. In the result, appeal filed by the Revenue is dismissed and the cross objection filed by the assessee is partly allowed.

ITA No.2822/Mum/2019 (Revenue's appeal)

15. Grounds 1 & 2 of the Revenue in this appeal are on the issue of deduction under section 80IB(10). The Ld.CIT(A) has directed the Assessing

Officer to allow the deduction on pro-rata basis against which the Revenue is in appeal before us. This issue has been decided by us in favour of the assessee by affirming the order of the Ld.CIT(A) in ITA No.5631/Mum/2014 for A.Y. 2010-11. Therefore, since the facts and issue involved in the grounds raised by the Revenue are akin to ground 3 & 4 of Revenue's appeal in ITA No.5631/Mum/2014, applying the findings therein, the grounds raised by the Revenue are dismissed.

16. In the result, appeal filed by the Revenue is dismissed.

ITA No.3003/Mum/2019 (Assessee's appeal)

17. Grounds 1 raised by the assessee in this appeal pertains to disallowance under section 14A. The facts and issue are identical to the facts and issue agitated in CO No.175/Mum/2018 & CO No.175/Mum/2018, which we have decided in favour of the assessee. Here, the assessee itself has made suo motu disallowance under section 14A to the amount of Rs.1,98,998/- only whereas the assessee has earned exempt income of Rs.3,11,152/-. Therefore, applying the finding of No.5631/Mum/2014 & CO No.175/Mum/2018, these grounds of appeal of the assessee are partly allowed by directing the Assessing Officer to restrict the disallowance to the extent of exempt income earned by the assessee.

18. Ground 2 raised by the assessee pertains to disallowance of Work-in-Progress (WIP) of Rs.5,51,637/-. During the course of assessment, the assessee was asked to furnish details of expenses claimed in respect of payments made to M/s Jitnat Infrastructure Pvt Ltd. In response, the assessee submitted that during the year under consideration, it has paid total professional fees of Rs.20,36,691/- to M/s Jitnat Infrastructure Pvt Ltd and submitted that out of it,

an amount of Rs.11,18,442/- was related to the assessee company. The assessee further explained that out of the aforesaid amount, an amount of Rs.5,66,637/- was transferred to WIP of the relevant project and the balance amount of Rs.5,51,805/- was claimed as expenses in the P&L Account. However, the Assessing Officer has stated that assessee has not furnished any documentary evidence of project management consultancy services provided by M/s Jitnat Infrastructure Pvt Ltd. Further, the assessee has also not furnished any details regarding the exact nature / quantum of services provided by the said party. Therefore, claim of deduction of Rs.5,51,637/- was disallowed. The Ld.CIT(A) has dismissed the ground of the assessee. Aggrieved, the assessee is in appeal before the Tribunal.

19. Heard both sides and perused the materials on record. Without reiterating the facts as elaborated above, the assessee has failed to provide relevant supporting evidence to substantiate that M/s Jitnat Infrastructure Pvt Ltd has provided project management services during the year. Even during the course of appellate proceedings before us, the assessee has not furnished any supporting evidences to demonstrate that the said party has rendered the project management services to justify the claim of payment. In this regard we further notice that co-ordinate bench of the ITAT in the case of assessee itself vide ITA No.951/Mum/2018 & Ors order dated 17/10/2022 has also sustained the disallowance made by the Ld.CIT(A) for want of relevant supporting evidence for rendering of service to the assessee. Accordingly, this ground of appeal of the assessee stands dismissed.

20. With regard to ground No.3 which pertains to disallowance under section 40(a)(ia), the assessee has raised this ground before the Ld.CIT(A) by way of an

additional ground and submitted before him that it has already disallowed the said amount under section 40(a)(ia) for non compliance with the TDS provisions for the assessment year 2011-12 and the same is now allowable in the assessment year 2012-13 as per the First Proviso to section 40(a)(ia) as the TDS was deducted and paid. The assessee also submitted before the Ld.CIT(A) that in the original return of income for A.Y.2012-13, it has duly made this claim. However, while filing the revised return of income, the same remained to be claimed. The Ld.CIT(A) has, however, dismissed the claim of the assessee.

21. Heard both the sides. During the course of appellate proceedings before us, the Ld.Counsel has relied on the decision of Hon'ble Supreme Court in the case of National Thermal Power Corporation Ltd (1998) 229 ITR 383 (SC).

22. On the other hand, the Ld.DR supported the orders of lower authorities.

23. Heard both the sides and perused the materials on record. The assessee filed the grounds of appeal before the Ld.CIT(A) stating that it had already disallowed the claim of Rs.27,58,53,742/- under section 40(a)(ia) for non compliance of TDS provisions in computation of income for A.Y. 2011-12 and the same was now allowable under section 40(a)(ia) as the TDS was deducted and paid. These facts were disclosed by the assessee in the original return of income. However, inadvertently, the same remained to be claimed in the revised return of income filed for A.Y. 2012-13. After following the decision of Hon'ble Supreme Court in the case of NTPC vs CIT (supra) as relied upon by the Ld.Counsel for the assessee, we restore this issue to the file of the Assessing Officer to allow the claim of the assessee after verification of the relevant materials and after affording due opportunity of being heard to the assessee.

Therefore, this ground of appeal of the assessee is allowed for statistical purpose.

ITA NO.1946/MUM/2022 (REVENUE'S APPEAL) & CO NO.17/MUM/2023 (ASSEESSEE)

24. Both the appeal of the Revenue and Cross Objection filed by the assessee are pertaining to the common issue of levying penalty under section 271(1)(c) of the Act.

25. During the course of assessment made under section 143(3) read with section 153A of the Act vide order dated 31/03/2013, the Assessing Officer had made the following disallowance / additions and initiated penalty proceedings under section 271(1)(c) of the Act on the same:-

- | | | |
|----|--|-------------------|
| 1. | Disallowance under section 14A | Rs. 2,37,68,669/- |
| 2. | Disallowance of claim under section 80IB(10) | Rs. 19,14,489/- |
| 3. | Disallowance of claim under section 80G | Rs. 50,000/- |
| 4. | On account of sale of car parking | Rs. 2,82,87,953/- |
| 5. | On account of sale of scrap | Rs. 27,68,349/- |

The Assessing Officer levied penalty to the extent of Rs.1,62,50,600 for concealment of income and furnishing of inaccurate particulars of income vide order under section 271(1)(c) of the Act dated 28/09/2018. Aggrieved, the assessee filed appeal before the Ld.CIT(A). However, the Ld.CIT(A) has restricted the penalty levied under section 271(1)(c) of the Act only to the extent of addition made on account of sale of scrap of Rs.27,68,349/-. The assessee has also submitted before the Ld.CIT(A) that in the notice issued by the Assessing Officer under section 274 read with section 271(1)(c) of the Act, the Assessing Officer has not specified whether the penalty was initiated for

concealment of income or for furnishing of inaccurate particulars of income. However, the Ld.CIT(A) has not given specific finding on the aforesaid ground of appeal filed by the assessee against levying the penalty by the Assessing Officer without mentioning the limb under which the penalty was initiated.

26. During the course of appellate proceedings before us, the Ld.Counsel also submitted copy of notice issued under section 274 read with section 271(1)(c) of the Act.

27. Heard both the sides and perused the materials on record. The Ld.CIT(A) has restricted the penalty levied under section 271(1)(c) of the act to the extent of quantum addition on account of sale of scrap which was confirmed in appeal. During the course of appellate proceedings before us, the assessee has also raised cross objection that in the notice under section 274 read with section 271(1)(c) of the Act dated 31/03/2013 that the Assessing Officer has not specified whether the penalty is levied for concealment of income or furnishing of inaccurate particulars of income.

28. The Ld.Counsel has also referred the decision of Hon'ble jurisdictional High Court in the case of Mohd Farhan A Shaikh vs DCIT 434 ITR 1 (Bom) wherein it was held that if there is a defect in notice by not striking off the irrelevant matter, the penalty cannot be levied.

29. On the other hand, the Ld.DR supported the order of Assessing Officer.

Kapstone Construction Pvt Ltd
 ITA 5631/Mum/2014
 ITA 2822/Mum/2019
 ITA 3003/Mum/2019
 ITA 1946/Mum/2022
 CO 175/Mum/2018
 CO 17/Mum/2023

30. The copy of the notice under section 274 read with section 271(1)(c) the Act is as under:-

IT.N.S.-29

NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE INCOME TAX ACT, 1961.
271(1)(C)

Pen. Pg. 2012-13

Office of the
 Deputy Commissioner of Income Tax,
 Central Circle-10,
 Room No. 802, 8th Floor,
 Old CGO Annexe Building,
 M. K. Road, Marine Lines,
 Mumbai - 400 020.

Date : 31.03.2013

To
 M/s Kapstone Realtors Pvt Ltd,
 702, Natraj, M. V. Road Junction,
 W. E. Highway, Andheri (E),
 Mumbai-400 069.

PAN AAAGK2499Q

Whereas in the course of proceedings before me for the Assessment Year 2005-06, it appears to me that you:-

*have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the Indian Income Tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(2)/148 of the Income Tax Act, 1961. No. _____ dated _____ or have without reasonable cause failed to furnish it within the time allowed and the manner required to by the said section 139(1) or by such notice.

*have without reasonable cause failed to comply with a notice under section 22(4)/23(2) of the Indian Income Tax Act, 1922 or under section 142(1)/143(2) of the Income Tax Act, 1961.

*have concealed the particulars of your income or _____ furnished inaccurate particulars of such income.

You are hereby requested to appear before me at A.M. /P.M. on **** 20 and show cause why an order imposing a penalty on you should not be made under section 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative, you may show cause in writing on or before the said date which will be considered before any such order is made under section 271(1)(C).

*** Within 15 days from the receipt of this notice.



(RAM KRISHN KEDIA)
 Deputy Commissioner of Income Tax
 Central Circle - 10, Mumbai.

Seal

Delete inappropriate words and paragraph

31. On perusal of the copy of the notice under section 274 read with section 271(1)(c) of the Act it is clear that Assessing Officer has not specified whether the penalty is being levied on account of concealment of income or furnishing of inaccurate particulars of income. In this regard we have gone through the judgement of the Hon'ble jurisdictional High Court in the case of Mohd Farhan A Shaikh vs DCIT (supra) and the decision of the co-ordinate bench in assessee's own case for A.Y. 2005-06 in ITA No.1227/Mum/2020 dated 18/10/2022. The relevant part of the order of the ITAT in assessee's own case as referred above is reproduced as below:-

"8. We have considered the rival submissions and perused the material available on record. In the present case, the Assessing Officer initiated penalty proceedings under section 271(1)(c) of the Act and levied penalty of Rs.7,36,300. From the perusal of the notice dated 31/03/2013 issued under section 274 r/w section 271(1)(c) of the Act, we find that the Assessing Officer did not strike-off any of the twin charges i.e., concealment of particulars of income or furnishing of inaccurate particulars of income. The case of the assessee is squarely covered by the decision of the Hon'ble Jurisdictional High Court in Mohd. Farhan A. Shaikh v/s CIT, [2021] 434 ITR 1 (Bom.), wherein the Larger Bench of the Hon'ble Court has held that the defect in notice by not striking off the irrelevant matter would vitiate the penalty proceedings. Accordingly, respectfully following the aforesaid decision of the Hon'ble Jurisdictional High Court, we reverse the findings of the lower authorities and quash the penalty order passed under section 271(1)(c) of the Act. Accordingly, the Assessing Officer is directed to delete the penalty of Rs.7,36,300, levied under section 271(1)(c) of the Act."

32. In the light of the decision of the co-ordinate bench in the case of assessee's own case as elaborated above, there is nothing before us on hand to differ from the issue raised in the cases cited (supra) so as to take a different view on this issue. Therefore, since the issue on hand being squarely covered, following the principle of consistency, we find merit in the submission of the assessee and direct the Assessing Officer to delete the penalty since the notice issued under section 274 read with section 271(1)(c) of the Act dated 31/03/2013 was bad in law.

33. Since we have deleted the penalty on account of invalid notice issued under section 274 read with section 271(1)(c) of the Act dated 31/03/2013, therefore, other ground on merit are not adjudicated upon. Therefore, ground of appeal of the Revenue stands dismissed and cross objection filed by the assessee is allowed.

34. In the result, appeal of the Revenue is dismissed and the Cross Objection of the assessee is allowed.

35. As a result, the appeals filed by the Revenue are dismissed and the appeal of the assessee is partly allowed and the cross objection for A.Y. 2010-11 is partly allowed and cross objection for A.Y. 2007-08 is allowed.

Order pronounced in the open court on 27 March, 2023

Sd/-

sd/-

(ABY T VARKEY)	(AMARJIT SINGH)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 27 March, 2023

pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR,
ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Dy./Asstt. Registrar) **ITAT, Mumbai**