

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
MS. MADHUMITA ROY, JUDICIAL MEMBER**

ITA No. 25/Bang/2021
Assessment Year : 2013-14

M/s. Silicon Estates, # 14, 6 th Floor, Geneva House, Cunningham Road, Bengaluru – 560 001. PAN: ABEFS6150N	Vs.	The Deputy Commissioner of Income Tax, Central Circle 1(4), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Tata Krishna, Advocate
Revenue by	:	Shri D.K. Mishra, CIT DR

Date of Hearing	:	11-09-2023
Date of Pronouncement	:	04-12-2023

ORDER

PER MADHUMITA ROY, JUDICIAL MEMBER

The instant appeal filed by the assessee is directed against the order dated 24.11.2020 passed by the Ld.CIT(A)-11, Bangalore arising out of the order dated 30.12.2015 passed by the Ld.DCIT, Central Circle – 1(4), Bangalore u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for A.Y. 2013-14 whereby and whereunder the rejection of the claim u/s. 80IB(10) of Rs.4,03,40,492/- for A.Y. 2013-14 has been confirmed.

2. The brief facts leading to the case is this that the assessee company having its business of builders and property developers, following mercantile system of accounting, filed its return of income on 30.09.2013 disclosing income at Rs.2,86,000/- after claiming deduction of Rs.4,03,40,492/- u/s. 80IB(10) of the Act. The assessee has paid tax u/s. 115JB of the Act. The return was processed u/s. 143(1) of the Act on 30.09.2013. Subsequently, upon selection of the matter for scrutiny through CASS, notice u/s. 143(2) dated 04.09.2014 followed by notice u/s. 142(1) dated 20.07.2015 was issued and served upon the assessee.

3. During the course of scrutiny proceeding after careful examination of books of accounts and other details furnished by the assessee, it was found that the assessee has filed its return in the status of partnership firm; the partnership firm is having 3 partners namely, Shri H.J. Siwani, Shri M.J. Siwani and Shri Chandra Singh in the name and style of Silicon Estates. In fact, Shri Chandra Singh has brought in land to the extent of 3 acres and 30.5 guntas as his share capital and the other partners have brought in money for construction of the residential complex thereon. According to the Assessing Officer, the firm has been formed and used only as a colourable device to show the profits from the sale of land of the said Shri Chandra Singh to the developers, Shri H.J. Siwani and Shri M.J. Siwani as business income and claimed deduction thereof u/s. 80IB(10) of the Act. A Memorandum of Agreement dated

01.07.2005 was executed amongst the partners. However Shri Chandra Singh never intended to participate in the assessee firm as partner and indemnified from all the risks of the business carried by the firm. He has granted fixed profit as percentage on the gross receipt of the business and his business is limited only to the extent of sale of his land and getting consideration therefrom in the form of constructed space. He was further granted the fixed share of profits irrespective of the fact whether or not, there is profits made ultimately by the firm. Considering the partnership firm and the other details furnished by the assessee, the Ld.AO was of the observation that Shri Chandra Singh has been admitted to the partnership firm only for its benefit and does not share in the losses, if any, that may arise out of the business of the firm, he is entitled to fixed profit to the extent of 43% of the gross profit from the sale of apartments, neither entitled to take part in any day-to-day management of the firm which is a development project of the residential complex and its sale. He is neither responsible and is indemnified against any loss or damage which may cause by reason of failure on the part of developers in discharging their liabilities towards labour or contractors. Thus, no risk undertaken by the said Shri Chandra Singh in his capacity as a partner. The other two partners are responsible to government (Bangalore Development Authority) and all other statutory authorities for compliance of all statutory requirements regarding construction. Since the profits from the development of the residential complex is entitled to deduction u/s. 80IB(10) of the

Act, Shri Chandra Singh wanted to confer the profits from the sale of his land into the profits from the development of residential apartments in order to get the benefit of exemption from tax u/s. 80IB(10) of the Act out of such gain as of the opinion of the Ld.AO and therefore it was held that the firm is only a colourable device whose purpose is to evade payment of tax and therefore the firm is disregarded and the profits made by the entity in the name of M/s. Silicon Estate is assessed in the status of "Association of Persons" with two members consisting of Shri M.J. Siwani and Shri H.J. Siwani.

4. At the time of hearing of the instant appeal, the Ld.Counsel appearing for the assessee joins issue here. According to him, the partnership is carried on the business of development and is not a joint development arrangement of the parties. The profits earned by the partnership firm required to be assessed as income of the firm as the profit amongst the partners is distributed in terms of the partnership deed. However, on the other hand, the Ld. DR supports the observation made by the authorities below. In fact, the submissions made by the Ld.AR is found to be not acceptable because of the particular reason that at the end of the day, the assessment was made treating the assessee as firm and not as AOP and therefore no prejudice is caused to the assessee. In that view of the matter, this ground of appeal preferred by the assessee is found to be devoid of any merit and thus dismissed.

5. Brief facts in relation to the merit of the matter is this that the assessee has claimed deduction u/s. 80IB(10) of the Act amounting to Rs.4,03,40,492/- for the assessment year 2013-14 in respect of residential project naming M/s. H.M. Constructions located in Bangalore. In order to claim the deduction, the requisite following conditions are to be fulfilled by the assessee:

- 1) Housing project is to be completed within 5 years from the end of the Financial year upon approval of the local authority.
- 2) The residential unit in the project needs to have a maximum built-up area of 1500 sq.ft.
- 3) Not more than one residential unit in the housing project is to be allotted to any person, not being an individual.
- 4) Not more than one residential unit is to be allotted to an individual including in the names of the spouse or minor children of such individual.

6. While dealing with the matter, the Ld.AO considered the following aspects:

- i. The assessee submitted the completion certificate, partial completion certificate issued by the Bangalore Development Authority.
- ii. From the approved plan by BDA, it appears that the sanction is given for construction of two buildings,

Building No. 1 having 300 units of flats and Building No. 2 having 4 number of flats.

The approval was granted as a single project consisting of two buildings, though the occupancy certificate was issued by the BDA, only after part completion of the construction of the project. When the construction of building was completed and partial completion certificate was issued, the building No. 2 remained incomplete as on 31.03.2011 i.e. the date of issuance of partial occupancy certificate. Further that the completion certificate issued by the local authority would be deemed to be the date of completion of the project.

7. However, completion certificate therefore, was not granted by the local authority. As the entire project has not been completed within the prescribed time limit of five years, the assessee has been found to be not complied with the prescribed conditions u/s. 80IB(10) of the Act and deduction, therefore, was denied.

It was further noticed that two flats being Nos. 1403 & 1503 were allotted to one Shri Ramzan Ali Khan who was also searched as part of the assessee's group concerns. The agreement entered upon with the assessee and Shri Ramzan Ali Khan was dated 21.04.2008 for sale of apartment No. 1403 with super built-up area of 1717 sq.ft. In addition to the same, he was further allotted apartment No. 1503 which was conveyed by and under Deed of Conveyance dated 18.04.2011.

It was further found upon verification, that these two flats were combined internally by way of staircase running inside the apartment. It is relevant to note that Shri Ramzan Ali Khan was the proprietor of RAK Constructions engaged by the assessee as a contractor of the construction of the residential complex. In order to settle the dues payable to him towards the contract payments, he was allotted two apartments in the project HM Symphony as of the case made by the assessee. As it was found that these two flats are duplex, each measuring about 1,717 sq.ft., interconnected to each other through staircase and thus the total area of 3,434 sq.ft. was conveyed to him. The entire consideration for both the flats were paid by way of adjustment of retention money receivable from the assessee. Thus, it was the finding of the Ld.AO that the assessee sold flats exceeding 1500 sq.ft to single buyer and violated the stipulated condition envisaged u/s. 80IB(10) in order to claim deduction.

8. The Ld. AO was further of the view that the allotment has been made to single entity violating this statutory provision. The same is allotted to one M/s. Kap (India) Projects and Construction Pvt. Limited who has executed certain contract work for assessee group in HM Vibha Project, which was executed under the banner HM Infratech Pvt. Ltd. An amount of Rs.1.58 Crore was due to be paid by the assessee to the said M/s. Kap (India) Projects and Construction Pvt. Limited. On the contrary, it was agreed by the assessee to allot three flats in HM Symphony valuing Rs.1.41 Crore; the flats being Nos. 409,

610 and 710 in concert tower were allotted to the said M/s. Kap (India) Projects and Construction Pvt. Limited. Subsequently, the dues payable by the assessee was reduced and allocation of one flat stood cancelled. The case of the assessee is this that the said flat allotted to said M/s. Kap (India) Projects and Construction Pvt. Limited. was cancelled and allotted to Mrs. Zubaida Aboobacker and Mr. Satan Kumar by Deed of Conveyance dated 12.11.2009 and 06.02.2010, respectively. Fact reveals that Mrs. Zubaida Aboobacker was one of the Directors of M/s. Kap (India) Projects & Construction Pvt. Limited who advanced certain loans to M/s. Kap (India) Projects and Construction Pvt. Limited. and against the said loan payable to her one of the flats were allotted to it by the assessee. However, the said flat was initially sold to M/s. Kap (India) Projects & Construction Pvt. Limited and further resold to Mrs. Zubaida Aboobacker. Apart from that from the copy of the ledger account of Mr. Satan Kumar in the books of M/s. Kap (India) Projects & Construction Pvt. Limited, it was found that the flat was sold to him for an amount of Rs.40,50,000/- which was sold to M/s. Kap (India) Projects & Construction Pvt. Limited by the assessee at Rs.43,75,030/-. Thus, M/s. Kap (India) Projects and Construction Pvt. Limited had accounted a loss on sale of flat of Rs.3,25,030/- from the said transaction. In that view of the matter, in both the cases, the Ld. AO was of the opinion that these two flats were not directly sold to Mr. Satan Kumar or Mrs. Zubaida Aboobacker rather lent to M/s. Kap (India) Projects & Construction Pvt. Limited. It further appears that the cost of the flat sold to these parties have been

adjusted against dues payable to M/s. H. M. Infratech Pvt. Ltd. which, in turn, had money payable to M/s. Kap (India) Projects and Construction Pvt. Limited. Such finding appears to be on the basis of the entry in the books of account of M/s. Kap (India) Projects and Construction Pvt. Limited, particularly, the journal entries dated 20.11.2009 and 06.02.2010 showing dues adjusted against the purchase of flats 610 and 409 in H M Symphony as more than one flat had been allotted to one entity. The assessee is found to be violative of the prescribed condition under Section 80IB(10) of the Act. Finally, deduction under Section 80IB(10) of the Act claimed by the assessee amounting to Rs.4,03,40,492/- was disallowed, which was further confirmed by the First Appellate Authority.

At the time of hearing of the instant appeal, the Ld. Counsel appearing for the assessee submitted before us that the completion certificate has been issued by the Bangalore Development Authority (in short 'BDA') which is relevant and jurisdictional authority for issuance of occupancy certificate. The certificate is in respect of 300 numbers of dwelling units in Block Nos. A, B & C of the project, namely, HM Symphony. According to him, the issuance of certificate coupled with the completion certificate issued by the Architect "shop design" is ample and credible proof of project having been completed before 31st March, 2011. Further that, the requirement of obtaining completion certificate from the local authority and local municipal authority since stipulated in Explanation (ii) to sub-section 80IB(10), the BDA should be considered as "local

authority for the said purpose”. Thus, the question of violation of Section 80IB(10) of the Act on this score does not and cannot arise as the crux of the argument advanced by the Ld. AR. On this aspect, he has relied upon the judgment passed by the Hon’ble Karnataka High Court in the case of PCIT vs. Majestic Developers reported in [2020] 122 taxmann.com 123 (Karnataka). Such submission has not been controverted by the Ld. DR. The facts of the case has already been discussed by us in foregoing paragraphs and relying upon the facts, we are, therefore, considered the judgment passed by the Hon’ble Jurisdictional High Court in the case of PCIT vs. Majestic Developers (supra). While dealing with the issue the Hon’ble Court has pleased to observe as follows:

“5. A Certificate is issued in terms of Schedule-VIII of Building Bye-laws certifying that the erection/re-erection/material alteration of buildings, which is subject matter of the plan sanction has been supervised by such registered architect/engineer/supervisor and has been completed in accordance with the plan sanctioned. Person issuing such certificate has to further state that work has been completed to the best of his satisfaction, the workmanship and materials used are strictly in accordance with the general and detailed specifications, that no provision of the Building Byelaws, sanctioned plan and conditions prescribed or orders issued thereunder have been transgressed in the course of work and thereby certifying that the building is fit for use for which it has been erected/re-erected or altered and while doing so, the concerned registered architect/engineer/supervisor would request for issuance of occupancy certificate for the premises. It is this completion certificate as contained in schedule-VIII referred to in Bylaw No. 5.6.1 of the Building Byelaws which is referred under section 310 of the KMC Act. It is this completion certificate which accompanies the intimation to be given by every person within one month after completion of erection of building or execution of any work to be delivered or sent to the Commissioner, in writing, of such completion accompanied by a certificate in the form prescribed under building bye-laws, which form has to be signed and subscribed in the manner as prescribed and same should be given to the Commissioner, who would thereafter conduct inspection of such building or such work and grant permission to occupy the building by issuing occupancy certificate. The, extant bye-laws is referable to Bengaluru Mahanagara Palike Building Bye-laws 2003 whereunder an occupancy certificate is to be issued under bye-law No. 5.6 by the Commissioner after certificate issued by the registered architect,

engineer or supervisor, as the case may be. Thus, completion certificate which is referred to in Section 310 of KMC Act is completion certificate which is required to be issued by Architect, engineer or supervisor, as the case may be, factum of completion of building or project to the Commissioner. It is only after such completion certificate being furnished and inspection conducted by the Commissioner, occupancy certificate would be issued by Commissioner of BBMP. Hence, contention of Revenue that completion certificate is required to be issued by local Authority as prescribed under Second Explanation to sub-clause (3) of sub-section (10) of Section 80-IB of the Act cannot be accepted. However, if the contention of the revenue that the completion certificate referred to under sub-clause (3) of Sub-Section (10) of Section of 80-IB of the Act is to be accepted, then, in that event, Authorities under the Act cannot insist for a completion certificate to be issued by the Municipal Corporation, when, in fact the said certificate contemplated under the KMC Act and the Building Bye-laws is to be issued by registered architect/engineer/supervisor.

6. Even on facts, it is noticed in the instant case, that a completion certificate came to be issued by registered architect on 27-2-2008 certifying that the project in question had been completed on 25-2-2008. Needless to say, this certificate has admittedly been issued in terms of Section 310 of the KMC Act r/w Rule 5.6(1) of the Building Bye-laws in the format prescribed under Schedule-VIII of building bye-laws. It is on enclosing this completion certificate issued by the registered architect that letters dated 5-3-2008 and 7-5-2008 were written to the Commissioner, BBMP by the assessee to issue occupancy certificate, the copies of which were also made available to the Assessing Officer during assessment proceedings under section 148 of the Act. Though said material evidence being available, same had been ignored by Assessing Officer and same was taken note of by CIT (Appeals) to allow the deduction claimed under section 80-IB, of the Act by the assessee. As such, we are not inclined to accept contention raised by Revenue. There being no substantial questions of law involved in this appeal for being formulated, adjudicated and answered admitting the appeal does not arise. We have also noticed that under similar circumstances, Co-ordinate Bench in ITA Nos.478/2015 and 641/2015 disposed of on 29-2-2016 had noticed in said cases that no certificate of completion had been issued and as such, it was held that neither under the Local Authorities Act nor under KMC Act there being any provision for issuance of completion certificate, revenue ought not to have insisted for production of such certificate for getting benefit under 80-IB (10) of IT Act. Hence, by reiterating the conclusion arrived at by the coordinate Bench in Ittina Properties (P.) Ltd. 's case (supra), referred to supra, whereunder it came to be held that distinction drawn to be put forward by the Revenue with regard to completion certificate vis-a-vis occupancy certificate would not dilute the legal position, we dismiss these appeals.”

9. In the above matter, it was found that the certificate issued by the registered Architect certifying the building fit for use. As the certificate has been issued in terms of Section 310 of KMC r.w. Rule 5.6.1 of the Building Byelaws and sent to the Commissioner, Bengaluru Mahanagara Palika for issuance of occupancy certificate. This was required to be taken into consideration in his proper perspective by the Ld. AO and therefore, the Revenue ought not to have insisted for production of certificate issued by any further localities for getting benefit under Section 80IB(10) of the Act. Once, the assessee has furnished certificate of Registered Architect before the Ld. AO establishing the project being completed within stipulated period deduction under Section 80IB of the Act cannot be denied.

10. So far as the rejection of claim for not having completion certificate of the entire project, we need to consider the beneficial legislation of enactment particularly the provision of granting deduction under 80IB(10) to the assessee. Initially approval was given on 20.12.2005 and the completion certificate issued by the registered architect namely "shop design" finally on 23.03.2011 and once the assessee has been found to have completed the project within the prescribed date i.e. 31.03.2011, the assessee is to be found eligible and deduction accordingly be given. In fact both the authorities below has not considered this particular aspect of the matter in its proper perspective. Moreso, the assessee has never claimed the deduction u/s. 80IB(10) so far as the building no. 2 is

concerned. Thus taking into consideration the entire aspect of the matter and the ratio laid down in the above matter, we find no reason to deviate from this stand therein particularly taking into consideration the completion certificate issued by the registered architect we find disallowance of deduction claimed by the assessee is perverse and therefore quashed.

11. The assessee's arguments to this effect that deduction u/s. 80IB(10) in respect of the said project cannot be disallowed except on pro rata basis in respect of either flat No. 610 or 409 in Concert Tower is also required consideration. In that interest the question of withholding deduction in respect of the entire housing project does not and cannot arise out as the crux of the argument advanced by the Ld.Counsel appearing for the assessee. On this aspect, he relied upon the judgment passed by the Hon'ble Bombay High Court in case of Kamat Constructions (P.) Ltd. vs. ACIT, reported in (2021) 124 taxmann.com 362.

12. So far as the allocation of residential units exceeding 1500 sq.ft. to Shri Ramzan Ali Khan, the disallowance of deduction thereof has been rebutted by the assessee to this effect that the insertion of section 80IB(10)(e/f) by Finance No. 2 Act of 2009 has been given effect on and from 01.04.2010 and this has no manner of application so far as the assessee's case is concerned. Similarly, in the matter of disallowance made by the revenue in regard to more than one apartment sold to the same buyer namely, M/s. KAP (I) Projects and Constructions

Pvt. Ltd. in respect of Flat Nos. 610 and 409, which has been found to be violative of conditions envisaged u/s. 80IB(10)(e) of the Act, the assessee adopts the same argument in respect of disallowance of claim made by revenue u/s. 80IB(10)(f) in respect of flats allocated to Shri Ramzan Ali Khan as the amendment brought to this statute w.e.f. 01.04.2010; the same is perspective in nature and could not be applied to the instant case of the assessee as was the case made out by the assessee before us. On this aspect, Ld.AR further relied upon the judgment of Hon'ble Jurisdictional High Court in case of CIT vs. Mandavi Builders, Mangalore, reported in (2020) 275 Taxman 575. While dealing with this particular aspect of the matter, we find that the Hon'ble Jurisdictional High Court has been pleased to observe as follows:

“This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the revenue. The subject matter of the appeal pertains to the Assessment year 2010-11. The appeal was admitted by a bench of this Court vide order dated 01.03.2017 on the following substantial questions of law:

(i) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that, unaccounted money, found during the search proceedings and explained as on money received, are eligible for deduction under Section 801'6(10) of the Act?

(ii) Whether, on the facts and in the circumstances of the case, that the Tribunal was right in holding that, transactions entered into, with the buyers of flats, are eligible for deduction, even though there is violation of the sub-Sections(e) and (f) of Section 801'B(10), on the ground that these transactions were entered into before the amendments to sub-Section (3) and (f) of Section 801B(10)?

2. Facts leading to filing of this appeal briefly stated are that the assessee is involved in the business of building and developing housing projects. A search under Section

152 of the Act was conducted in the business premises of the assessee on 04.02.2011. During the course of the search, various documents were seized. The assessee filed the return of income declaring gross income of Rs.12,26,80,417/- for Assessment Year 2010-11 and Rs.6,49,29,278/- for Assessment Year 2011-12 and claimed deduction under by the assessee were prior to introduction of clauses (e) and (f) to Section 8018(10) of the Act and the aforesaid clauses are prospective in nature and can only be applied in respect of transactions entered after 01.04.2010. The Tribunal therefore, upheld the order of the Commissioner of income Tax (Appeals) with regard to proportionate disallowance to be made in respect of transactions which were made subsequent to introduction of clauses (e) and (f) of Section 80113(10) of the Act as well as the residential units where there was a violation of condition (c) of Section 8018(10) of the Act both the Assessment Years. The Tribunal further held that the assessee is eligible for deduction under Section 80113(10) of the Act on additional income also. In the aforesaid factual background, this appeal has been filed.

3. Learned counsel for the revenue submitted that the Tribunal erred in holding that unaccounted money is eligible for deduction under Section 8018(10) of the Act. It is further submitted that the Tribunal grossly erred in extending the benefit of proportionate allowance on the flats which comply with the conditions laid down under Section 80IB(10)(e) and (f) of the Act. It is further submitted that clauses (e) and (f) can be applied in respect of transactions, which are entered into after 01.04.2010. On the other hand, Learned Senior counsel of the assessee has submitted that entire flats of the assessee were sold prior to 25.05.2009 and the Assessing Officer himself has treated the income found during the search proceedings as business from income. It is also submitted that assessee has rightly been held entitled for deduction under Section 8018(10) of the Act on the additional income as the assessee had made the claim in the return of income.

4. We have considered the submissions made by learned counsel for the parties and have perused the record. Clauses (e) and (f) to Section 8018(10) of the Act have been inserted by Finance Act (No.2), 2009 with and apply in respect of transactions entered on or after 01.04.2010, which is evident from Circular No.5/2010 dated 03.06.2010. From perusal of the order passed by the Assessing Officer, it is evident that unaccounted money

during the search proceedings has been treated to be business income by the Assessing Officer.

5. The Tribunal itself has found that all the transactions except in respect of two flats have been entered into by the assessee in the year 2007-08 and therefore, the provisions cannot be applied to transactions entered into by the assessee prior to introduction of clauses (e) and (f) to Section 80IB(10) of the Act.

In view of preceding analysis, the substantial questions of law framed by this court are answered against the revenue and in favour of the assessee.

In the result, the appeal fails and is hereby dismissed.”

13. We find substance in the case made out of the assessee against the disallowance of deduction made by the revenue in respect of these two issues mainly more than one residential unit in the housing project has been allotted to a person not being an individual namely M/s. KAP (I) Projects and Constructions Pvt. Ltd. and more than one residential unit allotted to an individual including in the names of spouse, minor children and such individual viz., Shri Ramzan Ali Khan. As admittedly, the disallowance relying upon the amendment in the Act in respect of 80IB(1)(e) & (f) is found to be perspective in nature w.e.f. 01.04.2010. Furthermore, since the said provision was not found to be applicable to the material point of time when the allocation of these two disputed flats were made by the assessee, respectfully relying upon the judgment relied upon by the assessee passed by the Hon'ble Karnataka High Court in case of CIT vs. Mandavi Builders, Mangalore (supra), we do not hesitate allow the appeal of the assessee by directing

the Ld.AO to pass orders in pro-rata basis as specified hereinbefore.

In the result, the appeal filed by the assessee stands allowed for statistical purposes.

Order pronounced in the open court on 04th December, 2023.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(MADHUMITA ROY)
Judicial Member

Bangalore,
Dated, the 04th December, 2023.
/MS /

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| 1. Appellant | 2. Respondent |
| 3. CIT | 4. DR, ITAT, Bangalore |
| 5. Guard file | |

By order

Assistant Registrar,
ITAT, Bangalore