

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SMT. RENU JAUHRI, ACCOUNTANT MEMBER**

**ITA No. 4150/MUM/2023
(Assessment Year :2015-16)**

M/s Akshar Anshul Construction LLP Unit no. 47, O Wing, Ground Floor, Akshar Business Park, Sector 25, Plot no. 03, Vashi, Navi Mumbai- 400705	Vs.	Assistant Commissioner Of Income Tax, Circle 28(1) 3 rd Floor, Tower no. 06, Vashi Railway Station Complex, Vashi, Navi Mumbai - 400703
PAN/GIR No. AARFA6226F		
(Appellant)	..	(Respondent)

Assessee by	Ms. Ritika Agarwal
Revenue by	Shri Manoj Kumar Sinha
Date of Hearing	25/04/2024
Date of Pronouncement	30/04/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 25/09/2023 passed by NFAC, Delhi for the quantum of assessment passed u/s. 143(3) for the A.Y.2015-16.

2. In the grounds of appeal assessee has challenged disallowance of claim u/s. 80IB (10) of Rs.1,03,83,468/-.

3. The brief facts are that assessee is engaged in real estate business and is a builder. It had constructed a residential building named Valencial on leasehold plot no.9, Sector 16E Road, Pali, Kalamboli, Navi Mumbai. This project was initially to be developed by M/s Karan Group Development Corporation, who had been granted **commencement certificate for the project on 29/03/2007 by CIDCO**. The assessee and Karan Group agreed to construct the project jointly and entered into an MOU on 20/09/2009. Subsequently, a tripartite agreement dated 16/06/2010 was executed between CIDCO, M/s Karan Group Development Corporation and Akshar Anshul Construction LLP (the assessee). Thereafter, the assessee was granted revised commencement certificate dated 21/09/2010 in pursuance to the original commencement certificate dated 29/03/2007. The assessee in the return of income has claimed deduction of Rs.1,03,83,468/- u/s.80IB(10) in the return of income filed on 31/10/2015. The assessee has been claiming this deduction u/s.80IB (10) since A.Y. 2011-12. Prior to this assessment year similar claim have been allowed from the stage of Id. CIT (A) or by the Id. AO. In A.Y.2011-12, claim for deduction on the same project was allowed by the AO initially, but later on, in the reassessment proceedings u/ 147/148 was decided against by the Id. AO. However, the reopening and notice u/s.148 was quashed by the Hon'ble Bombay High Court and thus in the first year this claim stood allowed.

4. In the present assessment year (A.Y.2015-16), the ld. AO on perusal of the allotment details and noted that some of the flats were allotted in the name of the family members also in violation of Section 80 IB (10) (f). For the sake of ready reference relevant portion of the ld. AO is incorporated as under:-

“5.2 From the Index II of the flats registered by the assessee with sub-registrar Uran, Panwell and on perusal of flat allotment details submitted in this office on 16.11.2017, the following have been observed with regards to Project Valencia, Plot Number -9 Sector-16E Road Pali, Kalamboli, Navi Mumbai, developed by the assessee:

Flat Number	Name of Owner	Date
701 A wing	1. Mrs Vimlaben Jagani	23.12.2011
702 A wing	2. Mrs Vimlaben Jagani	23.12.2011
902 B wing	3. Mrs Vimlaben Jagani	23.12.2011
703 wing	4. Rekha Jagani	23.12.2011
704 A wing	5. Rekha Jagani	23.12.2011
705 A wing	6. Rekha Jagani	23.12.2011
706 A wing	7. Rekha Jagani	23.12.2011
602 B wing	8. Rekha Jagani	23.12.2011
604 B wing	9. Rekha Jagani	23.12.2011
901 B wing	10. Rekha Jagani	23.12.2011
801 A Wing	11. Vijayaben Jagani	23.12.2011
802 A wing	12. Vijayaben Jagani	23.12.2011
601 A wing	13. Vijayaben Jagani	23.12.2011
606 A wing	14. Vijayaben Jagani	23.12.2011
1004 A wing Valencia	15. Prabil Raj C.P and Anila Prabil Raj	12.06.2015
1005 A wing	16. Prabil Raj C.P	08.05.2015
904 A wing	17. Sujata Patro and Saroj Kumar Patro	01.07.2015

905 A wing	18. Sujata Patro and Saroj Kumar Patro	08.01.2016
903 A wing	19. Sujata Patro and Saroj Kumar Patro	08.01.2016
1403 B wing	20. Mrs. Anwasha S Kukreja	30.01.2013
1405 B Wing	21. Mrs. Anwasha S Kukreja	30.01.2013
1602 B wing	22. Mrs. Anwasha S Kukreja	30.01.2013
1305 B Wing	23. Sandhya Iyer and Srinivasan g. Iyer	19.11.2010
1306 B wing	24. Sandhya Iyer and Srinivasan g. Iyer	19.11.2010
1406 B Wing	25. Sandhya Iyer and Matangi Iyer	19.11.2010

5.3 Also advances have been received from the following parties:

Flat Number	Name of the parties	Advance Received
0204 A wing	Girish Chhugani	25,00,000/-
0806 A wing	Girish Chhugani	24,99,972/-
1203 A wing	Anil Bansal	13,85,438/-
1204 A wing	Anil Bansal	12,85,437/-

5.4 From the above mentioned facts of the case it is evident that the project 'Valencia' is in violation of conditions stipulated in Section 80 IB (10) (f) of the IT Act, 1961 wherein no individual or his/her spouse may own more than one residential unit in a project claiming deduction under the aforementioned section.

5. From this information, he made following observations:-

5.5 From the Information gathered from the assessee's submissions and from sub registrar Uran, panel. The following observations may be made:

1. Vimlaben Jagani has been allotted Flat Number 701 A, 702 A and 902 B with date of registration being 23.12.2011.

2. Smt. Rekha Jagani has been allotted flats numbered 703 A, 704A, 705 A, 706 A, 602 B, 604 B, 901 B vide agreement registered on 23.12.2011

3. Smt. Vijayaßen Jagani has been allotted the following flats 601, 606, 801, 802 A wing vide agreement registered on 23.12.2011

4. Prabil Raj C.P has been allotted 1004 A and 1005 A vide agreement registered on 08.05.2015 and 12.06.2015.

6. Mrs. Anwasha Kukreja has been allotted 3 flats ie 1403 8, 1405 8, 1602 B wing registered on 30.01.2013.

7. Sandhya Iyer and Srinivasan Iyer have been allotted 1305 B, 1306 B and 1406 B registered on 19.11.2010.

5.5.1 Advances have been received from Shri. Girish Chhugani for flats No-0204 A and 0806 A and from Anil Bansal for 1203 and 1204 A.

5.6 Since multiple flats have been registered /allotted in the name of same individuals, it is amply clear that the assessee has been in violation of express provisions of the act right from the commencement of the project Valencia in year 2010.”

6. AO further noted that the commencement certificate was initially given on 29/03/2007 and then again on 21/09/2010 and the amendment u/s 80IB (10) introducing sub-clause –f came w.e.f. 01/04/2010 and therefore, if there is any violation of these conditions, the deduction u/s 80IB(10) could not be

allowed and accordingly, he disallowed the entire claim of Rs.1,03,83,468/-. The ld. CIT (A) too has confirmed the said action of the ld. AO on same reasoning.

7. We have heard both the parties and also perused the relevant finding given in the impugned orders as well as material referred to before us. The main issue is, whether there was any violation *u/s. 80IB (10)(f)* on some of the flats allotted in the year 2011 or in different years; and whether the entire claim of deduction *u/s.80IB(10)* should be disallowed. It is relevant to note here that as per chart noted above from the order of the ld. AO, it is seen that none of these flats were allotted during the year under consideration i.e. F.Y. 2014-15 (A.Y.2015-16). Thus, in this year there was no such violation of *Clause 'f'*. Be that as may be, one of the main point which has been argued by the ld. DR is that, here in this case, the revised CC in the assessee's name was received only on 21/09/2010 and earlier CC was in the name of a different person and therefore, it has to be reckoned that the commencement of the project by the assessee had started only after 01/04/2008 which is a condition applicable for deduction *u/s 80IB(10)*; and any commencement of the project post 01/04/2008 and after the insertion of sub-clause-(f) in 80IB(10) w.e.f. 01/04/2010, if it is found that there is any violation, the entire claim of deduction *u/s.80IB(10)* has to be disallowed.

8. Before us, ld. Counsel for the assessee has given the following chronology of dates for the commencement certificate, which is as under:-

Date	Event
29.03.2007	CC in the name of Karan for Plot no. 9, Sector 16E, Roadpali, a Kalamboli of 4962 sq mt.
10.10.2008	2nd CC giving reference to CC dt. 20.03.2007
20.09.2009	MOU with Karan
17.02.2010	3rd CC giving reference to CC dt. 10.10.2008
18.06.2010	Tripartite between CIDCO, Karan and Appellant
21.09.2010	Revised CC in Appellant's name
30.03.2010	Occupancy Certificate received

9. She further submitted that none of these transactions noted by the AO for alleged violation of clause (f) are pertaining to A.Y. 2015-16 and therefore, at the threshold itself, no disallowance u/s. 80IB(10) is warranted. Ld. Counsel further submitted that, in the earlier years by and large issue of claim u/s 80IB(10) has been settled in favour of the assessee. Regarding transactions pertaining to the prior years for which deduction has been allowed, she has given the following historical chart of allowance and disallowance, with reference to documents submitted in the paper book.

A. Y.	Amt. of deduction	Remarks
2011-2012	29,58,133/-	Allowed in regular assessment. Also allowed by HC after reopening contested in writ. Refer pg 82-86 and 87-94 of PB.
2012-2013	1,83,14,448/-	Disallowed by Assessing Officer under section 80AC. Allowed by CIT (A). Refer pg 95-99 of PB.
2013-2014	Nil	No income. Deduction not claimed
2014-2015	11,57,32,194/-	Allowed in regular assessment. Refer pg100-104 of PB.
2015-2016	1,03,83,468/-	Present matter

10. Without prejudice she submitted that in any case, if at all disallowance has to be made, then the same should be made on proportionate basis, where there is an alleged violation of clause-(f) of Section 80IB(10) is found, because such violation only happened with respect to only very few flats and therefore, it does not lead to conclusion that the entire deduction for the whole project has to be disallowed. She submitted that here in this case AO has not found any violation qua the claim made in this year, albeit he is referring to some violation in the earlier and subsequent year to deny deduction in this year. At the time of hearing we had directed to submit the details for this year if there is any violation the working of the proportionate disallowance. In response she fairly submitted the working which

was not even examined or inquired by the AO, which is as under:-

Date	Name of Purchaser	Amount Rs.	Claim Rs.
09.05.2014	FB-1205 Pashkar A. Ambedkar	44,42,000	
26.09.2014	A-1404 Vinit Gulati	47,57,736	
29.09.2014	B-1501 Mahtab Alam Khan	43,08,125	
03.11.2014	A-1604/1605 Navin Hinduja	86,56,800	21,96,988*
15.11.2014	FB-0203 Kaustava Bhattacharya	57,12,750	
18.12.2014	Valencia-B-1005 Farzad Photographer	44,61,860	
24.01.2014	Valencia-B-1001 DDhiraj Agrawal	41,26,000	
27.01.2014	Valencia-B-603 Dayaram Soni	44,48,750	
	Total	4,09,14,021	1,03,83,468

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11. In support of proportionate disallowance, she relied upon the following details:-

Sr.	Name and Citation	Held
1.	M/s Kamat Constructions P.L Tax appeal no. 47 of 2016 (HC Bom-Goa)	Pro-rata deduction, in the context of section 80(IB) (10) (f) upheld. Rel para 13. Copy attached.
2.	Sarkar Builders CA No. 4476 of 2015	Amendments in sec 80(IB)(10) prospective in nature
3.	Arun Excello Foundations Pvt. Ltd Tax Case Appeal No.s 1348 & 1349 of 2017 (Mad HC)	Deduction u/s 80(IB) (10) allowable on a pro-rata basis.
4.	Emgeen Holdings P.L ITA No. 332/Mum/2010	Even if some flats are not eligible u/s 80(IB)(10), the remaining flats are eligible.
5.	Brigade Enterprises Ltd. ITA No. 373 of 2014 Kar HC	Deduction u/s 80(IB) (10) allowable on a pro-rata basis.
6.	Elegant Estates (2018) 95 taxmann.com 157 (Mad HC)	Clause (f) of sec 80(IB)(10) Is prospective in nature and cannot apply to sale of units prior to its enactment.

12. From the perusal of the facts and material brought on record, it is seen that here in this case the commencement certificate was initially given on 29/03/2007 for the project and all the subsequent commencement certificates have reference to this commencement certificate dated 29/03/2007 and there is no new commencement certificate for a different project altogether. Earlier the CC was in the name of a different person but assessee was also part of the MOU and involved in the

project and later on the project was taken up by the assessee alone and some extra flats were sanctioned on the same project for which revised CC was to be obtained. Therefore, it cannot be said that project did not commence prior to 31/03/2008. Accordingly, we hold that the conditions for allowability of deduction u/s. 80IB (10) stands fulfilled, because the commencement of the project was started w.e.f. 29/03/2007. The amendment in Section 80IB (10) under which *clause (f)* was inserted w.e.f. 19.08.2009, applicable from 01/04/2010 reads as under:-

*“f. The amount of deduction in the case of an undertaking developing and building housing projects approved **before the 31st day of March, 2008 by a local authority** shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if,-*

1) in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely:-

(i) the Individual or the spouse or the minor children of such Individual.

(ii) the Hindu undivided family in which such individual is the karta,

(iii) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta.]”

13. Thus, deduction is allowed at @ 100% of the profit, if assessee does not violate the conditions provided in *Clause (f)*, i.e., in a case where residential unit in the housing project is

allotted to a person being individual and no other residential unit is allotted to any of the family members or HUF as mentioned in sub-clause (i) to (iii). Here in this case, the Id. AO has noted such violation in the earlier years and subsequent years when the flats were allotted, without giving any finding how it is impacting the claim of deduction for this year. AO's case is that if there is any violation in any year then the entire claim is to be disallowed for the project including this year. Now before us, as per our insistence, Id. Counsel has fairly given the details of units sold during the A.Y.2015-16, wherein violation was with respect to only allotment/ sale of flat No. A-1604 / 1605 sold for Rs.86,56,800/- on which the proportional disallowance has been worked to Rs.21,96,988/-.

14. Now, the issue is, if there is a violation with regard to one flat, can then the entire claim of deduction u/s.80IB(10) for other flats of the project can be denied. This issue is now settled by the Hon'ble Jurisdictional High Court in the case of **Kamat Constructions Pvt. Ltd., in Tax Appeal No.47 of 2016 judgment and order dated 01/12/2020** exactly on the issue of 80IB(10)(f). The relevant observation of the Hon'ble High Court reads as under:-

“11. There is no dispute that the provisions of Section 80IB(10) (f) entered into force on 19.08.2009. Therefore, the allotment of Flat Nos.401 and 402 to Mr. Suraj Kamble on 13.03.2009 and 29.06.2009 would not constitute a breach of the condition in Section 80IB(10)(f) of the said Act. The same is the position about allotment of flat no. 104 to Ms. Sangita Panvelcar. At the highest, there may be some issue about the allotment of Flat

No.103 on 10.10.2009. This is because clause (f) to Section 801B (10) entered into force on 19.08.2009, in terms of which, there was a prohibition for allotment in favour of a spouse. Therefore, deduction proportionate to the amount involved for allotment of Flat No.104 could have been denied to the assessee but certainly not the deduction in respect of the entire housing project comprising of 60 residential units.

12. The reasoning of the ITAT in the context of the area of the plot on which the housing project was put up is vitiated by perversity. Even if the area proportionate to the 4 residential units were to be excluded from consideration, still, the available area exceeded 4000 sq. meters or 1 Acre. In any case, now that only one of the residential units can be excluded, the area exceeds 1 Acre and there is no breach whatsoever on this count.

13. On the issue of pro-rata deduction, in the connected Tax Appeal Nos.4 to 8 of 2016 and Tax Appeal Nos.49 and 52 of 2016, we have already held that such pro-rata deductions can be granted under Section 80IB(10) of the said Act. This is after considering the very same contentions of Ms. Linhares as have been raised in the present matter. We have considered and distinguished the rulings relied upon by Ms. Linhares in this appeal, since, the very same rulings were relied upon in the connected appeals.

14. Therefore, by adopting our reasoning in our Judgment and Order dated 26.11.2020 disposing of the aforesaid connected appeals, we answer the second substantial question of law in favour of the assessee and against the Revenue.

15. Similarly, we also partly answer the first substantial question of law in favour of the assessee and against the Revenue. This means that the Revenue will be entitled to withhold deductions on a pro-rata basis, in respect of Flat No.103 allotted to Mr. Vivek Panvelcar on 10.10.2009 but not

withhold deductions in respect of the entire housing project save and except Flat No.103 therein.

16. Accordingly, we dispose of this appeal by making the following order:

(a) The first substantial question of law is answered partly in favour of the assessee and against the Revenue and it is held that there was no justification in disallowing deductions under Section 80IB (10) of the said Act in respect of the assessee's housing project "Kamat Riviera" except on pro-rata basis in respect of Flat No. 103 therein;

(b) The second substantial question of law is answered in favour of the assessee and against the Revenue and it is held that the assessee is entitled to pro-rata deduction in respect of the entire housing project "Kamat Riviera", including in respect of Flat Nos.401, 402 and 104 therein but not in respect of Flat No. 103 which was allotted only on 10.10.2009.

(c) As a consequence, the impugned Order dated 01.03.2016 is set aside and the Revenue is directed to allow a deduction to the assessee in respect of its housing project "Kamat Riviera" except, on pro-rata basis in respect of Flat No. 103 therein.

17. The appeal is partly allowed in the aforesaid terms. There shall be no order as to costs."

15. Similar view has been taken by the **Hon'ble Karnataka High Court in the case of Brigade Enterprises (supra)** wherein they have held that Section 80IB is allowable on pro rata basis. In any case Clause (f) has to be applied prospectively, i.e. 01/04/2010 as the same was brought in the statute w.e.f, 19/08/2009. Here in this case housing project has been

approved in the year 2007 and therefore, in view of the decision of the Hon'ble Madras High Court in the case of Elegant Estates reported in (2018) 95 taxmann.com 157, wherein it has been held that the same clause cannot be held to be applicable on the sale of units prior to its enactment. Thus, we hold the entire claim of deduction cannot be disallowed and if at all the disallowance has to be made, it has to be on pro rata basis, i.e., only on the unit on which conditions of **clause (f)** has been violated and only proportionate amount has to be disallowed. Accordingly, we restrict the disallowance to Rs. 21,96,988/- as noted above and the balance amount is directed to be deleted.

16. In the result, appeal of the assessee is partly allowed.

Order pronounced on 30th April, 2024.

Sd/-
(RENU JAUHRI)
ACCOUNTANT MEMBER

Mumbai; Dated 30/04/2024
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai