

आयकर अपीलीय अधिकरण ,मुंबई” ई “खंडपीठ
Income-tax Appellate Tribunal -“E”Bench Mumbai
सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी .एन .प्रसाद,न्यायिक सदस्य
Before S/Shri Rajendra,Accountant Member and C.N. Prasad,Judicial Member
आयकर अपील सं./ITA/2857/Mum/2012,निर्धारण वर्ष/ Assessment Years: 2005-06
आयकर अपील सं./ITA/8605/Mum/2010,निर्धारण वर्ष/ Assessment Years: 2007-08
आयकर अपील सं./ITA/2858/Mum/2012,निर्धारण वर्ष/ Assessment Years: 2008-09

ACIT, Circle-3, Vardaan Lower Ground Floor MIDC, Wagle Indl Estate, Thane	Vs.	M/s. S.B. Developers G-2, Marotraoji Bhavan Dr. Moose Road, Talaopali, Thane PAN:AAZFS 1880 K
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

CO/146/Mum/2012 & CO /90/Mum/2013**Arising out of/.ITA/2857/Mum/2012,निर्धारण वर्ष/ Assessment Years: 2007-08****Arising out of/.ITA/2858/Mum/2012,निर्धारण वर्ष/ Assessment Years: 2008-09**

M/s. S.B. Developers Thane.	Vs.	ACIT, Circle-3, Thane.
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(Cross Objector)

(Respondent)

Revenue by:Shri Manjunatha Swamy -CIT-DR**Assessee by: Dr. Sunil Pathak & Shri Subodh Ratnaparakhi****सुनवाई की तारीख/Date of Hearing: 19. 07.2016****घोषणा की तारीख / Date of Pronouncement: 12.08.2016****आयकर अधिनियम, 1961की धारा254 (1)के अन्तर्गत आदेश****Order u/s.254(1)of the Income-tax Act,1961(Act)****लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-**

Challenging the orders of CIT(A)Thane-I,the Assessing Officer(AO) and the assessee have filed appeal/cross objection for the above mentioned years. Assessee-firm is engaged in the business of builders and developers.Details of dates of filing of returns of incomes,returns incomes,assessed incomes etc. can be summarised as under:

A.Y.	Return filed on	Returned income (Rs.)	Assessment dt.	Assessed income	Dt. of CIT(A)'s order
2005-06	29.10.2005	Nil	31.12.2007	2.69 crores	24.01.2012
2007-08	25.10.2007	Nil	15.10.2009	6.34 crores	31.08.2010
2008-09	26.09.2008	630/-	29.12.2010	18.23 crores	30.01.2012

2.During the course of hearing before us, the Authorised Representative(AR) stated that assessee had filed additional evidences as per the provisions of Rule 29 of the ITAT,Rules,1963,that those documents were not available at the passing of assessment/appellate orders,that same directly dealt with the issues

on hand,that in the appeal filed by the AO for the AY.2007-08 some new issues were raised,that the AO had revised the grounds of appeal for the AY.2005-06, that paper included correspondence with the local authorities of the year 2012 and the assessment and appellate orders for the subsequent years.The Departmental Representative(DR)left the issue to the discretion of the bench. We find that the department had revised the grounds of appeal and raised 17 grounds for the AY.2007-08 and for the year 2005 -06 raised some grounds that are not arising out of the orders of the AO,that the documents came in to existence after the assessment proceedings.As the papers will assist us to decide the matter,so,we are admitting them as additional evidences invoking the provisions of Rule 29 of the ITAT,Rules.As the issues involved in the appeals and the CO.s are common,so,for the sake of convenience we are adjudicating all the appeals by single common order.

ITA/2857/Mum/2012-AY.2005-06:

3.First ground of appeal (GOA1-7 and 11-17),deal with allowability of deduction claimed by assessee u/s.80IB of the Act.While deciding the appeal filed by the AO,the Tribunal had,vide its order dated,27.10. 2010, (ITA / 5146/ Mum/2008)directed the First Appellate Authority (FAA) to decide the two additional grounds raised,by the AO for the first time,before it.

Brief Facts

4.The assessee had constructed a housing project Prakruti Park at Thane and profit arising out of the project was offered to tax in accordance with the work in progress method of accounting followed by it.It had claimed deduction u/s.80IB(10)of the Act for the entire profit of Rs.2.69 Crores. The assessee revised its return of income on 13/03/2006 for enclosing the report u/s. 80 IB (10) of the Act.The AO made an addition of Rs. 2.45 crores to the income of the

assessee by holding that it was not entitled to deduction u/s.80 IB(10),that certain residential units of the housing project exceeded the maximum permissible built-up area of thousand square feet, that the project undertaken by the assessee was not a housing project.During the course of assessment proceedings,another issue decided against the assessee was that of location of the project.It was held that the project of the assessee was situated beyond 25 km from the municipal limit of Mumbai.However, both the issues revolved around the eligibility for deduction u/s. 80 IB(10) of the Act.During the course of hearing before the Tribunal the AO filed two additional grounds and both the issues were restored back to the file of the FAA, as stated earlier.

5.During the second round of hearing before the FAA, the assessee argued that the AO had held that the project was first approved on 27/02/2004 and that it had to be completed by 31st/03/2008 as per the provisions of section 80 IB (10) (a)(i) of the Act, that CC was issued on 21/09/2004, that the project was to be completed by 31/03/2009, that it had completed the project by June 2008, that the provisions of section 80 IB (10) (a) (ii) were applicable to the facts of the case, that the Tribunal had decided the issue in its favour, while deciding the appeal for the AY.2006-07 (ITA/5170/Mum/2009, dated 29/04/2011).

After considering the submission of the assessee and the order/report of the AO, the FAA referred to the verifications received from the TMC and held that the housing project of the assessee was first approved on 21/09/2004, that it had to be completed on or before 31/03/2009 as per the provisions of section 80 IB (10)(a)(ii) of the Act, that the assessee had complied with requirement of the provisions by obtaining the final occupation certificate on 19/06/2008 well within the time available to it.Finally,he allowed the appeal filed by the assessee.

6. During the course of hearing before us The DR supported the order of AO. The AR stated that issue stands decided in favour of the assessee by the Tribunal order delivered for the AY.2005-06, at paragraphs no.16 and 17 of the order, that the case of the assessee was covered by the provisions of section 80IB(10)(a)(ii) and not by 80IB(10)(a)(i) of the Act, that the commencement certificate was issued on 21.09.2004, that it was the date of first approval by the municipal authorities for the purposes of section 80IB(10) of the Act, that the project was completed well within the stipulated time i.e. before 31.03.2009.

7. We have heard the rival submissions and perused the material before us. We find that while deciding the appeal for the assessment year 2006 – 07 (supra), the Tribunal has held as under:

“16. Accordingly the housing project in question was approved on 21/09/04 when the plan was approved by the Thane Municipal Corporation. The correspondence between the assessee and the Thane Municipal Corporation prior to the approval of the building is not relevant to decide the date of approval as per the explanation to section 80 IB (10).

17. In view of the above discussion, we decide this issue against the revenue and in favour of the assessee. The order of the CIT (A) is confirmed, qua this issue.”

Respectfully, following the above decision, first part of the first effective ground is decided against the AO.

8. Second part of the effective ground of appeal is about competence of issuing authority to issue commencement certificate. As per the AO the CC was issued under the signature of Executive Engineer (EE), a subordinate officer of Assistant Director of Town Planning (ADTP). He was of the opinion that CC not approved by the ADTP was not to be considered a valid sanction for the purpose of 80IB deduction.

9. Before us, the DR supported the order of the AO. The AR stated that the issue raised by the AO is not arising out of the assessment order or appellate order,

that it was not arising also out of the order of the Tribunal, that the Tribunal had dismissed attempt of the department to introduce fresh issue of issue of CC by EE, while deciding the appeal for the AY. 2005-06. He referred to the para.1.8 and 1.9 of the Tribunal order for AY.2006-07. He further contended that all the sanctions were issued in the name of Municipal Commissioner(MC), that different authorities under him would sign the sanctions as per the powers delegated to them, that municipal authorities had clarified that all the orders were signed by the MC, that different officers were issuing orders on his behalf, that the FAA had dismissed the issue in the appeal for the AY.2009-10, that the AO had not proved that the CC issued by the EE was invalid. He referred to pages 210-11 of the paper book.

10. We have perused letters issued by the municipal authorities and we find that all the permissions with regard to construction of housing projects are given by the Commissioner of the Corporation, that there is delegation of powers by him to his officers, that delegated powers were used by his junior officers. In our opinion, what is material is the approval of the municipal authorities and not the person signing the permission letter/CC. We do not find any precondition in the Act or the Income Tax Rules, 1962 that prescribes that for availing deduction u/s.80 IB (10) a certificate has to be signed by a particular officer only. The purpose to introduce the section was to encourage the construction of affordable houses for common man. The AO has tried to raise super/hyper technical objections to deny the deduction to the assessee. The stand taken by him is against the spirit and intent of the provision. We also agree that the issue is not arising out of the order of the FAA. However, we have decided the issue on merits. As stated earlier, effective first ground (GOA 1-7 & 11-17) stands decided against the AO.

11.Last ground of appeal (GOA 8-10) is about expenditure of Rs.21.86 lakhs incurred prior to receipt of commencement certificate. In that regard the FAA, in the second round of hearing, observed that the assessee had entered into an agreement for development on 27/10/2004, that the document was duly registered, that the price consideration of Rs. 1.68 crores was required to be paid by the assessee for acquiring the development rights besides transfer of 11 flats free of cost. He referred to the cases of Radhe Developers(113TTJ 300), Shakthi Corporation (32 SOT438) and held that the assessee had acquired dominion over the line in question to the exclusion of others, that conditions of part performance of the contract were satisfied, that it amounted to transfer as per the provisions of section 2(47)(v) of the Act, that the assessee was in possession of land on payment of agreed consideration and had all the rights to use develop construct buildings sell or transfer the flats etc., that merely CC and OC being issued in the name of the original holder would not disentitle the assessee to claim the deduction u/s.80 IB(10), that the section did not postulate any condition for allowing the deduction, that while passing the order u/s. 143 (3) of the Act for the AY.2008-09 the AO had not raised the issue of ownership of land in subsequent years. The FAA allowed the appeal filed by the assessee.

12.Before us, the DR stated that expenditure was incurred before the project started, that same was not an allowable expenditure. The AR supported the order of the FAA and argued that while filing revised grounds the AO had raised a new issue and same was not arising out of the order of the AO/FAA/ Tribunal, that expenditure in question was incurred for temporary shelter for security personnel, temporary shed for storage of material and erection of boundary wall, that the expenses were incurred after 01.04.2004, that the FAA decided the issue in favour of the assessee while deciding the appeals for the AY.s.2008-09 and 2009-10. He referred to the matter of Nirmiti Construction(4 SOT 383).

13.We find that the Tribunal has decided the issue in favour of the assessee and in the subsequent AY.s.the AO himself has not disallowed the deduction in that regard.In our opinion,expenditure incurred by an assessee for developing the housing project was an integral part of the project and hence allowable.Second effective ground of appeal is decided against the AO.

ITA/8605/Mum/2010-AY.2007-08:

14.First effective ground of appeal has two parts-date of approval of the project (GOA 1-7 and 11-17)and issue of CC by a particular municipal authority(GOA 8-10).While adjudicating the identical issues for the AY.2005-06,we have decided the ground against the AO.Following the same,Grounds no.1-17 are dismissed.

15.Second effective Ground(GOA-18-20)deals with expenditure of Rs.21.86 lakhs incurred prior to receipt of CC.Following our order for AY.2005-06, where we have decided the identical ground of appeal,we decide Grounds no. 18-20 against the AO.

16.Third effective ground of appeal(GOA 21)pertains to pro-rata deduction in respect of eligible units of the housing project.It is found that while deciding the appeals for the AY.s.2005-06(Paragraph 1.3 at pg.5) and 2006-07(Paragraph 26 at pg.17)the Tribunal has held that proportionate deduction should be allowed to the assessee for the housing project, except for the 12 flats.Following the orders for earlier year,we dismiss the third ground of appeal also.

ITA/2858/Mum/2012-AY.2008-09:

17.All the three effective grounds of appeal(GOA-1-17,18-20 and 21 respectively)deal with the identical issues that were raised by the AO in the earlier year. Following our order for that year we decide Grounds no.1-21 against the AO.

CO/146/Mum/20/AY.2007-08:

18.The AR during the course of hearing before us, stated that the assessee was not interested in pressing grounds no.1A and 1B of the CO. Hence, same stand dismissed as not pressed.

19.Second ground deals with size of the flat. While completing the assessment the AO held that certain flats have been merged with adjoining flats to create six flats having built up area exceeding 1000 Sq.feet. In the appellate proceedings the FAA held that the assessee was eligible to claim deduction on proportionate basis, that proportionate deduction on residential units having more than 1000 sq.ft constructed area needed to be denied.

20.Before us, the AR argued that the housing project completed by the assessee was more than 25 Kilometers away from the municipal limits of City of Mumbai, that the eligible built up area of residential unit was 1500 Sq.feet, that none of the combined units exceeded 1500 Sq.feet built up area, that the assessee was entitled to claim deduction for those units also. He referred to the cases of Mavji Mulji Merchant (1993,(3)Bom.C.R.220) and Silver Land Developers Pvt. Ltd.(ITA/2506/Mum/2009, dtd.11.07.2012). The DR supported the order of the FAA.

21.We have heard the rival submissions and perused the material before us. We find that in the case of Silver Land Developers(supra), the Tribunal had set aside the matter to the file of the AO. Respectfully, following the same we restore back the issue to the file of the AO for fresh adjudication. He would afford a reasonable opportunity of hearing to the assessee. Ground, raised by the assessee, is allowed in its favour, in part.

CO/90/Mum/2013/AY.2008-09:

22.As the issues raised by the assessee for the year are identical to the grounds assailed for the last AY.So, following the our order of the earlier year, Ground 1 is dismissed as not pressed and second ground is restored back to the file of the AO for fresh adjudication.Second ground is partly allowed.

As a result, appeals filed by the AO for all the three AY.s stand dismissed and the CO.s. of the assessee stand partly allowed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गईं तीनों नि.व.की अपीलें नामंजूर की जाती हैं और निर्धारिती के प्रत्याक्षेप अंशतः मंजूर किए जाते हैं.

Order pronounced in the open court on 12th August, 2016.
आदेश की घोषणा खुले न्यायालय में दिनांक 12 अगस्त, 2016 को की गई।

Sd/-

(सी. एन. प्रसाद / C.N. Prasad)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 12 .08.2016.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "E" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.