Harshad P. Doshi Vs. Assistant Commissioner of Income

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jan-28-2007

Reported in : (2007)109TTJ(Mum.)335

Judge : S Tiwari, S Chowla

Appellant : Harshad P. Doshi

Respondent : Assistant Commissioner of Income

Judgement :

1. This appeal has been filed by the assessee on 17th April, 2006 against the order of the learned CIT(A)-XXV, Mumbai dt. 5th March, 2006 in the case of the assessee in relation to assessment order under Section 143(3) for asst. yr. 2003-04.

2. In this appeal, the assessee has disputed the order of the learned CIT(A) confirming the disallowance of assessee's claim of deduction under Section 80-IB(10) to the extent of Rs. 44,43,100 on the ground that shopping area included in the housing project of the assessee is not entitled to deduction under Section 80-IB(10).

3. Facts of the case leading to this dispute briefly are that the assessee was engaged in the business of building construction. In the return of income filed the assessee claimed that some of building projects undertaken by him were eligible for deduction under the provisions of Section 80-IB(10). Accordingly, he claimed

deduction aggregating Rs. 6,04,50,350. The learned AO found that in those building projects certain area was utilized for construction of shops.

He asked the assessee a's to why the proportionate profit attributable to the sale of shops should not be disallowed as not covered by exemption under Section 80-IB(10) of the Act. The assessee submitted that same issue had arisen in his case for asst. yr. 2001-02 and the learned CIT(A) held by his order dt. 26th Aug., 2004 for that assessment year deleted the similar disallowance made by the AO.Further the assessee submitted his arguments on merits. The learned AO found that while the CIT(A)'s order in the case of the assessee was in favour of the assessee there was another order of CIT(A) in the case of M/s Saroj Sales Corporation that had been decided against that assessee. Following the reasoning adopted by the learned CIT(A) in the case of M/s Saroj Sales Corporation and also on the basis that deduction under Section 80-IB(10) was intended to give boost to the residential housing activities so that middle class/lower middle class population could afford a house, the learned AO held that the shops, that generally fetched higher prices, were not covered by the provision. He, therefore, disallowed the assessee's claim of deduction in proportion to the ratio of shopping area vis-a-vis total area constructed in the relevant building projects. Thus out of total exemption of Rs. 6,04,50,350 claimed by the assessee, the learned AO made disallowance of Rs. 44,43,100.

4. During the course of proceedings before the learned CIT(A) the assessee relied upon the order of the learned CIT(A) in his own case for asst. yr. 2001-02. Further, the assessee relied upon his submissions on merits as made before the AO. He filed the documents indicating that Municipal Corporation had approved the entire projects as housing projects. The learned CIT(A) held that the provisions of Section 80-IB(10) applied to housing projects only. The AO was therefore right in holding that the purpose of provisions was to boost residential housing activity for middle and lower middle class population and not to exempt the profits made out of commercial premises. The projects executed by the assessee were partly commercial and partly residential. That part of the buildings constructed which was for commercial purpose did not qualify to be called "housing project". The exemption claimed by the assessee was against the spirit of introduction of the

provision. She also found discrepancy between the construction carried out by the assessee and plans approved by the Municipal Corporation. As to the order of predecessor in the assessee's own case the learned CIT(A) noted that further appeal had been filed against that order by the Revenue. She found the reasoning given in the case of M/s Saroj Sales Corporation as being correct. As to the CBDT Instructions relied upon by her predecessor in the order in the case of the assessee, the learned CIT(A) held that the said Instructions dt.

4th May, 2001 had been given in response to the query raised in relation to Section 80-IB(10). However, in the Board's reply, the definition of housing project under Section 80-IB(10) too had been included. That definition once given did not mean that the same had to be accepted blindly without looking into the construction of the project actually done by the builder. The learned CIT(A) noted that the legislation had added Clause (d) to Section 80-IB(10) w.e.f. 1st April, 2005. Had there been intention of legislation to allow deduction on shop area also in earlier years the legislature could have amended the section with effect from an earlier date. In this view of the matter two interpretations were not possible. The provisions of Section 80-IB(10) as applicable for the assessment year talked of housing project and not the commercial shops. The CIT(A), on such reasoning, upheld the disallowance as made by the AO. Still aggrieved, the assessee is in appeal before us.

5. During the course of hearing before us the learned Counsel for the assessee argued that the assessee had fulfilled all the conditions as laid down under the provisions applicable to assessment year before us.

The housing projects concerned had been approved before 31st March, 2005 by the local authorities concerned. All the undertakings had commenced development and construction of the housing projects on or after 1st Oct., 1998. All the projects were on plot of land which had a minimum area of one acre. The residential units had maximum built-up area of one thousand square feet. The learned Counsel argued that certain portions were utilized for construction of shops by way of amenities and facilities provided to the residents of the housing projects. The learned AO had himself accepted that the project of the assessee was housing project. He had only made proportionate disallowances in respect of the portions of the construction corresponding to convenience shops, etc.

6. The learned Counsel further argued that in past a question had arisen as to whether a housing project meant construction of residential flats exclusively or it also included ancillary and connected activities like construction of shops, etc., to provide amenities and facilities to the inhabitants of the dwelling portions necessary for functioning of the housing project as such. On that issue, a representation had been made by the Maharashtra Chamber of Housing Industry to the Hon'ble Finance Minister by its memorandum dt.

1st Jan., 2001 (copy at pp. 2-4 of the supplementary paper book)" in which, inter alia amongst other matters, it was also requested that a "suitable clarification be made to define the term 'housing project' so as to include various amenities and facilities including that of 'convenient shopping' etc." (vide p. 3 of the supplementary paper book). In response to the same, the CBDT, Department of Revenue, addressed a reply under F. No. 205/3/ 2001/IT A-II dt. 4th May, 2001 (copy placed at page No. 5 of the paper book and at p. 1 of the supplementary paper book), giving the following clarification: With regard to your query regarding the definition of housing project, it is clarified that any project which has been approved by a local authority as a housing project should be considered adequate for the purpose of Sections 10(23G) and 80-IB(10).

7. The learned Counsel for the assessee submitted that all the three projects had been duly approved by the local authorities and that approval took into account both the actual residential portion as well as the portion relating to the convenience shops. In support of this contention the learned Counsel for the assessee relied upon the following documents: (i) Form No. 10CCB along with copy of local authority's approval dt.

19th June, 2000 and certificate of architect for the built-up area of the housing project of M/s Unique Star Construction (at pp. 7-15 of the paper book).

(ii) Form No. 10CCB along with copy of local authority's approval dt. 25th Jan., 2001 and certificate of architect for the built-up area of the housing project of M/s

Harsh Unique Developers (at pp.

16-24 of the paper book).

(iii) Form No. 10CCB along with copy of local authority's approval dt. 19th June, 2000 and certificate of architect for the built-up area of the housing project of M/s Harsh Deep Construction (at pp.

25-32 of the paper book).

The learned CIT(A) for asst. yr. 2003-04 seemed to have a wrong notion that the local authority concerned gave approval only in respect of the residential portions and not the portions of construction relating to 'amenities and benefits' to the residents like the 'convenient shops', etc. While delivering her appellate judgment for asst. yr. 2003-04, the CIT(A) remarked at para 10 (p. 6) of her order, as follows,--"Perusal of the approval letter by Municipal Corporation revealed that the Municipal Corporation has approved the housing project and not the project with commercial construction of shops on whole ground floor.

From the plan map which has been signed by the architect and engineer of the appellant, it is clear that the construction has not been done as per approval of Municipal Corporation, for residential project." The learned Counsel strongly denied the allegation and argued that "Municipal Corporation" concerned approved the entire plan of construction as submitted by the assessee and the construction of the shops, etc., was a part of the said building plan submitted. There was absolutely no basis for the allegation that the construction activity was not according to the plan submitted or in violation of the approved plan.

8. The learned Counsel argued that the matter stood settled by the CBDT decision conveyed to Maharashtra Chamber of Housing Industry by letter dt. 4th May, 2001. The arguments of the learned CIT(A) that since the query was raised with regard to Section 10(23G), the inclusion of Section 80-IB(10), in the reply should be ignored was to say the least very queer. Once the board in its wisdom included Section 80-IB(10), the learned CIT(A) had no authority to question it. There was also no force in the contention of the learned CIT(A) that the amendment brought

to Section 80-IB(10) by the Finance (No. 2) Act, 2004 effective from 1st April, 2005 proved that before amendment, the exemption was available to residential area only. The purpose of insertion of Clause (d) was to put a restriction of five per cent on the built-up area for shops and other commercial establishments. At any rate if the provision as it stood prior to amendment was read independently, there was no room for any doubt that it applied to housing projects as a whole. As in the case of the assessee, the exemption was sought in relation to housing projects, it could not be denied for any non-residential user of the housing project. The learned Counsel further argued that both the AO and the learned CIT(A) erred in interpreting the provisions of Section 80-IB(10) on the basis of their own feelings about the object of the legislation. It was settled law that once the language of statute is clear, the plain meaning of the words used has to be assigned to it.

9. The learned Departmental Representative strongly relied upon various reasons given in the assessment order and the order of the learned CIT(A). He argued that as the provisions of Section 80-IB(10) conferred the exemption, the intention behind the provision was most important.

10. We have carefully considered the rival submissions. There is a suggestion in the order of the learned CIT(A), that the construction has not been done as per approved plan of Municipal Corporation. She, however, does not elaborate and relies upon any material for those observations. During the course of hearing before us, the learned Counsel categorically stated that there is no violation of building plans. Both the learned AO as well as the learned CIT(A) have founded their orders on the premise that the expression "house" means a residential accommodation only. Under the head "Chapter IV-C" "Income from house property" charge of tax is in respect of house property that may be residential house, a shop, an office building, factory premises, godown, warehouse etc.

11. Apart from the provisions of "Chapter IV-C" of the Act that place the charge of tax on building premises for all dues under the head "Income from house property", in the case of Tata Engg. and Locomotive Co. Ltd. v. Gram Panchayat the Hon'ble Supreme Court have observed: The word 'house' is not defined in the Act. This Court in Ramavatar v. Asstt. STO , said that the correct approach is to

construe the word in that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. Counsel for the respondent rightly contended that the word 'house' would in its ordinary sense include any building irrespective of its user.

12. We now proceed to consider the arguments of the learned AO and the learned CIT(A) that the expression "housing project" appearing in Section 80-IB(10) should be construed as purely residential housing project. We may state here that the issue before us, in principle, is already concluded by the CBDT clarification in this behalf under F. No.205/3/2001/IT A-II dt. 4th May, 2001 being a letter addressed to Maharashtra Chamber of Housing Industry in the following words: With regard to your query regarding the definition of housing project it is clarified that any project which has been approved by a local authority as a housing project should be considered adequate for the purpose of Sections 10(23G) and 80-IB(10).

During the course of assessment proceedings the assessee has furnished certificate from Mira Bhayandar, Municipal Corporation to the effect that the three projects undertaken had been approved as "housing project".

13. In view of the discussion in the foregoing paras we hold that there is no justification in reducing deduction claimed by the assessee by the sum of Rs. 44,43,100 provided that the shops in question have been constructed by the assessee in accordance with the approved plans of Municipal Corporation. In view of the doubts raised in this behalf we direct the AO to make necessary verification, after allowing the assessee reasonable opportunity, as to whether or not the construction of the shops is in accordance with the plans approved by the Municipal Corporation. Subject to this verification we direct the AO to allow the assessee further deduction of the sum of Rs. 44,43,100 as claimed by the assessee.