IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

आ.अ.सं/.I.T.A No.3569/Del/2016
निर्धारणवर्ष/Assessment Year: 2012-13

Shipra Estate Ltd. & Jai Krishan Estate Developers Pvt. Ltd., C/o Pradeep & Co., Tax Advocate, 7, Navyug Market, Ghaziabad. PAN No.ABGFS9748C	बनाम Vs.	ACIT Circle-58(1), New Delhi.
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

&

आ.अ.सं/.I.T.A No.3926/Del/2016
निर्धारणवर्ष/Assessment Year: 2012-13

ACIT Circle-58(1), Room No.218, D-Block, Vikas Bhawan, New Delhi.	बनाम Vs.	Shipra Estate Ltd. & Jai Krishan Estate Developers Pvt. Ltd., D-32, Main Vikas Marg, Delhi. PAN No.ABGFS9748C
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

Assessee by	**Shri Rajkumar, CA**
Revenue by	**Ms. Amisha Gupt, CIT DR**

सुनवाईकीतारीख/ Date of hearing:	30.01.2024
उद्घोषणाकीतारीख/Pronouncement on	24.04.2024

आदेश /O R D E R

PER C.N. PRASAD, J.M.

These two appeals are filed by the Assessee and Revenue against the order of the Ld.CIT(Appeals)-19, New Delhi dated

25.04.2016 for the AY 2012-13. Assessee in its appeal raised the following grounds: -

1. *"That the Ld. Commissioner of Income Tax (Appeals) grossly erred in disallowing deduction u/s 80IB(10) of the Income Tax Act, 1961 in respect of corner units of which area as determined by the District Valuation Officer, Delhi of the Income Tax Act, 1961 exceeds the limit of 1,000 sq. fts., even when a certificate from an architect was filed stating the area of such units to be below 1,000 sq. fts.*

2. *That the Ld. CIT(Appeals) grossly erred in disallowing deduction u/s 80IB(10) of the Act in respect of units where built up area exceeds the limit of 1000 sq. fts only when area of open sky balcony is added to built area."*

2. At the time of hearing, the Ld. Counsel for the assessee submits that ground no.1 of grounds of appeal is not pressed and accordingly ground no.1 is dismissed as not pressed.

3. Coming to ground no.2 i.e. disallowance of deduction u/s 80IB(10) of the Act in respect of units where builtup area exceeding the limit of 1000 sq. fts only when area of open balcony is added to builtup area, the Ld. Counsel for the assessee submits that this issue is decided in favour of the assessee for the assessment years 2008-09 and 2009-10 and also for the assessment years 2010-11 and 2011-12 by the Tribunal. Ld. Counsel for the assessee submits that the order for the assessment years 2008-09 and 2009-10 in ITA Nos.1950/Del/2012 & 5849/Del/2012 dated 30.05.2016 is placed on

record. Similarly, the order for the assessment years 2010-11 & 2011-12 in ITA Nos. 2022 & 2023/Del/2016 dated 26.04.2018 is placed on record.

4. Ld. DR supported the orders of the authorities below.

5. Heard rival submissions, perused the orders of the authorities below and the decision of the Tribunal in assessee's own case for the assessment years 2008-09 to 2011-12. We observe that the Tribunal for the assessment years 2008-09 & 2009-10 in the common order dated 30.05.2016 in ITA Nos. 1950/Del/2012 & 5849/Del/2012 allowed the claim for deduction u/s 80IB(10) of the Act in respect of flats excluding the balcony open to sky for the purpose of calculating the builtup area of the individual units observing as under: -

> *"36. As far as ground nos. 1 & 2 of the assessee's appeal are concerned, the first issue requiring adjudication is whether the projections open to sky are to be included or excluded in the calculation of the built-up area of a particulars residential unit. We find that this issue is covered in favour of the assessee by the decision of the ITAT Pune Bench in the case of Naresh T. Wadhwani vs DCIT (52 taxmann.com 360 Pune-Trib) wherein, in para 27, the Bench has held as follows:-*
>
> > *"27. Considered in the above background, we conclude by holding that the Assessing Officer and thereafter the CIT(A) has erred in including the area of projected terrace (open to sky) for the purposes of computing 'built- up area' while examining the*

condition prescribed in clause (e) of section 80IB(10) of the Act Once the area of projected terrace (open to sky) is excluded then there is no dispute that the residual built-up area of six units in question falls within the prescribed limit of 1500 sq.ft. As a result, we hold that assessee fulfills the condition prescribed in clause (c) of section 80IB (10) of the Act with regard to the six units in question. Therefore, we set-aside the order of the CIT(A) and direct the Assessing Officer to consider that the six units in question fulfill the condition prescribed in clause (e) of section 801 B(10) of the Act and the assessee is entitled to the benefit of section 80IB(10) of the Act."

37. In the proceedings before us, the Department could not point out any judgment/judicial precedent to the contrary. We accordingly hold that the balconies open to the sky are to be excluded from the calculation of the built-up area of a particular residential unit. We, therefore, direct that the assessee be allowed the claim of deduction u/s 80IB (10) in respect of flats (at S.Nos. 2 & 3 as in the chart reproduced in on Para 28 of this order) which have been excluded from the benefit of deduction by including the balconies open to sky for the purpose of calculating the built-up area of the individual units."

6. Similarly for the assessment years 2010-11 & 2011-12 the Tribunal in ITA Nos. 2022 & 2023/Del/2016 dated 26.04.2018 decided the issue in favour of the assessee following the order of the Tribunal for the assessment years 2008-09 & 2009-10 observing as under: -

"12. In view of the above decision, while respectfully following the same, we hold that the balconies open to the sky are to be excluded from the calculation of the built-up area of a particular residential unit and according qualify for deduction under section 80IB(10) of the Act. We further hold that in view of the dispute as to

the measurements between the assessee and the DVO, we restore this limited issue as to the discrepancy in measurements in respect of the alleged units with the area exceeding 1000 Sq.ft. to the file of the Assessing Officer for fresh examination and adjudication thereon after giving due opportunity to the assessee to present their case. Grounds of appeals of the assessee are answered accordingly."

7. Issue being identical following the order of the Tribunal, we allow the claim for deduction u/s 80IB(10) of the Act in respect of those flats which area exceeds 1000 sq. fts excluding balcony open to the sky. The Assessing Officer is directed to verify the claim of the assessee after obtaining the details and allow deduction in view of the observations of the Tribunal in assessee's own case for the assessment years 2008-09 to 2010-11 after providing adequate opportunity of being heard to the assessee.

8. Coming to Revenue's appeal the Revenue has raised the following grounds: -

1. *"The order of the Ld.CIT(A) is bad in law and not inconsonance with the facts of the case.*

2. *The Ld.CIT(A) erred in directing the Assessing Officer to accept "Project Completion Method" by ignoring the fact that the assessee is neither following cash system nor mercantile system completely.*

3. *The Ld.CIT(A) has erred in partly allowing the deduction u/s 80IB(10) of the Act as the project as a whole does not satisfy the conditions enumerated in the sub-section (10) of section 80IB.*

4. *The Ld.CIT(A) erred in allowing deduction u/s 80IB(10) since the conditions laid down in clauses (e) & (f) of sub-section u/s 80IB(10) of sub-section (10) of section 80IB of the Act are not fulfilled."*

9. Ground no.1 is general in nature and, therefore, no need for adjudication.

10. Ground no.2 is in respect of direction given by the Ld.CIT(Appeals) to the AO to accept the project completion method. Ld. Counsel for the assessee submits that this issue also came up for adjudication in assessee's own case for the assessment years 2008-09 to 2011-12. Ld. Counsel for the assessee referring to the order of the Tribunal at page 14 para 13 for the assessment years 2008-09 & 2009-10 submits that the Tribunal upheld the order of the Ld.CIT(A) in accepting the project completion method adopted by the assessee.

11. Ld. DR supported the orders of the authorities below.

12. Heard rival contentions, perused the orders of the authorities below and the order of the Tribunal. We observe that the Tribunal decided the issue in appeal in favour of the assessee by sustaining the order of the Ld.CIT(A) in holding that the project completion method adopted by the assessee is the right method for determining the profits. Ld. CIT(A) also held that the Assessing Officer should

not have been disturbed the project completion method followed by the assessee regularly and there is no cogent reason to change the method. This finding of the Ld.CIT(A) was upheld by the Tribunal for the assessment years 2008-09 & 2009-10 observing as under: -

> *"13. In view of discussion of the facts of the case and the legal position as above it is held that the Project Completion Method followed by the appellant is a recognized method of accounting prescribed by the ICAI which has been regularly followed by the assessee. The assessee being a real estate developer and not a construction contractor, Project Completion Method is the right method for determining the profits. The Project Completion Method being followed should not have been disturbed by the Assessing Officer as it was being regularly followed by the assessee in earlier years also and there is no cogent reason to change the method. We, accordingly, uphold the findings of the Ld.CIT(A) on this issue."*

13. We further observe that the appeal of the Revenue has been dismissed by the Hon'ble High Court in ITA No.766/2016 and 178/2017 dated 16.05.2017 holding that there is no substantial question of law. We further observe that the Hon'ble High Court held that the question "whether the addition made by the Assessing Officer to the income of the Respondent for the relevant year based on percentage completion method was not correct as held by the ITAT" stands answered in favour of the assessee and against the Revenue by order dated 16.11.2016 in ITA No.802/2016 in PCIT Vs. Shipra Estate Ltd. & Jai Krishan Estate Developers Pvt. Ltd. Thus,

respectfully following the decision of the Hon'ble High Court we reject the ground raised by the Revenue.

14. Coming to ground no.3 of grounds of appeal of the Revenue the Ld. Counsel for the assessee submits that this ground also decided in favour of the assessee in earlier years by the Tribunal. Ld. Counsel referring to page 32 para 34 of the Tribunal order submits that Tribunal following the decision of the Hon'ble Madras High Court in the case of Vishwas Promoters Pvt. Ltd. Vs. ACIT [255 CTR 149] and also the decision of the Pune Bench of ITAT in the case of Siddhivinayak Kohinoor Venture Vs. ACIT [159 TTJ 390] dismissed the ground of the Revenue.

15. Ld. DR supported the orders of the authorities below.

16. Heard rival submissions, perused the order of the authorities below and the order of the Tribunal. We observe that the Tribunal decided this ground in favour of the assessee observing as under: -

> *"34. As far as the issue of requirement of a separate approval for each housing project is concerned (corresponding to ground no 3 of the Department's appeal), we are of the considered opinion that section 80IB (10) prescribes approval of a housing project. A Housing Project may comprise of both eligible as well as ineligible units. The deduction will be available and limited to the claim on eligible units irrespective of the fact that the entire project comprising of eligible and ineligible units has been approved by the authority by*

way of a single approval/composite approval. Section 80IB(10) refers to the approval of a housing project but does not prescribe a pre-condition that the deduction will be available in respect of only that unit or part of the project which has been separately approved by the local authority. Hence, it is our considered view that a separate approval for each eligible unit or project is not the intention of the Act. The Hon'ble Madras High Court in the case of Viswas Promoters (P) Ltd. vs ACIT 255 CTR 149 has held that the mere fact that one of the blocks have units exceeding built-up area of 1500 sq ft per se, would not result in nullifying the claim of the assessee for the entire project. Consequently, it was held, that assessee was entitled to the benefit of deduction u/s 80IB (10(c) of the Act in respect of each of the blocks. The Pune Bench of the ITAT has held in the case of Siddhivinayak Kohinoor Venture vs ACIT (2014) 159 TTJ 390 that construction of even one building with several residential projects of the prescribed size would constitute a housing project for the purpose of section 80IB(10) of the Act. The Pune Bench further held that each block in a particular project has to be taken as an independent building and hence is to be considered a housing project for the purpose of claiming deduction u/s 80IB(10). Para 32 of the order is relevant in the present appeal also and is being reproduced herein under for a ready reference: -

> *"32. The argument of the Revenue, based on the statement of Chief Engineer, PCMC, in our view, does not help the case of the Revenue as the following discussion would show. The case set up by the Revenue is that two projects have been sanctioned by a common approval and thus the PCMC has viewed the two projects as a single composite project. It is contended by the Revenue that the expression 'housing project', though not defined in s. 80-113(10) of the Act, should be taken to be the project per se, as approved by a 'local authority' for the purposes of s. 80-IB(10) of the Act. No doubt, for a 'housing project' to be eligible for deduction under s. 80-IB (10) of the Act, it is required to be approved by a 'local authority', so however, the*

phraseology of s. 80-IB (10) of the Act does not reflect a legislative intent that the project should be 'as approved' by a 'local authority'. The requirement of s. 80-IB (10) of the Act to the effect that project should be approved by a 'local authority' is fulfilled no sooner when the 'housing project' considered by an assessee is approved by a 'local authority'. Moreover, the expression 'housing project' is not defined in the Development Control Rules for PCMC i.e. the 'local authority' in the case before us and thus, the said enactment cannot be resorted to for the purpose of understanding the meaning of expression 'housing project' contained in s. 80-IB(10) of the Act. Therefore, so long as the claim of deduction is in relation to a 'housing project', which has been approved by the 'local authority', it would satisfy the requirement of s. 80-IB(10) of the Act. Pertinently, if the proposition of the Revenue is to be upheld, the same would be quite contrary to the manner in which the expression 'housing project' contained in s. 80-IB (10) of the Act has been understood by the Hon'ble Bombay High Court in the case of Vandana Properties (suvra) and also by the Hon'ble Madras High Court in Viswas Promoters (P.) Ltd. (supra) and Arun Excello Foundations (P.) Ltd. (supra). It may also be pertinent to observe that the Hon'ble Bombay High Court in Vandana Properties (supra) not only noted that the expression 'housing project' is not defined under s. 80-IB(10) of the Act but also noted that the same was not defined even under the relevant local regulations before it, viz. the Mumbai Municipal Corporation Act, 1988 and the Development Control Regulations for Greater Mumbai, 1991. Thus, the Hon'ble High Court proceeded to observe that the expression 'housing project' in s. 80-IB(10) would have to be construed as commonly understood. Even in the case before us, there is no dispute that the expression 'housing project' is not defined in the Development Control Rules for PCMC and therefore, the concept of housing project' as sought to be understood by the AO based on the explanation of Chief Engineer.

PCMC is not relevant for the purposes of s, 80IB (10) of the Act. Thus, the argument of the Revenue to the effect that since SWRH and 'S'1 projects have been approved by PCMC under a common approval, the two projects should be combined and considered as a single project for the purpose of s. under s. 80-IB(10) of the Act in our opinion is misplaced."

35. Therefore, in view of the facts of the case as well as the judicial precedents discussed above, we dismiss ground no. 3 of the Department's appeal."

17. Following the order of the Tribunal, we reject ground no.3 of grounds of appeal of the Revenue.

18. Coming to ground no.4 of grounds of appeal of the Revenue Ld. Counsel for the assessee submits that there is no addition/disallowance for this reason in the assessment order, neither specific, nor identifiable, hence in substance, there is no addition for this reason. Also, the A.O. has not mentioned as to how these conditions remains unsatisfied. The A.O. is also silent as to on which flats these conditions are not satisfied out of the flats claimed by the assessee to be eligible U/s.80IB. As per assessee there is absolutely no violation of these two clauses. Hence this ground of Revenue is unsustainable, unfounded and unproved, therefore be please dismissed.

19. On hearing both the sides and perusing the assessment order it is observed that even though there is a reference to clause (e) & (f)

of section 80IB(10) of the Act in the assessment order there is no specific finding by the Assessing Officer as to which flats are violative of clause (e) & (f) of section 80IB(10) of the Act. We also observe that there is no separate addition or disallowance for violation of these clauses u/s 80IB(10) of the Act in the assessment order. Similarly, there is no specific adjudication on this aspect of the matter by the Ld.CIT(A). In such circumstances, we find no merit in the ground raised by the Revenue. Thus, this ground is rejected.

20. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed as indicated above.

Order pronounced in the open court on 24/04/2024

Sd/-	**Sd/-**
(DR. BRR KUMAR)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 24/04/2024

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi