Laukik Developers Vs. Dcit

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jul-10-2006

Reported in : (2007)105ITD657(Mum.)

Judge : G Gupta, V Murthy

Appellant : Laukik Developers

Respondent : Dcit

Judgement :

1. This appeal by the assessee for the assessment year 2002-2003 is directed against the order of the CIT(A). The only issue in this appeal is regarding the validity of deduction Under Section 80-IB(10) of the I.T. Act, 1961 claimed by the assessee on its profits from the project at village Gajbandhan, Dombivali, District Thane.

2. The Ld. Counsel for the assessee submitted that the assessee is a partnership firm engaged in the business of Developing and Construction of houses. The assessee has undertaken a housing project during the relevant period at village Gajbandhan situated within the municipal limits of Kalyan Dombivali Municipal Corporation (KDMC). The assessee filed its return of income disclosing total income at Rs. Nil, which was arrived at after claiming deduction Under Section 80 IB (10) of Rs. 8,74,331/-. The claim of the assessee Under Section 80 IB (10) was rejected by the Assesing Officer mainly on two grounds i.e. the project contains of some commercial area of 3143 Sq. feet and that the project was within the 25 Kms

from the city of Mumbai and consisted of six residential units built up more than 1,000 sq. feet area. The Ld.

Counsel for the assessee submitted that the housing project is approved by KDMC, which is a local authority. He submitted that the housing project is not defined Under Section 80.1B(10) of the Act. As per explanation to Section 80 HHBA (4) "Housing Project" means a project for the construction of any building, road, bridge or other structure in any part of India. The Local authority or any Corporation sanctions the building plans under three zones namely, Residential zone, Commercial zone, and Industrial zone. The assessee's site fall under residential zone. The Ld. Counsel for the assessee submitted that the provisions of Section 80 IB(10) were introduced to promote housing in the country. The housing project has to provide in a planned manner facilities needed in a modern developing society for the convenience of its residents and these housing projects may contain shops etc. as its integral part. The Ld. Counsel for the assessee submitted that while dealing with provision of Section 5(1)(iv) of the Wealth Tax Act, various courts have held that the house used for commercial purposes was eligible exemption and therefore, commercial property was considered as housing property. He relied on decisions in 197 ITR 258 (Ker.) and 212 ITR 203 (Patna). The Ld. Counsel for the assessee submitted that both the reasoning of the Assessing Officer rejecting the claim of the assessee Under Section 80IB(10) are untenable for the reason that the amendment to the provisions of Section 80 IB(10) is effective from 01.04.05 i.e. from the assessment year 2005-2006 and they shall not be applicable to the case of the assessee, which pertains to the assessment year 2002-2003. This amendment has curtailed the deduction by inserting Clause (d) to the fact that deduction will be available only if the built up area of the shops and other commercial establishments included in the Housing project does not exceed 5% of the aggregate built up area of the housing project or 2,00.0 sq. feet, whichever is less. The Ld. Counsel for the assessee submitted that this amendment on the statute book is not retrospective in nature and therefore, shall not apply to the earlier years and the deduction Under Section 80 IB(10) will be available, even if the shops and other commercial establishments are included in the housing project. He submitted that total commercial area in the housing project is 3143 square feet, only, which is essential for proper provision of basic necessities within the housing project. He referred to the query of Maharastra Chamber of Housing Industry dt. 01.01.01 refered to the Hon'ble Finance Minister for a clarification and the reply of the CBDT dt. 4.5.01 to Maharastra Chamber of Housing Industry in which the CBDT has stated that regarding the definition of housing project, it is clarified that any project which is approved by a local authority as a housing project/ should be considered adequate for the purpose of Section 10(23G) and 80 IB (10). The Ld. Counsel for the assessee submitted that as per the provisions of Section 80IB (10)(c) of the Act, the area of 25 KMs is from the municipal limits of the city of Mumbai and not from the outer limits of the Municipal Corporation of BMC, which includes the districts of Mumbai and Thane both. He referred to the various other provisions such as Section 80 IB(7), Section 54-G, Section 139 of the Act where the municipal jurisdiction of municipal corporation of Mumbai has been referred to instead of that of Mumbai City. The Ld. Counsel for the assessee relied on the decision of Pune Tribunal in the case of Mangalam Inorganics Pvt Ltd. Sangamner v. ACITT ITA No. 622, 622A/PN/01 for the assessment year 1992-93 and 1993-94, wherein held that the distance between the municipal limit and the assessee's industrial undertaking is to be measured having regard to the road distance and not as be the crow's flies i.e. a straight line as observed by the CIT. He submitted that the distance between the municipal limit of Mumbai city and the site of housing project of the assessee per the road distance is more than 25 KMs and therefore, there is no violation of the provisions of Section 80IB(10)(c) since the assessee can build a maximum build up area of 1500 sq. feet of the residential units. He relied on the decision of Hon'ble Gwahati High Court in 200 ITR 577 (Gwahati). The Ld. Counsel for the assessee argued that the incentive provision of law should be given a liberal interpretation and cited a number of decisions in support of his plea that a provision in the taxing statute granting incentives must be construed Iiberally. He relied on the decisions in 103 ITR 123 (SC), 271 ITR 322 (SC), 227 ITR 414 (SC), 196 ITR 188(SC), 105 ITR 179 (SC), 88 ITR 192 (SC).

3. The Ld. Departmental Representative submitted that in order to avail exemption from tax, the assessee has to satisfy all the conditions precedent thereto simultaneously and even non-fulfillment of a single pre-condition shall dis-entitle the assessee from its claim of exemption from tax with regard to the particular

transaction. The Ld Departmental Representative submitted that in this case there are two clear violation or the provisions of Section 80 IB(10) of the Act by the assessee inasmuch as the assessee's project was approved as a "residential as well as commercial project" by the local authority and not as a "residential project" of the assessee. He submitted that the explanation to Section 80HHBA(4) of the Act has no application to the issue before the Tribunal. He submitted that as per the clarification given by the CBDT to Maharastra Chamber of Housing Industry, it is clear that the provision of 80 IB (10) shall apply only when the project is approved as a "Housing Project" whereas the CIT(A) has given a clear finding that the building project in this case was residential as well as commercial project. He submitted that the amendment in the provisions of Section 80IB(10) with effect from 01.04.05 is not retrospective in nature and therefore, has no application to the case of the assessee and therefore, there can not be any commercial space in the building project of the assessee in order to claim exemption from tax as per the provisions of Section 80 IB(10) of the Act. He submitted that no proportionate deduction can be allowed to the assessee since the building project has to be eligible first in order to claim exemption under the provisions of Section 80 IB (10) of the Act. The Ld. Departmental Representative submitted that the distance of 25 KMs has to be seen form the outer having jurisdiction over the municipal limits of Mumbai the site of building project of the assessee has to be measured from the outer municipal limits of 'BMC' only. He submitted that the straight line distance has to be measured in accordance with provisions of Section 11 of General Clause Act. The Assessing Officer has given a finding that the distance of assessee's site is within 25 KMs of the municipal limits of the BMC.4. The Ld. Counsel for the assessee in rejoinder submitted that the provisions of General Clause Act have been considered by the Pune Tribunal in the decision in ITA No. 622 & 622A /PN/01 cited (Supra) and there being no contrary decision on the issue by another Tribunal, the same may be followed for measuring the distance of 25 Km for the purpose of Section 80 IB (10) (c) of the Act. He submitted that the assessee's site is well within residential zone and therefore, the benefit of Section 80 IB (10) should be allowed to the assessee.

5. We have considered the rival submissions carefully,. We have also perused the orders of the Assessing Officer and the CIT(A) and also the copies of the various

documents filed by the assessee in its compilation before the Tribunal. We find that the provision of Section 80 IB(10) of the Act is a beneficial provision giving deduction at the rate of 100% of the profits derived in any previous year from a Housing project, if all the conditions mentioned therein are fulfilled by an assessee. In this case the assessee is a registered firm engaged in the business of developing real estate project in Dombivali. The assessee has claimed exemption with regard to its building project at village Gajbandhan, Dombivali Under Section 80 IB(10) of the I.T. Act, 1961. It has been denied by the Assessing Officer and the order of the Assessing Officer has been confirmed by the CIT(A). The ground of rejection of the claim of the assessee Under Section 80IB(10) of the Act by the Department are two namely that the project contain commercial area of 3143 Sq. feet of shops and hence is not a Housing project and the other reason is that the project was within 25 Kms from the city of Mumbai and consisted of six residential units of built up area more than 1000 sq. feet, which violates the provision of Section 80 IB(10)(c) of the Act. There is no dispute with regard to other conditions laid down Under Section 80-IB(10) of the Act, which are fulfilled by the assessee.

6. The material facts of the case are not in dispute. Before proceeding to decide the issues before us, it shall be relevant to reproduce the relevant provision of Section 80IB(10) of the Act, as prevalent in the relevant period, as under: Section 80IB(10: " The amount of profits in case of an undertaking developing and building housing projects approved before the 31^st day of March, 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if,- (a) Such undertaking has commenced or commences development and construction of the housing project on or after the 1^st day of October, 1998; (b) The project is on the size of a plot of land which has a minimum area of one acre; and (c) The residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty five kilometers from the municipal limits of these cities and one thousand and five hundred square feet at any other place.

The first issue before us whether the building project of the assessee at village Gajbandhan, Dombivali is a "housing project" of the assessee for the purposes of Section 80-IB(10) of the Act. Both the assessee and the Revenue stated before us that the amendment brought by Finance No.(2) Act, 2004 with effect from 01 04.05 introducing sub clause(d) in the provision of Section 80-IB(10) shall have no application to the case of the assessee for the reason that the amendment is not retrospective in nature. The assessee has admittedly constructed commercial area of 3143 Sq. feet in its building project The word "Housing Project" is not defined Under Section 80-IB(10) of the Act. We find that in the explanation to Section 80HHBA(4) defining "Housing Project" is in entirely different context and therefore, has no bearing on the issue before us. The legislature has introduced the provision of Section 80IB(10) to encourage residential housing projects of units not exceeding specified built up area. In. order to avail the tax exemption with regard to the housing project, the assessee has to fulfill ail the conditions laid down under the beneficial provision of Section 80IB(10) of the Act. The construction of shops or commercial place can not be considered a "Housing Project" for the purposes of application of the provision of Section 80-IB(10) of the Act. We find that in this case it was not established by the assessee that its building project is primarily a "Housing project" in the facts of the case of the assessee.

The building project of the assessee was approved by the local authority named Kalyan Dombivali Municipal Corporation(KDMC) as a residential as well as commercial project. The CIT(A) has given a clear cut finding on this issue on the basis of a copy of the approval letter by KDMC filed by the assessee. We are unable to accept the argument of the Ld. Counsel for the assessee that since the case pertains to pre-amendment period, the deduction Under Section 80IB(10) will be available to the assessee even if the shops and other commercial establishments are included in the housing project of the assessee. If this argument of the assessee is accepted, then it shall nullify the very object of introducing the provision of Section 80-IB(10) in the statute book for promotion of housing activity in the country since there shall be no limit of the total built up area devoted to the construction of shops and other commercial establishments in the housing project of the assessee. The clarification of CBDT vide letter dt. 04.05.01 to Maharastra Chamber of Housing Industry clearly states that any project, which is approved by local authority as a "housing project", should be considered adequate for the purpose of Section-10(23G) and 80IB(10) of the Act. This clarification by the CBDT is of no help to the case of the assessee for the reason that the Building Project of the assessee was not approved by the local authority namely KDMC as a "Housing Project" and was in fact approved as a "residential as well as commercial project" by them. Although we are aware that incentive provision of law should be given a liberal interpretation as held in a number of decisions by the Hon'ble courts but the liberal interpretation shall not be to the extent of defeating the very purpose of enacting a particular incentive provision of law.

We find that the plea of the Ld. Counsel for the assesses that while dealing with the provision of Section 5(1)(iv) of the Wealth Tax Act, various courts held that house used for commercial purposes was also eligible for exemption and therefore commercial property should be considered as a housing property, is not sustainable, since the decisions relating to the provision of Section 5(1)(iv) of Wealth Tax Act were in the context of exemption of housing property for the purpose of the Wealth Tax Act and has no bearing to the present issue before us with regard to exemption of "housing project" under the provisions of Income Tax Act 1961. We are of the considered view that no proportionate deduction can be allowed to the assessee to the extent of residential units constructed by it in the building project for the simple reason that the building project should be eligible first in order to claim exemption under the provision of Section 80.IB(10). of the Act by fulfilling the conditions precedent for its application and the non fulfillment of a single pre condition as detailed in the provision of 80 IB(10) of the Act shall dis-entitle the assessee from claiming exemption of any part of its income, which may accrue from its building project during the year. The fact that the assessee's site fall under the residential zone, is not decisive of the issue. In view of the above findings, it is clear that the provisions of Section 80IB(10) of the I.T. Act is not applicable to the facts of the case of the assessee for the relevant year as the building project of the assessee was not a "Housing Project" and accordingly does not qualify for deduction Under Section 80IB(10) of the Act. In view of our finding that the building project of the assessee was not a "Housing Project" and therefore, the assessee's case does not qualify for deduction under Section

80IB(10) of the Act, we hold that all the conditions specified Under Section 80IB(10) are not satisfied by the assessee and accordingly the assessee is not entitled to any deduction Under Section 80IB(10) of the Act on this ground alone.

7. The other issue of measurement of distance of 25 KMs from Mumbai city and the six residential units of more than 1,000 Sq. ft. built up area constructed by the assessee, we find that the issue is merely of academic interest only for the reason that we have already held in the preceding paras of this order that the assessee's building project is not a "Housing Project" and therefore, not entitled to the benefit of deduction Under Section 80IB(10) of the Act. However, since much arguments were addressed from both the sides on this issue also, we proceed to record our findings on this issue.

8. The other issue is with regard to measurement of 25 Kms distance from the city of Mumbai. The case of the assessee is that the six residential units of whose built up area exceeds 1000 sq. ft.

constructed by the assessee are not hit by provisions of Section 80IB(10)(c) of the Act for the reason that the assessee's site is outside the 25 KMs distance from the limits of city of Mumbai. In the provisions of Section 80IB(10)(c) the word 25 Kms from the municipal limits of city of Mumbai is mentioned. The case of the Department is that the distance of 25 Km has to be measured from the outer limits of municipality of Mumbai and there being only "BMC" having jurisdiction over the municipal limits of Mumbai, the site of the building project of the assessee has to be measured from the outer municipal limits of "BMC" only. The other controversy regarding this provision is that the Revenue insist that straight line distance has to be measured in accordance with provisions of Section 11 of the General Clause Act whereas the case of the assessee is that the distance between the municipal limits and the assessee's site has to be measured having regard to the road distance only. We find that the issue regarding distance to be measured with regard to road distance or a straight line distance is covered with the decision of the Pune Tribunal in the case of Mangalam Inorganics Pvt Ltd., Sangamner v. CIT(supra) wherein held that the distance between the municipal limits and assessee's industrial undertaking is to be measured having regard to the road distance and not as per the crow's flies i.e. a straight line distance as convessed by the Revenue. There being no contradictory decision before us on this issue, we hold that the distance of 25 Kms for the purpose of Section 80IB(10) of the Act has to be measured as per the road distance and not as per the straight line distance on a horizontal plain. The other issue regarding whether this Section 80IB(10)(c) referred the outer limit of city of Mumbai or outer limits of municipal Corporation of Greater Mumbai, we find that it is the "BMC" having the jurisdiction over the municipal limits of Mumbai and therefore, the site of building project of the assessee has to be measured from the outer municipal limits of municipal corporation i.e. "BMC" only. In this case, the claim of the assessee is that the road way distance between the assessee's project and the precincts of Mumbai even from toll Naka at Mulund side as verified by the Inspector sent by the Assessing Officer is 25.3 KM. This is a factual issue and in case the road way distance from the outer limits of municipal corporation of BMC is more than 25 KMs from the assessee's site, the assessee's construction of six residential units of built up area of more than 1,000 sq. ft. (less than 1500 sq ft.), shall not be violative of condition mentioned in Section 80IB(10)(c) of the Act, subject to verification in this regard. As we have already held that since the assessee's building project is not a "Housing project" within the meaning of Section 80IB(10) of the Act and therefore, the assessee is not entitled to any exemption claimed Under Section 80IB(10) of the Act, the above discussion regarding the measurement of 25 Km distance from the assessee's site to the limits of Mumbai city is of academic interest only. Accordingly, the issue in the present appeal before us is decided in favour of the Revenue and the grounds of appeal of the assessee are dismissed.

9. Before parting with the appeal, we want to place on record our appreciation for the assistance given by Ld. Counsel for the assessee as well as Ld. Departmental Representative during the course of hearing of the appeal.