

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE "A" BENCH : PUNE

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

I.T.A.No.2422/PUN./2016
Assessment Year 2009-2010

The DCIT, Circle-3, PMT Bldg., Swargate, Shankarshet Road, PUNE – 411 037. Maharashtra.	vs.	Shri Shamkant Keshav Kotkar, Flat No.1, Prabhat Road, Erandwana, PUNE. PIN – 411 004. PAN ABEPK3581D Maharashtra.
(Appellant)		(Respondent)

For Revenue :	Shri Ramnath P. Murkunde
For Assessee :	Shri Ch. Naniwadekar

Date of Hearing :	03.10.2024
Date of Pronouncement :	10.10.2024

ORDER

PER SATBEER SINGH GODARA, J.M.

This Revenue's appeal for assessment year 2009-2010, arises against the CIT(A)-3, Pune, Pune's order appeal no.PN/CIT(A)-3/DCIT, Cir-3, Pn/03/2015-16/2, dated 26.07.2016, in proceedings u/s.143(3) r.w.s.147 of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties. Case file perused.

2. The Revenue pleads the following substantive grounds in the instant appeal :

1. *“On the facts and circumstances of the case, the CIT(A) has erred in holding that the parking constitutes a part of housing project and is eligible for deduction u/s 80IB(10).*
2. *On the facts and circumstances of the case, without prejudice of ground no. 1 above, the CIT(A) has also erred in not appreciating that in case such parking is taken as a part of eligible housing project, the area sold through such parking sale will attract the built up area limit imposed by clause c and clause d of Sec. 80IB(10) and area of such parking unit will increase the overall built up area allotted to the unit holder.*
3. *The appellant prays that order of the CIT(A) be held to be bad in law and quashed and also restore back the order of the A.O.*
4. *The appellant prays to be allowed to add, amend, modify, rectify, delete or raise any grounds of appeal during the course of appellate proceedings. “*

3. Both the learned representatives next invite our attention to the CIT(A)'s lower appellate discussion accepting the assessee's sec.80IB(10) deduction claim of Rs.42.95 lakhs as under :

“3.1. In the second ground the denial of deduction of Rs.42,95,000/- u/s 80IB(10) on the ground that car parking is a common amenity and cannot be termed as building has been contested. In respect of this ground following written submission was given during appellate proceedings :

"The reason provided by the learned AO for not allowing the deduction u/s 80-IB(10) is reproduced hereunder :

"A reading of section 801B(10) shows that the deduction is given only for sale of residential flats upto 1500 sq. ft. area. The benefit is not available for income Bearned from sale of any other amenities provided outside the flat. Hon'ble Supreme Court in the case of Nahalchand Laloochand Pvt. Ltd. vs. Panchall Co-operative Housing Society Ltd (Civil Appeal No. 2544 of 2010) held that,

- 1. The parking space enclosed or unenclosed, covered or open cannot be a 'building'.*
- 2. It is compulsory requirement to provide for parking spaces under DCR and it is obligatory on the part of the*

3. *The stilt car parking or open car parking spaces is part of the common amenities and it cannot be treated to be a separate premises/garage which could be sold by the developer to any of the member of the society or an outsider.*

4. *Under MOFA, the developer's right is restricted to extent of disposal of flats, shops and/or garages, which means that any premises which is included in the Flat Space Index (FSI) can be sold by the developer/promoter.*

As car parking is not covered under the definition of flat thus income earned from sole of car-parking is not earned from sale of flat, further such sale is illegal and proscribed by law and as such extending the benefit of section 80-IB for such Illegal income was not envisaged by the legislature nor was it provided in the Income Tax Act. From the above ruling it is clear that promoter or builder have no right to sell the parking space in the housing complex developed by him. Any Income earned by selling the car parking space on which builder has no title is illegal in the eye of law and this generates illegal income which though liable to tax is not eligible for deduction u/s 801B(10).

In the present case assessee had shown total income of Rs.4,27,34,408.for claiming deduction u/s 80IB(10) which included Rs.42,95,000 for sale of parking. Hence, I have reason to believe that income amount in to Rs.42,95,000 has escaped assessment within the meaning of section 147 of the Income Tax Act. 1961.

Hence, assessment is reopened for A.Y.2009-10 on the basis of reason above."

It must first be appreciate that, "the deduction regarding 801B(10) is given only for sale of residential flats..... is incorrect. The deduction is allowable to a housing project fulfilling certain conditions as laid down in that section.

Section 80IB(10) gives benefits of deduction of profit in the case of an undertaking developing and building housing projects approved before the 31st March 2008 by a local authority. The project has to satisfy various conditions laid down u/s 80IB(10). In the case of the assessee, there is no dispute over the fact that, assessee has fulfilled all the conditions as laid down in law by the assessee.

The case law quoted by the learned AO viz Nahalchand Pvt Ltd vs. Pancholi Co-operative Soc. Ltd pertains to civil suit whereby the supreme court had deemed it improper for the builder to sell the parking spaces. However, it must

be appreciated that, the issue in the current case is deduction u/s.80IB(10) and thus, the said case law has no applicability in the case. Also, it must be appreciated that, it is mandatory for the builder to provide for parking space under DCR and it is obligatory for him to follow DCR. Therefore, the builder cannot have housing project without a parking space and thus, the parking space becomes an integral part of the housing project.

In support of our claim, we place reliance upon the decision of Hon'ble Jurisdictional Bombay High Court in case of M/s Bramha Associates ((2011) 333 ITR 289 (Bom)). The court has observed as under ;

The expression 'housing project' is not defined under the act. However, section 80IB(10) refers to the Housing Projects approved by the local authorities. Therefore, for the purposes of section 80IB(10) which project should be treated as a housing project is left to the local authorities. In the light of the above observations of the Hon'ble Bombay High Court, it can be clearly implied that since the parking spaces are approved by the local authorities and without which plan cannot be passed, they are very much part and parcel of the housing project approved by the local authority. Since car parking space is part and parcel of the housing project, the profits flowing from the sale of parking

is part of the profits from the housing project and therefore covered by the provisions of section 8018(10). Copy attached at Page No.21 to 33."

3.2. *Bombay High Court in the case of Bramha Associates ((2011) 333 ITR 289 (Bom)) has held that the expression 'housing project' is not defined under the Income Tax Act. The section 8018(10) refers to the Housing Project approved by Local Authorities. As per the Development Rules, it is mandatory for the builder to provide for parking space and it is an integral part of the housing project. The said project has been approved by local authorities. Therefore, following the Bombay High Court the deduction is available to the entire project inclusive of parking spaces and cannot be denied on receipts pertaining to sale of parking spaces."*

4. The Revenue vehemently contends during the course of hearing that the learned CIT(A) has accepted the assessee's impugned sec.80IB(10) deduction claim regarding the parking space(s) charged to its customers, the corresponding area thereof has to form part of the corresponding eligible residential unit(s) under sub-clause (c) and (d) thereof; as the case may be. That being the case, it accordingly submits that the "built-up area" thereof has to be re-computed in very terms.

5. The assessee has drawn support from CIT(A)'s above extracted lower appellate discussion. Mr. Naniwadekar further quotes CIT, Mumbai vs. Purvankara Projects Limited Income Tax Appeal nos.4975-4977 of 2010, dated 25.07.2011, to buttress the point that the instant issue is no more *res integra* once their lordships' have already decided the same against the department.

6. We have given our thoughtful consideration to the Revenue's foregoing vehement contentions and find no merit therein. This is for the precise reason that although the assessee has charged it's customer(s) for the purpose of allotting parking space(s); there is no provision in the Act and more particularly; in sec.80IB(10)(c) or (d); as the case may be; which could include such a parking space(s) in the prescribed dimension(s) of the residential unit(s). Coupled with this, learned counsel has further elaborated the fact that such a parking area(s) has to be mandatorily provided in a housing project as per the building plan to be sanctioned by the prescribed authority(ies). Be that as it may, we conclude that the Revenue's instant sole substantive argument deserves to be rejected only since the same does not satisfy the relevant statutory provision in sec.80IB(10)(c) of the Act. Ordered accordingly.

7. This Revenue's appeal is dismissed in above terms.

Order pronounced in the open Court on 10.10.2024.

Sd/-
[DR. DIPAK P. RIPOTE]
ACCOUNTANT MEMBER

Sd/-
[SATBEER SINGH GODARA]
JUDICIAL MEMBER

Pune, Dated 10th October, 2024

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	The CIT(A), Pune-3, Pune.
4.	The Pr. CIT, Pune concerned
5.	D.R. ITAT, "A" Bench, Pune.
6.	Guard File.

//By Order//

//True Copy //

Sr. Private Secretary, ITAT, Pune Benches,
Pune.