IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B. R. BASKARAN, ACCOUNTANT MEMBER

ITA No.190/Bang/2017
Assessment Year : 2010-11

The Assistant Commissioner of Income Tax Circle -7(2)(1), Bangalore.	Vs.	M/s. Eagleton Property Holdings, #4, Model House Street, Basavanagudi, Bangalore – 560 004. **PAN : AABFE 9867 C**
APPELLANT		RESPONDENT

Appellant by	:	Shri. Arun Kumar, CIT(DR)(ITAT), Bengaluru
Respondent by	:	None

Date of hearing	:	7.1.2021
Date of Pronouncement	:	7.1.2021

O R D E R

Per N.V. Vasudevan, Vice President

This is an appeal by the assessee against the order dated 27.10.2016 of CIT(A)-5, Bangalore, relating to Assessment Year 2010-11. The grounds of appeal raised by the Revenue reads as follows:

1. *The order of the learned CIT(A) is opposed to law and facts of the case.*
2. *"Whether on the facts and circumstances of the case, the CIT(A) was justified in law in allowing the appeal on proportionate basis in respect of units having built up area of less than or equal to 1500 Sq ft"?*
3. *"Whether on the facts and circumstances of the case, the CIT(A) was justified in law in rejecting the District Valuation Officer's Report and directing the AO to take physical measurements of*

individual units and decide on the allowability of the deduction as claimed u/s 80/8(10)"?

4. *The CIT(Appeals) erred in not considering the fact that even if some of the residential units of the housing project exceeded the prescribed limit of 1500 sq ft, the benefit of section 8018(10) cannot be given to the entire project".*
5. *For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.*
6. *The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above.*

2. The notice of hearing was served on the assessee but none appeared on behalf of the assessee. Hence, we proceed to decide the appeal after hearing the submissions of the learned DR.

3. The assessee, a partnership firm and is engaged in the business of constructing residential buildings at Eagleton, Bidadi, Bangalore Rural District. The firm had undertaken construction of two housing projects viz., County-I and County-II in the past and continuing these projects in this year also. Separate P&L a/c for County-I and County-II, and the consolidated balance sheet were filed before the AO. On construction revenue of Rs.14,24,83,653/-, net profit of Rs.4,31,16,275/- was shown in respect of County-I project. In County-II project, net profit of Rs.2,33,50,483/- was shown on construction revenue of Rs.5,91,01,790/-. These profits were shown separately in the computation of income under the head “Business Income”. After computing the gross total income, a deduction of Rs.4,31,16,275/- has been claimed u/s 80IB(10) in respect of income from the County-I housing project as an eligible project u/s 80IB(10).

4. One of the condition for claiming deduction under section 80IB(10) is that the Built up area of the units in a project should not exceed 1500 sq.ft.

5. The AO with a view to ascertain whether County-I project has complied with conditions of section 80IB(10), made a reference was made by this office to District Valuation Officer (DVO) requesting him to inspect the property, take measurements of the residential units constructed in this project and furnish a report. The D.V.O, after inspecting the approval of the local authorities, taking measurements of few sample residential units submitted a report in which he gave measurements of builtup area of seven residential units. Out of these seven units, the built up area of five residential units exceeded 1500 sq.ft. The D.V.O had also stated in his report that the built-up area is quantified after considering inner measurements of the residential units at the floor level, including projections, balconies and thickness of walls. According to the AO, the built-up area furnished by the D.V.O was in accordance with definition of built-up area given in sub section 14 of section 80IB. The AO therefore took the view that the assessee has not satisfied the condition that the built up area of the units should not exceed 1500 sq.ft. for claiming deduction under section 80IB(10)14(a) of the Act.

6. The assessee contended before the AO that the DVO has not depicted the method of calculation of the buit-up area of the measured residential units in his report and it appears the DVO has included some open areas which is not contemplated u/s. 80IB(10)14(a). It was further stated that the correct area is only 1483 sq.ft. as approved by the Government. The AO did not accept the stand of the assessee because physical inspection had been carried out by the DVO and that no reliance can be placed on the sanctioned plant as there could

have been some deviations resulting in excess built up area. Since the assessee did not satisfy the condition that built up area of each residential unit should be less than 1500 sq.ft, the AO held that assessee is not eligible for deduction u/s 80IB(10). Accordingly, the deduction claimed was rejected.

7. Besides the non-compliance of condition of built up area in respect of some residential units, the AO also noticed that as per the plan sanction obtained from Secretary, Manchanayakana Halli, Ramanagar Taluk on 11.4.2005,the site area of each plot is mentioned along with number of those plots and the proposed built-up area was shown as 48,243/- sq.ft. Besides these details, the plot area was mentioned as 10.385 acres. This plot area is the total plot area inclusive of County-I & County-II, etc. However, the plot area of County-I has not been separately mentioned. The AO also noticed that the project consists of individual residential houses spread over different portions of a big land with certain intervening areas demarcated as lands for future development and some area of the land shown as area meant of landscaping. In other words, according to AO, all these residential units were not situated in contiguous area and were individual duplex houses. The AO also noticed that as per the sale deeds produced, the land originally belongs to a company called M/s Chamundeshwari Build-Tech Pvt. Ltd. which had formed a layout called "Eagleton Golf Village" and sold sites to different individuals. These sites have been individually registered by M/s Chamundeshwari Build-Tech Pvt. Ltd. to the individual owners. These individual owners of the sited have obtained plan sanctions separately from the Secretary, Manchanayakana Halli, Ramanagar Taluk. The completion certificates have also been obtained separately for each residential unit and not for the project as a whole. According to the AO, the assessee has entered into construction agreements with each one of the land owners for building duplex houses as per the

sanctioned plans for each of those units and eructed separate buildings. So in this arrangement the assessee can only be termed as a building contractor but not a developer.

8. According to the AO, in the case of a developer, he owns a land or enters into JDA and sells the residential units by registering undivided sale of land and building/flat. Section 80IB(10) clearly says that the deduction is available to the undertaking "developing and building housing projects". In other words, unless the undertaking carries out both developing as well as building activities, it is not entitled to the deduction. According to the AO, the assessee is not the owner of the and it has neither sold the land or building and since the assessee had received only construction receipts which are in the nature of contract receipts, the profit earned is not on account of selling the units in the housing project. The AO therefore held that the assessee's business cannot be treated as business of developing and building housing Projects as envisaged in section 80IB(10) and the profit shown has not arisen from such housing project. For this reason also, the AO held that assessee is not eligible for deduction u/s 80IB(10). Accordingly, the claim of deduction under section 80IB (10) amounting to Rs. 4,31,16,275/- is disallowed.

9. Aggrieved by the order of the AO, the assessee filed appeal before the CIT(A). The CIT(A) considered the issue whether the assessee should be considered as a developer or only a mere contractor and therefore not entitled to deduction under section 80IB(1) of the Act. The CIT(A), in paragraphs 11.1 and 11.2 of his order, held that the assessee waw a developer and had taken the risk and rewards in developing and constructing the housing project.

This finding of the CIT(A) has not been challenged by the Revenue in this appeal.

10. The next issue that the CIT(A) took up for consideration was as to whether the deduction under section 80IB(10) can be allowed on proportionate basis in respect of residential units having a built up area of 1500 sq.ft. or less. On this aspect, the CIT(A) held that the assessee would be entitled to deduction under section 80IB(10) of the Act on a proportionate basis in respect of housing units which are 1500 sq.ft. or less in built up area. Incidentally, the CIT(A) also held that in respect of an independent residential units, assessee would be entitled to claim deduction under section 80IB(10) of the Act. The final conclusions of the CIT(A) were as follows:

> *"13. As regards to the alternative grounds of appeal that the deduction should be allowed on proportionate basis in respect of the residential units having built up area of 1500 Sft and below is concerned, I am of the opinion, in order to meet the ends of the justice and also keeping in view of the intention of the appellant developer claiming deduction only in respect of the housing project county 1, which is having the residential units-built up area 1500 Sft and below, which was built for the purpose of catering to the middle income group citizens for using the facilities of the Golf Club and not in respect of housing project County 2, wherein all the residential units were built for catering to the high income group citizens, which is in accordance with the intention of the legislature. Therefore, I hereby allow the deduction on the proportionate basis, accordingly, I direct the Assessing Officer to take the physical measurement of each and every residential unit of County 1 and to allow the deduction u/s.80IB (10) in respect of those units having built up area 1500 Sft. and below and to deny the deduction in respect of those units having built up area of more than 1500 sq.ft."*

11. Aggrieved by the aforesaid order of the CIT(A), the Revenue has preferred the present appeal.

12. We have heard the submissions of learned DR and reiterated the stand of the Revenue as reflected in the grounds of appeal filed before the Tribunal. We have considered the submissions of the learned DR and the grounds of appeal raised by the Revenue. On the aspect of the assessee being entitled to deduction on a proportionate basis in respect of units having built up area of 1500 sq.ft. or less, we find that the conclusions of the CIT(A) do not require any interference as the principle of proportionate deduction has been accepted by the Hon'ble Karnataka High Court. In CIT Vs. Brigade Enterprises Ltd. I.T.A. NO.373 OF 2014 Judgment dated 22.10.2020, the Hon'ble Karnataka High Court dealt with the following question of law:

> "(iv) Whether the tribunal was correct in allowing proportionate deduction under Section 80IB(10) in respect of the individual units measuring 1500 sq.ft. or less without appreciating that the decision was contrary to the provision of Section 80IB(10) as the section contemplates fulfillment of condition of area of 1500 sq.ft. or less in respect of all units in a project are not in respect of individual units under the same project?"

The factual background was that the assessee was engaged in the business of real estate development. The assessee duction under Section 80IB(10) of the Act to the extent of Rs.25,08,21,669/- in respect of profits of two projects viz., Brigade Gateway and Brigade Metropolis. The Assessing Officer made disallowance of the claims of the assessee under Section 80IB(10). The Commissioner of Income Tax (Appeals) who by an order dated 14.11.2012 allowed the claim of the assessee for deduction under Section 80IB(10) of the Act. On further appeal by the revenue the Income Tax Appellate Tribunal by an order dated 21.03.2014 upheld the order of the CIT(A). On further appeal by the Revenue, the Hon'ble Karnataka High Court answered the question of law in favour of the Assessee by following its own order in the case of the

assessee by this court vide orders dated 22.09.2020 passed in Commissioner of Income Tax vs. Brigade Enterprises Ltd., in I.T.A.Nos.54/2013 and 55/2013. The following were the relevant observations of the Hon'ble High Court in respect of proportionate deduction u/s.80IB(1) of the Act in the judgment dated 22.9.2020:

> "B. REQUIREMENT OF RESIDENTIAL UNIT HAVING A MAXIMUM BUILT UP AREA OF 1,500 SQUARE FEET:
>
> 16. The Assessing Officer has held that 32% of the units of the assessee are having an area of more than 1,500 square feet. It was further held that though the Income Tax Appellate Tribunal has recorded a finding in favour of the assessee that assessee is entitled to benefit of principle of proportionality for the Assessment Years 2004-05 and 2005-06, yet the aforesaid finding has not attained finality and the same is pending before this court in an appeal. **The Commissioner of Income Tax (Appeals) by placing reliance on the order passed by the Tribunal in respect of previous Assessment Year viz., 2004-05 has held that the assessee is entitled to benefit of deduction under Section 80IB(10) of the Act proportionately in respect of residential units having built up area less than or equal to 1,500 square feet. The aforesaid finding has been affirmed by the Tribunal vide order dated 07.09.2012 by placing reliance in case of the assessee in respect of previous Assessment Year i.e., 2005-06 as well as 2006-07. It is pertinent to note that the aforesaid view has been affirmed by a bench of this court in respect of another project of the assessee for the Assessment Year 2004-05 vide order dated 29.02.2012 passed in I.T.A.No.763/2009. It is also pertinent to note that similar view was taken in favour of the assessee in respect of Assessment Year 2005-06 and 2006-07 and the SLP against the order passed by this court has been dismissed vide orders dated 04.01.2013 and 14.03.2014 respectively. The aforesaid issue has therefore, attained finality. It is also pertinent to mention here that clause(c) of Section 80IB(10) of the Act, the Legislature has used the expression 'residential unit' and has specifically omitted to use the expression 'each'. It is also pertinent to mention here that in several Sections like Section 5A, 6(5), 10(10), 35D(1), 44AD(3), 80HHB, 80I(5), 153C, 153D, 158 DA, 293A(3), 296 and 298(4) of the Act as well as under Rules 2BA,**

> **20(4), 22(3), 62(3), 74(2), 74(6) and 104 of the Rules, the Legislature has expressly used the word 'each'.** It is well settled rule of statutory interpretation that when a situation has been expressed differently, the legislation must be taken to have been tended to express a different intention. [SEE: 'COMMISSIONER OF INCOME TAX, NEW DELHI VS. EAST WEST IMPORT AND EXPORT (P) LTD' 1989 (1) SCC 760]. **On plain reading of clause (c) of Section 80IB(10) of the Act, it is evident that the same does not exclude the principle of proportionality in any manner. Therefore, we hold that the Commissioner of Income Tax (Appeals) as well as the Tribunal have rightly found that the assessee has complied with the requirement contained in clause (c) of Section 80IB(10) of the Act."**

In view of the aforesaid decision of the Hon'ble Karnataka High Court, we are of the view that there is no merit in the stand taken by the revenue in this appeal.

13. Even in respect of ground No.3, it is clear from the perusal of the submissions of the assessee before CIT(A) that the DVO has not considered the units in County – I project and therefore the report of the DVO cannot be said to be final in the matter. In these circumstances, we do not find any merit in the ground No.3 raised by the Revenue. In any event, the physical measurement has to be taken by the AO and the AO is at liberty to take physical measurement in an appropriate manner and therefore there cannot be any grievance to the Revenue. For the reasons given above, we find no merit in the appeal by the Revenue. Consequently, the appeal by the Revenue is dismissed.

14. In the result, the appeal of the Revenue is dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(B. R. BASKARAN)	**(N. V. VASUDEVAN)**
Accountant Member	**Vice President**

Bangalore,
Dated: 7.1.2021.
/NS/*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.