

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI
BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No.920/Mum/2016
(Assessment Year 2011-12)

M/s. Mahavir Enterprises,
The Emerald, 3rd Floor,
Plot No.195B, Sector -12.
Vashi, Navi Mumbai 400703
PAN:AAKFM7869D

..... Appellant

Vs.

The Pr. Commissioner of Income Tax -28,
Tower No.6, 3rd Floor, Room No.4,
Vashi Rly. Station Complex,
Vashi Navi Mumbai 400703

.... Respondent

Appellant by : S/Shri Sunil Pathak &
Subodh Ratnaparkhi
Respondent by : Shri N.P.Singh

Date of hearing : 28/09/2016
Date of pronouncement : 28/12/2016

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the assessee pertaining to assessment year 2011-12 is directed against an order passed by CIT-28, Navi Mumbai dated 15/12/2015 under section 263 of the Income Tax Act, 1961 (in short 'the Act'), whereby the assessment order passed by the Assessing Officer under section 143(3) of the Act, dated 13/01/2014 has been held to be erroneous in so far as it is prejudicial to the interests of the Revenue within the meaning of section 263 of the Act .

2. In this appeal, the primary grievance of the assessee is against the action of the Commissioner of Income Tax (in short 'the CIT')in holding that the order of assessment passed by the Assessing Officer under section 143(3) of the Act dated 13/01/2014 was bad in law within the meaning of section 263 of the Act. Notably, in the assessment order dated 13/1/2014(supra), the Assessing Officer has allowed a deduction of Rs.13,23,43,671/- under section 80 IB(10) of the Act in respect of profits earned from the housing project consisting of Buildings No.2 & 5, Balaji Garden, Koper (E), Dombivali,Dist. Thane. As per the CIT, assessee does not satisfy some of the conditions prescribed in section 80 IB(10) of the Act , therefore, he has set aside the assessment order dated 13/01/2014(supra) with a direction that the Assessing Officer shall make a fresh assessment in compliance with the directions contained in his order. Before, us the assessee has preferred an appeal by raising various Grounds, but the primary grievance is that the CIT was not justified in holding that the assessment order dated 13/1/2014(supra) was erroneous, in so far as, it is prejudicial to the interests of the Revenue within the meaning of section 263 of the Act. The stand of the assessee is that it is wrong on the part of the CIT to hold that the assessee has not satisfied some of the conditions prescribed under section 80 IB(10) of the Act and further it is also wrong on the part of the CIT to say that the Assessing Officer has not made the required enquiry and verification with respect to the claim of deduction under section 80IB(10) of the Act.

3. In this background, it is notable that the appellant before us is a partnership firm which is, inter-alia, engaged in the business of developing a housing project called 'Balaji Gardern' at Koper(E), Dobivali, Dist. Thane. With

respect to the profits derived from the said project assessee had claimed deduction under section 80IB(10) of the Act of Rs. 13,23,43,671/-. In the assessment order passed under section 143(3) of the Act dated 13/1/2014, the Assessing Officer notes that during the year under consideration assessee had completed Buildings No.2 & 5 in the above project and the resultant profit has been subject to the claim of deduction under section 80 IB(10) of the Act. It is also noted by the Assessing Officer that in so far as Buildings No.3,4 & 8 are concerned, the profits arising from the said buildings was considered in the assessment year 2010-11, where the claim of deduction made under section 80 IB(10) of the Act was examined and allowed. After noticing so in para- 3 of the assessment order, the Assessing Officer has noted that the occupancy certificate with respect to Buildings No.2 & 5 have deemed to have been granted on 19/03/2010 and thereafter, he has referred to a detailed explanation of the assessee, wherein each of the condition mentioned in section 80IB(10) of the Act are stated to have been complied with. Thereafter, in the computation of income, the Assessing Officer has allowed the claim of deduction claimed by the assessee under section 80IB(10) of the Act with respect to Buildings No.2 & 5 of Rs. 13,23,43,671/-.

4. The CIT in the notice issued under section 263 of the Act has mentioned two issues, on the basis of which he has invoked revisionary jurisdiction under section 263 of the Act. Firstly, as per the CIT, the project 'Balaji Garden' consisted of total nine buildings and that as per the provisions of section 80IB(10) of the Act, assessee was required to complete the said project by 31/03/2012, but for some of the buildings, the final completion certificate was not received before this date. Secondly, according to CIT, the built-up area of

some of the units in the building might exceed the permissible limit of 1000 sq.fts. by virtue of closed balcony which was not included in the built-up area calculated by the architect, which violated the condition contained in clause (c) of section 80IB(10) of the Act. For the aforesaid reasons, the CIT has proceeded to hold that the assessee firm does not satisfy the conditions prescribed under the provisions of section 80IB(10) of the Act and, therefore, he has set-aside the assessment requiring the Assessing Officer to re-do the same.

5. Before us, the Ld. Representative for the assessee has vehemently argued that the project of the assessee satisfies all the conditions prescribed as per the provisions of section 80IB(10) of the Act and in this context, he has referred to a detailed chart made in the assessment order, which brings out the manner in which all the conditions prescribed as per the provisions of section 80 IB(10) of the Act have been complied with. At the time of hearing, Ld. Representative for the assessee has also referred to the relevant material placed in the Paper Book so as to support the chart contained in the assessment order, which enumerates the various contentions. In so far as the specific objections of the CIT is concerned, it is submitted that assessee has considered the project of Buildings No.2 & 5 as eligible for the purposes of deduction under section 80 IB(10) of the Act in the instant assessment year, a contention which has been accepted by the Assessing Officer. The Ld. Representative for the assessee pointed out that the CIT has erred in treating the entire building complex of 'Balaji Garden' as consisting of one project. According to the CIT, as some of the buildings in the complex of 'Balaji Garden'

have been completed subsequently, therefore, the condition of completion of the project is not satisfied as per the provision of section 80 IB(10) of the Act.

5.1 In this context, the Ld. Representative for the assessee pointed out that the expression 'housing project' is not defined in section 80 IB(10) of the Act and that as per the available judicial pronouncements, it has been held that whatever portion of the project which satisfies the conditions of section 80 IB(10) of the Act, the same can be considered as a project for the purposes of availment of deduction under section 80 IB(10) of the Act. In this context, he has referred to the judgment of the Hon'ble Bombay High Court in the case of CIT vs. Vandana Properties, 353 ITR 36(Bom) to point out that even one building with several residential unit can constitute a housing project for the purposes of section 80 IB(10) of the Act, provided the same is otherwise in compliance with the conditions of section 80 IB(10) of the Act. It was, thus, contended that the CIT has wrongly observed that the entire 'Balaji Garden' complex consisting of nine buildings is to be reckoned as one housing project. In this context, reliance has also been placed on the following decisions:-

(i) Mudit M. Gupta v. ACIT, 51 DTR 217 (Mum-Trib)

(ii) Siddhi Real Estate Developers vs. CIT(Central), Pune.,

ITA NO.2630 to 2635/Mum/2012 dated 13/05/2014.

(iii) DCIT vs. Magarpatta Township Development & Construction Co.

150 TTJ 590 (Pune)

(iv) M/s. Rahul Construction C. Vs. ITO, Ward 3(1), Pune,

51 SOT 192 (Pune)

5.2 Coming to the factual matrix, Ld. Representative for the assessee explained that in so far as the commencement certificate for Buildings No.2 & 5 is concerned, the same has been issued by the Local authority on 08/02/2007, a copy of which has been placed in the Paper Book at page -14. It is pointed out that application for issue of completion certificate was submitted on 19/09/2010 i.e. within the time limit of five years prescribed in section 80 IB(10) of the Act, but the Local authority did not issue the certificate within 21 days nor did it communicate any objection to the assessee and, therefore, following a petition moved by the assessee The Court of Joint Civil Judge, Junior Division Kalyan held that the Local authority not having rejected the application within 21 days, as per Rule-38 of the Corporation Development Control Regulations, the application is deemed to have been accepted. Therefore, as per the Court order, the Local authority is deemed to have issued the completion certificate for the Buildings No.2 & 5 on the basis of the application dated 19/03/2010; and, a copy of such certificate dated 17/09/2013 has been placed at page 60A of the Paper Book.

6. Before we proceed further, at this stage, we may refer to the other objection raised by the CIT, which is to the effect that the built-up area of the flats in the project might be in excess of 1000 sq.fts., which violates the condition prescribed in clause (c) of section 80 IB(10) of the Act. This stand of the CIT is based on the premise that the area of balcony is to be included in the calculation of built-up area of the flats. In the impugned order, the CIT has referred to the certificate of the architect furnished by the assessee in the course of assessment proceedings, wherein the maximum built-up area for some of the flats have been depicted at 985.12 sq.fts and the CIT held that, if

the area covered by balcony/terrace is included, the resultant built-up area might exceed 1000 sq.fts. As per the CIT, under these circumstances Assessing Officer was required to verify the built-up area of such flats so as to examine the claim of deduction in the required manner. In this context, the CIT has directed the Assessing Officer to examine the issue of built-up area of flats and if necessary make physical verification of some of the flats.

7. On this aspect, the Ld. Representative for the assessee pointed out that the CIT has wrongly interpreted the certificate of architect dated 25/11/2013, a copy of which has been placed in the Paper Book at pages 61 to 62. The Ld. Representative for the assessee has referred to the specific observation made by the architect, which is to the effect that the built-up area of the flats certified by him was in terms of the definition of the expression 'built-up area' contained in section 80IB(14) of the Act. It has been pointed out that in terms of the said definition, the 'built-up area' of the flat is inclusive of the balcony/projections and therefore, according to the Ld. Representative for the assessee the built-up area certified by the architect has been completely negated by the CIT without there being any evidence to the contrary. Ld. Representative for the assessee pointed out that such certificate of the Architect was very much available at the time of assessment proceedings and even at the time of proceedings before the CIT there is no material to suggest that the certificate was wrong and that the CIT has merely proceeded on surmises and suspicion. At this point, the Ld. Representative for the assessee has also made a statement at Bar that in the course of the earlier assessment year 2010-11, the Assessing Officer had inspected the project site and had also inspected the built-up area of the flats and no discrepancy has been brought out. In any case, Ld. Representative for the assessee pointed out that in the

context of a Writ Petition No.111 of 2016, preferred by the assessee before the Hon'ble High Court for assessment year 2010-11, the fact of the inspection having been carried out with respect to the area of some of the flats is corroborated in the affidavit in reply as filed by the Assessing Officer. In this context, a copy of the affidavit-in reply of the Assessing Officer has been placed on record, which brings out the assertions of the assessee. For all the above reasons, it is canvassed that the CIT has erred in coming to a presumption that built-up area of some of the flats might exceed 1000 sq.fts., if balconies are included.

7.1 Before us, it has also been vehemently canvassed that appropriate enquiries have been made at the time of assessment proceedings and that it is not a case of lack of enquiries and that the CIT has proceeded on misinterpretation of the architect's certificate on the issue of the built-up area of flats.

8. On the other hand, the Ld. Departmental Representative has not contested any of the factual matrix brought out by the Ld. Representative for the assessee, but has primarily reiterated the stand of the CIT that all the buildings in the complex 'Balaji Garden' were not completed within the stipulated date and, therefore, the deduction under section 80 IB(10) of the Act could not be allowed to the assessee. As per the Ld. Departmental Representative, the CIT was also justified in setting aside the assessment on the issue of verification of built-up area of some of the flats. Apart therefrom, the Ld. Departmental Representative has justified the invoking of section 263 of the Act in the present case, as according to him the Assessing Officer has allowed the claim of deduction in the assessment proceedings in a perfunctory manner and that there was lack of any discussion in the assessment order also.

The Ld. Departmental Representative also pointed out that the CIT has ultimately restored the matter to the file of the Assessing Officer for examination afresh, which entails another opportunity to the assessee and under these circumstances the invoking of section 263 of the Act is justified. The Ld. Departmental Representative has also relied upon the Hon'ble Delhi High Court in the case of Ashok Lagani in ITA No. 553 of 2010 and others dated 11th May, 2011 for the proposition that, if the records shows that there was no proper consideration of an issue by the Assessing Officer or that the approach of the Assessing Officer was perfunctory, the CIT was justified in invoking the provisions of section 263 of the Act.

9. We have carefully considered the rival submissions. As we have noted earlier, in the present case, the CIT has found the assessment order as erroneous and prejudicial to the interest of the Revenue within the meaning of section 263 of the Act, on two counts. Firstly, as per the CIT, the completion of construction of the project has not been done within the stipulated period and therefore, the deduction under section. 80IB(10) of the Act has been wrongly allowed. The aforesaid stand of the CIT is based on the premise that the entire complex of 'Balaji Garden' consisting of nine buildings is to be taken as a singular project for the purposes of section 80 IB(10) of the Act. Section 80 IB(10) of the Act permits deduction in respect of profits derived from development and building housing projects. Clause (a) to (f) of section 80IB(10) of the Act prescribes various conditions which are required to be complied for availment of exemption in relation to the profits derived from development and building of housing project. A perusal of section 80IB(10) of the Act reveals that the expression 'housing project' has not been defined. The point for consideration is as to whether in the facts of the present case, the

assessee firm is justified in considering the group of Buildings No.2 & 5 in the 'Balaji Garden' complex as a 'project' for the purposes of claim of deduction under section 80 IB(10) of the Act. A somewhat similar issue had come-up in the case of M/s. Vandana Properties (supra), wherein a singular building namely, "E" building was sought to be construed as a housing project for the purposes of section 80 IB(10) of the Act, whereas the Revenue contended that project for the purposes of section 80 IB(10) has to be reckoned after taking into account the other buildings constructed on the same piece of land. In this context, the Hon'ble High Court noted that in the absence of the expression 'housing project' being defined under the Act or even under Bombay Municipal Corporation Act, 1988, such expression for the purposes of section 80IB(10) of the Act has to be considered as commonly understood. In this context, Hon'ble High Court observed that the expression 'housing project' in common parlance would mean constructing building or group of buildings consisting of several residential units. According to the Hon'ble High Court, the provisions of section 80 IB(10) of the Act envisage that construction of even one building with several residential units of the size not exceeding 1000 sq.fts would constitute a 'housing project' for the purposes of availment of benefits under section 80 IB(10) of the Act. In the spirit of what has been laid down by the Hon'ble Bombay High Court in the case of Vandana Properties(supra), in our considered opinion, assessee is fully justified in considering Buildings No. 2 & 5 in the complex of 'Balaji Garden' as a 'housing project' for the purposes of claiming deduction under section 80 IB(10) of the Act. Clearly on this aspect the CIT misdirected himself and, therefore, in this view of the matter the issue as to whether the other buildings have been completed within the time frame is not at all relevant to evaluate assessee's

claim for deduction under section 80B(10) of the Act in the instant year. Moreover, in so far as the said project comprising of Buildings No.2 & 5 is concerned, the same has been completed on 19/03/2010, when assessee's architect submitted application to the local authority for issuance of Occupancy Certificate. The aforesaid is clearly born out of the completion certificate issued by the concerned local authority i.e. Kalyan & Dombivili Municipal Corporation, Kalyan dated 17/09/2013, a copy of which has been placed at page 60A of the Paper Book. Further, the assessee has referred to the decision of the Court of Joint Civil Judge, Kalyan dated 25/11/2010, wherein it is decreed that the Occupancy Certificate and Completion Certificate as per provisions of Rule-38 of the Kalyan-Dombivili Municipal Corporation Development Control Regulations is deemed to have been obtained in respect of Buildings No.2 & 5 on 19/03/2010, i.e. on the date when requisite application was made by the assessee. Considered in this light, it has to be understood that the completion of construction of the instant housing project is within the period stipulated in section 80B(10)(a)(iii) of the Act r.w. Explanation (ii) thereof. Thus, on this aspect, we find no reason to uphold the stand of the CIT.

10.1 The second issue raised by the CIT is with regard to the built-up area of some of the flats comprised in the housing project. Clause(c) of section 80B(10) of the Act prescribes that the residential units comprised in the housing project must have a maximum built-up area of 1000 sq.ft., where such residential unit is situated within the states of Delhi or Mumbai or within 25 Kms. from the municipal limits of these states and 1500 sq.ft. at any other place. The case made out by the CIT on this aspect is that the certificate of

built-up area of flats issued by the architect shows that the built-up area of some of the flats is very near the figure of 1000 sq.fts and that, if the area of balcony is added, the total 'built-up area' might exceed 1000 sq.fts. Therefore, according to the CIT, the Assessing Officer ought to have carried out the necessary verification. In this context, it is noticed that 'built-up area' has been defined in section 80 IB(14)(a) of the Act, which means the inner measurements of the residential units at the floor level, including the projections and balconies, as increased by the thickness of the walls but it does not include the common areas shared with other residential units. In the background of the aforesaid definition of 'built-up area', we have perused the relevant certificate of the architect, which is placed at pages 61 to 62 of the Paper Book. The architect has enumerated the 'built-up area' of various flats comprised in the Buildings No.2 & 5. He has further certified that such built-up area is as per the sanctioned plan and also that the same is as per the definition of the expression 'built-up area' contained in section 80 IB(14) of the Act. Thus, as per the said certificate of the architect, it is quite clear that the area of balconies/projections, as required, has been taken into account in calculating the built-up area. It is also clear that built-up area of none of the flats is exceeding the limit of 1000 sq.fts prescribed in clause (c) of section 80IB(10) of the Act. We have perused the order of the CIT and find that he has merely proceeded on a presumption that the built-up area of some of the flats might exceed 1000 sq.fts., if the area of balcony is added. However, we find not even an iota of evidence with the CIT to suggest that the built-up area shown in the certificate of the architect is without including the area of balcony; whereas the certificate clearly mentions that the built-up area is inclusive of the requisite projections and balconies. At the time of hearing, the

Ld. Representative for the assessee has also made assertion that in the earlier assessment year of 2010-11, the site inspection was carried out by the Assessing Officer and that there was no adverse finding on this aspect. There is no negation to the aforesaid plea of the assessee and, therefore, considering the material on record, we find that the CIT has proceeded on mere doubt to hold that there is a violation of the provision of clause (c) of section 80 IB(10) of the Act.

10.2 At this stage, we may refer to the stand of the Ld. Departmental Representative based on the judgment of the Hon'ble Delhi High Court in the case of Ashok Lagani(supra). As per Ld. Departmental Representative, in the absence of proper consideration of the issues by the Assessing Officer, the CIT was justified in invoking the provisions of section 263 of the Act. In our considered opinion, whether or not there is a proper consideration of an issue by the Assessing Officer is to be addressed having regard to the facts and circumstances of each case. In the case before the Hon'ble Delhi High Court, the fact-situation was such, which showed that there was no proper consideration by the Assessing Officer of the issue at hand. In the present case, there is nothing to suggest that the issues have not been addressed by the Assessing Officer. In fact, the Assessing Officer has reproduced in the assessment order a chart which enumerates the various conditions prescribed in section 80 IB(10) of the Act and how the same are complied by the assessee firm. Clearly, it is not a case of any lack of enquiry. In fact, as our aforesaid discussion shows, the CIT has misdirected himself on both the counts namely non-consideration of Buildings No. 2 & 5 as a project for the purposes of section 80 IB(10) of the Act and regarding the built-up area of some of the

units as prescribed in section 80IB(10(c) of the Act. Under these circumstances, in our view, there was no justification for the CIT to uphold that the assessment order dated 13/01/2014 is erroneous in so far as it is prejudicial to the interest of the Revenue within the meaning of section 263 of the Act, qua the claim of deduction under section 80IB(10) of the Act allowed by the Assessing Officer.

10.3 In view of the aforesaid discussion, we hereby set-aside the order of the CIT and restore the assessment order passed by the Assessing Officer under section 143(3) of the Act dated 13/01/2014.

11. In the result, appeal of the assessee is allowed as above.

Order pronounced in the open court on 28/12/2016

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

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

Mumbai, Dated 28/12/2016
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