

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, डी, मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "D", MUMBAI**

**श्री शैलेंद्र कुमार यादव, न्यायिक सदस्य एवं  
श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष**

**Before Shri Shailendra Kumar Yadav, Judicial Member,  
and  
Shri Ashwani Taneja, Accountant Member**

**ITA NO.2652/Mum/2013  
Assessment Year: 2009-10**

Dreamcity Developers, A/35-36, Patil Bhuvan, NSB Road, Mulund (W), Mumbai-400080	<b>बनाम/ Vs.</b>	ITO -23(2)-2 C-10, 2 <sup>nd</sup> Floor, Pratyakshar Bhavan BKC, Bandra (E) Mumbai-
(Assessee)		(Revenue)
P.A. No.AAFFD1884L		

निर्धारिती की ओर से / Assessee by	Shri R.G. Tralshawala (AR)
राजस्व की ओर से / Revenue by	Shri Jitendra Kumar (DR)

सुनवाई की तारीख/ <b>Date of Hearing:</b>	<b>09/10/2015</b>
आदेश की तारीख / <b>Date of Order:</b>	<b>18/11/2015</b>

**आदेश / O R D E R**

**Per Ashwani Taneja (Accountant Member):**

The present appeal has been filed by the Assessee against the order of Ld. Commissioner of Income Tax (Appeals) -33, Mumbai {In short, 'CIT(A)'}, for the assessment year 2009-10 dated 22.02.2013, decided against the assessment order passed by the Assessing Officer (in short 'AO') u/s 143(3) of

the Act. The grounds raised by the assessee are reproduced below:

*1.The learned CIT(A) erred in not allowing the deduction claimed u/s.80113(10) of the Act without appreciating the fact that the appellant was builder cum developer of the project undertaken by it and hence, the disallowance of deduction u/s.80113(10) of the Act is without any justification and may be deleted.*

*2.The Ld. CIT(A) failed to appreciate that as per the terms of the development agreement lump-sum payment was made to the owners/POA holders of the plot of land, & it was the appellant that developed the entire housing project and sold the same to various parties on its own without involvement of POA holders of land or any other third party and the entire risk, responsibility and rewards of construction as also entire investment in development of housing project was of appellant and hence, the appellant is the builder - developer of the housing project and not mere contractor & thus the disallowance of deduction claimed u/s.80113(10) of the Act is without any justification and liable to be deleted.*

*3.The Ld. CIT(A) failed to appreciate that vide CIT(A) order dated 21/12/2011 for AY 2007-08 in appellant own case it was allowed the claim of deduction u/s.801B(10) by holding in para 3.1 of the order for AY 07-08 that the appellant has fulfilled all the conditions and that the appellant was builder of the housing project and entitled to deduction u/s.801B(10) and this order for AY 07-08 has been accepted by the department and thus, on the same set of facts, not following the order for AY 2007-08, the order passed by the Ld. CIT(A) for AY 2009-10 is patently perverse and hence, deduction claimed u/s.801B(10) of the Act ought to be allowed.*

*4.Without prejudice to the above, the learned CIT(A) failed to appreciate that whatever details called for were furnished and confirmation of KDC was also furnished*

*that it has not claimed any deduction u/s.801B(10) for the impugned AY as also for later years when the flats in the housing project were sold and profits offered to tax and hence, the observation of the Ld. CIT(A) in para 3.5 is contrary to the facts of the case and in any case. the details for earlier years of KDC were filed and recorded as such in the order for AY 2007-08 and thus, the disallowance of deduction u/s.801B(10) of the Act is without any justification and liable to be deleted."*

**2.** During the course of hearing, arguments were made by Shri R.G. Tralshawala, counsel of the assessee, and Shri Jitendra Kumar, Departmental Representative ('DR'), on behalf of the revenue.

**3.** During the course of hearing, it was argued by the Ld. Counsel on behalf of the assessee that the assessee claimed deduction u/s 80IB(10) which has been denied by the AO. Before the Ld. CIT(A), it was submitted that similar issue was involved in assessment year 2007-08 being the first year for claiming of this deduction, wherein claim of the assessee was rejected by the AO, but allowed by Ld CIT(A). Thus, prayer was made to Ld CIT(A) to follow his earlier order and allow the claim in this year also. But, Ld. CIT(A), under some confusion, did not follow his earlier order of A.Y. 2007-08, on the ground that the issue involved in A.Y.2007-08 was different from the issue involved in the impugned year. It was further submitted by Ld Counsel before us that, inadvertently, the Ld. CIT(A) referred to some irrelevant para of his order of assessment year 2007-08. Our attention was drawn on the correct para of the order of Ld. CIT(A) of A.Y.2007-08, to show that identical

issue was involved therein, which has been decided in favour of the assessee by considering all the facts and circumstances of the case. It has been further submitted that assessment year 2007-08 was the first year of claim of this deduction, all the facts and circumstances were examined in that year by Ld. CIT(A), and thereafter it was held by him that it was assessee was a developer and therefore eligible for deduction u/s 80IB(10). It was also submitted by the Ld. Counsel that validity of claim of deduction u/s 80IB(10) can be examined in the first year of the business of the assessee, and whatever decision is taken in the first year, it should be followed in the subsequent years, so long as the business of the assessee remains the same and requisite conditions prescribed for claim of deduction are continued to be complied with by the assessee. It was submitted that the Ld. AO has mentioned in the assessment order of the impugned year that the facts are identical as were in A.Y.2007-08, and following his assessment order for A.Y.2007-08, benefit of deduction was denied to the assessee in the impugned year. It was contended that when the AO himself has admitted that the facts are same, then, the Ld. CIT(A) ought to have followed his own order of A.Y. 2007-08, and that the Revenue cannot take a contrary stand every time, year after year. Lastly, it was submitted by the Ld. Counsel that assessee's case is that of developer and the impugned issue now stands covered with many judgments.

**4.** He has drawn our attention on the paper book containing development agreement with M/s. Kalyan Development Corporation. Further, he placed reliance on following judgments:

- i. CIT v. Radhe Developers 341 ITR 403 (Guj)
- ii. CIT v. Shital Corp. 369 ITR 476 (Guj)
- iii. CIT v. Sahajanand Associates 367 ITR 645 (Guj)
- iv. ITO v. Kewal Construction 354 ITR 13 (Guj)
- v. ACIT v. Vijay Mallya (Mum), ITA No.2339/Mum/2008
- vi. ITO vs. Bhoomi Developers (Mum) ITA No.5633/Mum/2010
- vii. Shri Umeya Corp. v. ITO (Ahd), ITA No.211/Ahd/2010

**5.** On the other hand, Ld. DR has relied upon the orders of the lower authorities and placed reliance upon the judgment of Hyderabad Bench in the case of M/s. Vertex Private Limited. We put a query to him i.e. whether facts are identical with assessment year 2007-08 and whether CIT(A) has, by mistake, referred to some incorrect para while adjudicating this matter. In response, he was not able to show any distinction between the facts of impugned year with the facts of A.Y.2007-08, nor was he able to negate the argument of Ld. Counsel that Ld. CIT(A) has gone wrong while making the reference to the order of A.Y. 2007-08.

**6.** We have considered the orders of the lower authorities in the year before us as well as for A.Y.2007-08, being first year of claim of deduction u/s 80IB(10), and also gone through the submissions made by both the sides and material placed before us for our consideration, as well as judgments relied upon by both the sides.

**6.1.** Brief facts, as culled out from the impugned orders are that assessee has been engaged in carrying on the business of construction under the firm name and style of M/s Dreamcity Developers. The assessee claimed deduction u/s 80IB in the return of income for Rs.1,14,61,600/-, and accordingly declared his total income at Nil. The AO made detailed discussion in his order to conclude that the assessee was a contractor and not builder. He, inter alia, took help of amendment made by Finance Act 2009 u/s 80IB(10) to hold that the assessee was merely a contractor. However, while concluding, it was mentioned by him at last Para of page 12 of the assessment order that on similar facts an addition was made in A.Y.2007-08. Thus, the AO has himself accepted that the facts of the impugned year were similar to assessment year 2007-08. Further, it has been brought to our notice that A.Y. 2007-08 was first year of the claim of the deduction u/s 80IB(10). It is noted that in A.Y.2007-08, the Ld. CIT(A) has accepted the claim of the assessee and granted the benefit of deduction u/s 80IB(10), holding the assessee as developer, and not merely a contractor.

**6.2.** We have also gone through the assessment order of A.Y.2007-08, wherein we found that apart from other issues, the AO also raised the issue whether the assessee was eligible for deduction u/s 80IB(10) in view of the amendment to u/s 80IB(10) brought out by Finance Act 2009, with retrospective effect from 01.04.2001, and the AO finally held therein that the assessee was not a builder but merely contractor. Before

Ld. CIT(A), the assessee filed detailed written submissions, wherein, in addition to addressing other issues, the assessee also addressed aforesaid issue in detail, duly supported with agreements and other documentary evidences, to establish that the assessee was developer as envisaged u/s 80IB(10). After considering detailed submissions of the assessee and material placed before him, Ld. CIT(A) in A.Y. 2007-08, decided all the issues in favour of the assessee including the aforesaid issue and held that the assessee was 'developer'. The relevant para of order of CIT(A) is reproduced below:

*“3.2. I have gone through the submissions. During the appellate proceedings the appellant was asked to verify the authenticity of the claim made u/s.801B(10). The appellant was also asked to furnish confirmation from M/s.Kalyan Development Corporation who were entrusted with the development of the said plot to ensure that they have not claimed deduction u/s.80IB. In reply to the same the appellant has filed copy of return filed by M/s.Kalyan Development Corporation along with their confirmations which are available on page.No.207 to 210 of the paper book filed. The appellant was also asked to furnish the approved map of the plot on which they along with one more developer i.e. Thirumati Developers are constructing flats. The appellant has furnished a copy of map with commencement certificate. It is seen from the same that bldg. No.3 with Wing 'A', 'B', 'C', 'D', 'E', 'F' are constructed by the appellant according to which this plot starting from No.6 to 24 on which he has constructed building No.3 with different names is itself exceeding area of 1 acre. The appellant has submitted that their shares to give allotment of flats to eight government nominees and rest of the flats are their shares which they are entitled to sell,*

*3.3. After going into these details I am satisfied that the other requirement of section 801B(10) i.e. area of the plot*

*being more than 1 acre **and the appellant being themselves builder and the project being totally residential, are fulfilled.** Now comes moot question if the profit has to be assessed consequent rebate u/s.801B is admissible to them. The A.O. has rejected profit declared which appellant ;claimed to be on the percentage method basis, for the reason that the profit has been estimated on advances which is a balance sheet item and does not find its place in the trading account for the simple reason that the agreement of sale has been entered in the subsequent assessment year.”*

**6.3.** Thus, from the above, it is clear that Ld. CIT(A), after giving detailed findings held that the assessee was a developer, as per law and facts. But Ld. CIT(A) in the impugned year, while reproducing para from his earlier order of A.Y.2007-08, omitted to consider and reproduce para no. 3.2 and 3.3. He simply reproduced and considered para 3.4 only. Thus, it appears that there has been inadvertent mistake on the part of Ld. CIT(A), and resultantly, a contrary view has been taken in the impugned year, notwithstanding the fact that the AO himself had accepted the position of similarity of facts in the both the assessment years i.e. AY 2007-08 & AY 2009-10. In our considered view, the requisite facts for deciding allowbilty for deduction has to be primarily examined in the first year, i.e. A.Y. 2007-08, in this case. Facts remaining the same, benefit of deduction cannot be denied in the subsequent years. It has been brought to our notice that the order of Ld. CIT(A) for A.Y. 2007-08 has been accepted by the revenue and no further appeal has been filed against this, thus, the order of Ld. CIT(A) with A.Y.2007-08 remains uncontested and has attained finality. Under these circumstances, in our

considered view, when the revenue has accepted a claim in a particular year, the same should be accepted in other years also, as has been recently held by Hon'ble Supreme Court in the case of **CIT vs. Excel Industries Ltd. 358 ITR 295**, and its relevant Para is reproduced hereunder:

*“It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the taxpayers' money in pursuing litigation for the sake of it.”*

**6.4.** Apart from the above, it is further noted by us that the judgments relied upon by Ld. Counsel on the merits also support the claim of the assessee. We place reliance upon the judgments of Hon'ble Gujarat High Court in the case of CIT vs. Radhe Developers 341 ITR 403 (Guj) and CIT vs. Sheetal Corp. (supra).

**6.5.** Thus, in view of the facts and circumstances of the case and order of Ld. CIT(A) of assessment year 2007-08 and judgments relied by the Ld. Counsel, we hold that the claim of the assessee u/s 80IB(10) is in accordance with law, and therefore, same is hereby allowed. The ground raised by the assessee in its appeal is allowed.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 18<sup>th</sup> November, 2015.

Sd/- (Shailendra Kumar Yadav) न्यायिक सदस्य / JUDICIAL MEMBER	Sd/- (Ashwani Taneja) लेखा सदस्य / ACCOUNTANT MEMBER
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मुंबई Mumbai; दिनांक Dated : 18/11/2015

*Patel, P.S.* नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai