

IT: Where assessee developer had allotted three flats in a housing project to a single person and, thus, violated provisions of section 80-IB(10)(f), denial of deduction under section 80-IB would be limited only to said three flats and for balance flats assessee would be entitled to deduction

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[2018] 90 taxmann.com 267 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'C'

Om Swami Smaran Developers (P.) Ltd.

v.

Income-tax Officer, Ward- 8 (2) (4), Mumbai*

SAKTIJIT DEY, JUDICIAL MEMBER
AND G. MANJUNATHA, ACCOUNTANT MEMBER
IT APPEAL NO. 6355 (MUM.) OF 2014
[ASSESSMENT YEAR 2011-12]
JANUARY 31, 2018

Section [80-IB](#) of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing project) - Assessment year 2011-12 - Assessee, a developer, had developed a housing project and claimed deduction under section 80-IB(10) - Assessing Officer disallowed same on grounds that assessee had allotted three flats to a single person, thus, violated conditions of section 80-IB(10)(f) which provides that more than one residential unit in a housing project cannot be sold to one person/individual - Whether merely because assessee had violated conditions of section 80-IB(10)(f) in respect of three flats, deduction under section 80-IB(10) could not be disallowed for entire housing project and, assessee was entitled to deduction proportionately in respect of flats which fulfilled all conditions of section 80-IB(10) - Held, yes [Para 8] [In favour of assessee]

FACTS

- The assessee-company was engaged in the business of construction and development of housing projects. The assessee claimed deduction under section 80-IB(10) in respect of housing project developed by it.
- The Assessing Officer while verifying assessee's claim of deduction under section 80-IB(10) found that the assessee had commenced the project in 2006, whereas, in the impugned assessment year for the first time, the assessee had claimed deduction under section 80-IB(10). The Assessing Officer also noticed that the assessee had allotted three flats to a single person thus, violated condition under clauses (e) and (f) of section 80-IB(10) which provides that if more than one residential unit in a housing project was allotted to one individual, no deduction under section 80-IB(10) was allowable. Accordingly, he disallowed the assessee's claim of deduction under section 80-IB(10).
- On appeal, the Commissioner (Appeals) also upheld the order of the Assessing Officer.

- On second appeal:

HELD

- As can be seen from the facts available on record, the assessee had developed a housing project. It is also a fact that in the impugned assessment year for the first time, the assessee had offered profit from the said housing project and had claimed deduction under section 80-IB(10). There is no dispute that the assessee had sold three flats to a single individual in the said housing project. The Assessing Officer has disallowed assessee's claim of deduction alleging violation of conditions of clause (f) of section 80-IB(10), which provides that more than one residential unit in a housing project cannot be sold to a person/individual. The factual matrix of the case reveals that except violation of conditions of clause (f) of section 80-IB(10), in the sense that the assessee had sold three flats to a single individual, there was no allegation by the Departmental Authorities that any other conditions of section 80-IB(10) in respect of any other flats of the housing project were violated. Thus, the issue is whether for violation of the conditions of clause (f) of section 80-IB(10) in respect of two flats, assessee's claim of deduction in respect of entire housing project can be disallowed. Reading the provisions of section 80-IB(10) as a whole and the legislative intent/object behind introducing such provision into the statute would reveal that it is a beneficial provision introduced by the legislature to deal with the housing problem. Thus, such provision has to be construed liberally. Undisputedly, except violation of conditions of clause (f) of section 80-IB(10) in respect of two flats, all other conditions of section 80-IB(10) are fulfilled in respect of the housing project which is evident from the fact that there is no other allegation made by the Assessing Officer. Therefore, for violation of conditions of clause (f) of section 80-IB(10) in respect of three flats, the deduction for the entire housing project or in respect of other flats which otherwise were complying to the conditions of section 80-IB(10) could not be disallowed. The disallowance, if any, has to be restricted to the flats which violate the conditions of section 80-IB(10). Thus, the assessee, would be entitled to deduction under section 80-IB(10) proportionately in respect of flats which fulfilled all the conditions of section 80-IB(10). Accordingly, the Assessing Officer is directed to compute deduction under section 80-IB(10). [Para 8]

CASE REVIEW

CIT v. Bramha Associates [2011] 197 Taxman 459/9 taxmann.com 289/333 ITR 289 (Bom.) (para 8); *Viswas Promoters (P.) Ltd. v. Asstt. CIT* [2013] 214 Taxman 524/29 taxmann.com 19 (Mad.) (para 8); *CIT v. Arun Exello Foundation (P.) Ltd.* [2013] 212 Taxman 342/29 taxmann.com 149 (Mad.) (para 8) and *ITO v. Paras Builders* [2015] 69 SOT 82/58 taxmann.com 286 (Pune - Trib.) (para 8) followed.

CASES REFERRED TO

Viswas Promoters (P.) Ltd. v. Asstt. CIT [2013] 214 Taxman 524/29 taxmann.com 19 (Mad.) (para 6), *CIT v. Arun Exello Foundation (P.) Ltd.* [2013] 212 Taxman 342/29 taxmann.com 149 (Mad.) (para 6), *ITO v. Paras Builders* [2015] 69 SOT 82/58 taxmann.com 286 (Pune - Trib.) (para 6) and *CIT v. Brahma Associates* [2011] 197 Taxman 459/9 taxmann.com 289/333 ITR 289 (Bom.) (para 8).

Madhur Agarwal for the Appellant. **Rajat Mittal** for the Respondent.

ORDER

Saktijit Dey, Judicial Member - Aforesaid appeal by the assessee is against the order dated 19th June 2014, passed by the learned Commissioner (Appeals)-17, Mumbai, for the assessment year 2011-12.

2. There is a delay of 57 days in filing the appeal. The assessee has filed an affidavit explaining the cause of delay and seeking condonation thereof. After perusing the affidavit filed by the assessee and considering the submissions of the learned Authorised Representative, we are satisfied that the delay in filing the present appeal is due to bonafide reasons. Hence, we are inclined to condone the delay and admit the appeal for hearing on merits.

3. The solitary issue arising for consideration in this appeal relates to disallowance of deduction claimed under section 80IB(10) of the Act in respect of housing project.

4. Brief facts are, the assessee a company is engaged in the business of construction and development of housing projects. For the impugned assessment year, the assessee filed its return of income on 30th September 2011, declaring nil income under the normal provisions after claiming deduction under section 80IB(10) of the Act in respect of slum rehabilitation project development at Vile Parle known as Ajinkya Durga. Of course, the assessee also offered book profit of Rs. 1,48,66,701 under section 115JB of the Act. During the assessment proceedings, the Assessing Officer while verifying assessee's claim of deduction under section 80IB(10) of the Act, as made in Form no.10CCB, found that the assessee has commenced the project on 18th December 2006, whereas, in the impugned assessment year for the first time, the assessee has claimed deduction under section 80IB(10) of the Act for an amount of Rs. 1,48,66,701. He, therefore, called upon the assessee to furnish necessary details for housing project and deduction claimed under section 80IB(10) of the Act. On verifying the details submitted by the assessee, the Assessing Officer noticed that the assessee has allotted three flats bearing no.201, 501 and 502, to a single person namely Shri Dwarkanath Tiwari, through allotment letter dated 3rd February 2010. Subsequently, from the sale agreement submitted by the assessee, the Assessing Officer found that three flats were sold to the concerned person for a total sale consideration of Rs. 1,92,000 and the agreements were registered on 22nd June 2011. To further verify the claim of the assessee that the flats were allotted to Shri Dwarkanath Tiwari, on 3rd February 2010, the Assessing Officer sought information under section 133(6) of the Act and Shri Dwarkanath Tiwari was also examined on oath under section 131 of the Act by the Assessing Officer. In the statement recorded, Shri Dwarkanath Tiwari, agreed that the assessee has sold three flats to him in SRA project. The Assessing Officer referring to clause-(e) and (f) of section 80IB(10) of the Act observed, if more than one residential unit in a housing project is allotted to one individual no deduction under section 80IB(10) of the Act is allowable. Accordingly, he called upon the assessee to explain why deduction claimed under section 80IB(10) should not be disallowed. In response, it was submitted by the assessee, even if conditions of section 80IB(10) of the Act are not complied with in respect of some flats, however, the project would still qualify for deduction under section 80IB(10) of the Act and deduction under the said provision can be allowed on proportionate basis in respect of flats which complied to all the conditions of section 80IB(10) of the Act. The Assessing Officer, however, did not find merit in the submissions of the assessee. He was of the view that after amendment to section 80IB(10) of the Act and introduction of clause-(e) and (f) by Finance Act, 2009, w.e.f. 1st April 2010, if more than one flat is sold to a single person, no deduction under section 80IB(10) of the Act is allowable for the entire project. Accordingly, he disallowed assessee's claim of deduction under section 80IB(10) of the Act. Being aggrieved of the disallowance of deduction under section 80IB(10) of the Act, the assessee preferred appeal before the learned Commissioner (Appeals).

5. Learned Commissioner (Appeals), after considering the submissions of the assessee did not find merit in them. Agreeing with the view expressed by the Assessing Officer, the learned Commissioner (Appeals) held that after amendment to section 80IB(10) by Finance Act, 2009, no deduction can be

allowed if conditions of clause-(e) and (f) of section 80IB(10) has been violated.

6. Learned Authorised Representative submitted, the SRA project by the assessee has fulfilled all the conditions of section 80IB(10) except the conditions of clause-(f) of section 80IB(10) of the Act, that too, in respect of only three flats sold to a single individual. He submitted, for violation of conditions of clause-(f) in respect of three flats deduction claimed for the entire housing project cannot be disallowed. He submitted, proportionate disallowance can made in respect of flats which do not fulfill the conditions of section 80IB(10) of the Act. In this context, he relied upon the following decisions:-

- (i) *Viswas Promoters (P.) Ltd. v. Asstt. CIT* [2013] 214 Taxman 524/29 taxmann.com 19 (Mad.);
- (ii) *CIT v. Arun Exello Foundation (P.) Ltd.* [2013] 212 Taxman 342/29 taxmann.com 149 (Mad.);
- (iii) *ITO v. Paras Builders* [2015] 69 SOT 82/58 taxmann.com 286 (Pune - Trib.);

7. Learned Departmental Representative relied upon the observations of the Assessing Officer and the learned Commissioner (Appeals).

8. We have heard rival contentions and perused the material available on record. As could be seen from the facts available on record, the assessee has developed a housing project under the slum rehabilitation scheme of the Government. It is also a fact that in the impugned assessment year for the first time, the assessee had offered profit from the said housing project amounting to Rs. 1,48,66,701 and has claimed deduction thereof under section 80IB(10) of the Act. There is no dispute that the assessee has sold three flats to a single individual in the said housing project. The Assessing Officer has disallowed assessee's claim of deduction alleging violation of conditions of clause-(f) of section 80IB(10) of the Act, which provides that more than one residential unit in a housing project cannot be sold to a person / individual. The factual matrix of the case reveals that except violation of conditions of clause-(f) of section 80IB(10) of the Act, in the sense that the assessee has sold three flats to a single individual, there is no allegation by the Departmental Authorities that any other conditions of section 80IB(10) of the Act in respect of any other flats of the housing project are violated. Thus, the issue before us is whether for violation of the conditions of clause-(f) of section 80IB(10) of the Act in respect of two flats, assessee's claim of deduction in respect of entire housing project can be disallowed. In our view, reading the provisions of section 80IB(10) as a whole and the legislative intent / object behind introducing such provision into the statute would reveal that it is a beneficial provision introduced by the legislature to deal with the housing problem. Thus, such provision has to be construed liberally. Undisputedly, except violation of conditions of clause-(f) of section 80IB(10) of the Act in respect of two flats, all other conditions of section 80IB(10) of the Act are fulfilled in respect of the housing project which is evident from the fact that there is no other allegation made by the Assessing Officer. Therefore, in our view, for violation of conditions of clause-(f) of section 80IB(10) of the Act in respect of two flats, the deduction for the entire housing project or in respect of other flats which otherwise are complying to the conditions of section 80IB(10) cannot be disallowed. The disallowance, if any, has to be restricted to the flats which violate the conditions of section 80IB(10). The Hon'ble Jurisdictional High Court in *CIT v. Brahma Associates* [2011] 197 Taxman 459/9 taxmann.com 289/333 ITR 289 (Bom.), has held that deduction under section 80IB(10) can be allowed on proportionate basis in respect of flats which fulfilled the conditions of section 80IB(10). The same view was expressed by the Hon'ble Madras High Court in the decisions cited by the learned Authorised Representative. In our view, the ratio laid down in the aforesaid decisions, though, are in the context of clause-(c) of section 80IB(10) of the Act, however, they will apply to the facts of the present case as there is not much difference in the object for which section 80IB(10) was introduced, even after introduction of clause-(e) and (f) to section 80IB(10) by Finance Act, 2009. Therefore, applying the ratio laid down in the decisions cited before us, we hold that the assessee will be entitled to deduction under section 80IB(10) of the Act proportionately in respect of

flats which fulfilled all the conditions of section 80IB(10) of the Act. Accordingly, we direct the Assessing Officer to compute deduction under section 80IB(10) of the Act. Ground raised is partly allowed.

9. In the result, assessee's appeal is partly allowed.

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*In favour of assessee.