

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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
ITA No. 4157/Mum/2015
(Assessment Year : 2010-11)

Vijay Enterprise
Ground Floor Eesha Kripa Brahman Sabha Lane,
Malad (W), Mumbai 400 064
PAN: AAAFV 2622D Appellant

Vs.

The DCIT 24(2),
Mumbai Respondent

Appellants by : Shri Reepal Tralshavala
Respondent by : Shri A.K.Kardam

Date of hearing : 14/07/2016
Date of pronouncement : 17/08/2016

ORDER

The captioned appeal filed by the assessee pertaining to assessment year 2010-11 is directed against an order passed by CIT(A)-42 Mumbai dated 27/04/2015, which in turn arises out of an order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal assessee has raised the following Grounds of appeal:-

" 1. (a) The learned CIT (A) erred in confirming disallowance (by way of reducing the Appellant's claim of deduction u/s. 80IB(10) of the Income-tax Act, 1961) of Rs. 1,28,000/- received by the Appellant towards formation and registration of Housing Society for "Symphony Housing Project" by holding that the said registration

charges receipt of Rs.1,28,000/- is income not eligible for the deduction of 80IB(10) of the Income Tax Act,1961.

(b) The learned CIT(A) also erred in confirming disallowance (by way of reducing the Appellant's claim of deduction u/s.80IB(10) of the Income-tax Act, 1961) of Rs.28,000/- received by the Appellant towards Formation and Registration of Housing Society for "Nazarene Housing Project" by holding that the said registration charges receipt of Rs. 28,000/- is income not eligible for the deduction of 80IB(10) of the Income Tax Act,1961.

2. The learned CIT (A) erred in confirming the disallowance (by way of reducing the Appellant's claim of deduction u/s.80IB (10) of the Income-tax Act,1961) of Rs.16,06,290/- out of the Appellant's collection of charges towards swimming pool and health club by holding that the income earned on construction of swimming pool & health club is not eligible for deduction u/s 80IB (10) of the Income Tax Act, 1961. 3. The learned assessing officer erred in disallowing Rs.64,332/- u/s.14(A) of the Income-tax Act, though the Appellant had themselves offered expenses for disallowance the amount of Rs 4,03,488/- as disallowance u/s. 14(A).

3. The appellant before us is a partnership firm, which is engaged in the business of builders and developers. In so far as the disputes in Grounds of appeal No.1(i) to 1(b) is concerned, the same relate to the claim of deduction under section 80 IB(10)of the Act with respect to income earned by the assessee of Rs.1,28,000/- and Rs.28,000/- by way of formation and registration charges of housing society for the two projects namely, Symphony and Nazarene Housing Project respectively. The Assessing Officer denied the claim of deduction under section 80IB(10)of the Act with respect to the aforesaid incomes on the ground that the same did not constitute incomes derived from development and construction of a housing project. The CIT(A) also confirmed the action of the Assessing Officer by following the decision of the Tribunal

in the assessee's own case for assessment year 2009-10, rendered vide ITA No.7758/Mum/2012 dated 22/10/2014.

3.1 On this point, it was a common point between the parties that the decision of the Tribunal on this aspect continues to hold the field and, therefore, the decision of the CIT(A) deserves to be affirmed. The Ld. Representative for the assessee also quite fairly pointed out that even when the matter was set-aside by the Tribunal for the limited purpose, the Assessing Officer in a subsequent order dated 29/1/2016 has rejected the claim of the assessee. In this view of the matter, I, therefore, uphold the stand of the CIT(A) and assessee fails on Grounds of appeal No.1 (a) & 1(b).

4. The dispute in Ground of appeal No.2 relates to the claim of deduction under section 80IB(10) of the Act with respect to earning made by the assessee towards swimming pool and health club. The Assessing Officer had denied the claim on the ground that the said income did not constitute an income derived from the development and construction of housing project. The CIT(A) has also upheld the stand of the Assessing Officer. Notably, the CIT(A) noted that the said issue had come up before the Tribunal in assessment year 2009-10(supra), whereby the matter was set-aside to the Assessing Officer for examining whether the swimming pool and health club was a part of the housing project approved by the local authority. The CIT(A) notes that in the absence of any documentary evidence to verify the said decision, the denial of deduction under section 80IB(10) of the Act was upheld.

4.1 On this aspect, the Ld. Representative for the assessee pointed out that consequent to the direction of the Tribunal in its order dated 22/10/2014, the Assessing Officer had carried out the verification exercise and vide order dated 29/1/2016, the claim for deduction under section 80B(10) of the Act with respect to collections towards swimming pool and health club has been allowed for assessment year 2009-10, a copy of such order has also been placed on record. On the strength of the aforesaid, it is canvassed that in the instant year too, the assessee be allowed the claim of deduction under section 80B(10) of the Act with respect to the earnings toward swimming pool and health club. The Ld. Representative for the assessee has also pointed out that the impugned order of the CIT(A) was rendered prior to the order passed by the Assessing Officer for assessment year 2009-10 dated 29/01/2016, wherein the appropriate verification exercise has been carried out with respect to the plan of housing project approved by the local authority. In view of the aforesaid factual matrix, which has not been controverted by the Ld. Departmental Representative, I deem it fit and proper to direct that assessee's claim of deduction under section 80B(10) of the Act with respect to collection of charges towards swimming pool and health club amounting to Rs.16,06,290/- be allowed. Thus, in Ground of appeal No.2, assessee succeeds.

5. The dispute in the last Ground relates to the quantification of the disallowance under section 14A of the Act. The Assessing Officer noticed that assessee had declared dividend income from mutual funds of Rs.16,95,532/-, which was claimed as exempt under section 10(35) of the Act. The assessee had also made suo-motu disallowance under

section 14A of the Act amounting to Rs.4,03,488/-. It was explained by the assessee that while computing disallowance under section 14A of the Act, it had excluded the investments in mutual funds, which did not yield exempt dividend incomes. The Assessing Officer however, computed the disallowance under section 14A of the Act by including the entire investments in mutual funds and thus, the disallowance was computed at Rs.4,67,820/-. Accordingly, the additional disallowance was computed at Rs.64,332/-, which was challenged in an appeal before the CIT(A). The CIT(A) has since affirmed the disallowance, against which the assessee is in further appeal before the Tribunal.

5.1 I find that the assessee has consistently explained that the investment in mutual funds which do not yield exempt dividend incomes are liable to be excluded for the purposes of computing disallowance under section 14A of the Act. It has been explained that assessee has invested also in mutual funds which are non-dividend paying schemes i.e. Growth Option Schemes, which do not pay any dividend and the gain arises only on redemption of the same, which is taxable as capital gains.

5.2 The Ld. Departmental Representative merely reiterated the stand of the Assessing Officer, which I have already adverted to in the earlier para and the same is not being repeated for the same of brevity.

5.3 In my considered opinion, the proposition being advanced by the assessee is quite fair and apt. Obviously, whether an investment does not or shall generate exempt dividend income, such investments are to be excluded for the purposes of computing disallowance under section

14A of the Act. At the time of hearing, it was pointed out that the aforesaid would require a factual appreciation of the affairs, as to whether the investments sought to be excluded by the assessee are those which are not to yield exempt income. The Ld. Representative for the assessee submitted that the matter be restored back to the file of the Assessing Officer for the limited purpose of examining the aforesaid fact position. In view of the matter, I, therefore, deem it fit and proper to direct the Assessing Officer to consider the explanation of the assessee and to limit the computation of disallowance under section 14A of the Act only with respect to the investments in mutual funds, which yield exempt income and exclude the investments in mutual funds which do not yield exempt incomes. Needless to say the Assessing Officer shall allow the assessee a reasonable opportunity of being heard and, thereafter re-determine the disallowance under section 14A of the Act as per law. Thus, on this aspect assessee partly succeeds.

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

Order pronounced in the open court on 17/08/2016

Sd/-
(G.S. PANNU)
ACCOCUNTANT MEMBER

Mumbai, Dated 17/08/2016
Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai