
(2012) 02 KAR CK 0010
In the Karnataka High Court
Case No : IT Appeal No. 177 of 2011

Commissioner Of Income Tax and Another	APPELLANT
Vs	
Raghavendra constructions	RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Income Tax Act, 1961 — Section 119, 80 IB, 80 IB (10)

Citation : (2012) 250 CTR 285 : (2013) 354 ITR 194 : (2012) 208 TAXMAN 366

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : E.R. Indrakumar and E.I. Sanmathi, for the Appellant; A. Shankar and M. Lava, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—The Revenue has preferred this appeal challenging the order passed by the Tribunal wherein it has been held that the assessee is entitled to claim deduction under s. 80-IB(10) of the IT Act, 1961 (hereinafter referred to as "the Act") on pro rata basis in respect of those flats, the built-up area of which was not more than 1500 sq. ft. The assessee is a partnership firm engaged in the business of construction and sale of flats. The assessee entered into joint development agreement with Sri Mahaveer Ranka for building a residential project called "Paramount Raghavendra Arisht" which consists of 160 flats. The assessee had claimed deduction of the entire net profit of Rs. 36 crores relating to the said residential complex under s. 80-IB(10) of the Act for the asst. yr. 2007-08, which was rejected by the assessing authority for the reason that the built-up area of some of the flats exceeded 1500 sq. ft. The said order was challenged before the CIT(A). The appellate authority partly allowed the appeals holding that the assessee is entitled for the said deduction on pro rata basis. The Revenue challenged the said order before the Tribunal. The Tribunal dismissed the appeal holding that the assessee is entitled to the said deduction on pro rata basis in respect of those flats, the built-up area of which does not

exceed 1500 sq. ft. Aggrieved by the said order, the Revenue is in appeal.

2. The material on record discloses, the building consists of 160 apartments comprising of duplex flats, 2 BHK and 3 BHK flats. During the survey, flats-wise details of built-up area, as well as super built-up area were gathered. The built-up area of duplex flats cover ground and mezzanine floors and over these floors 1st, 2nd and 3rd floors consisting of 2 BHK and 3 BHK flats are constructed. Built-up area of duplex flats and some 3 bedroom flats are shown in the range of 1404 to 1488 sq. ft. Super built-up areas are shown more than 1800 sq. ft. With a view to ascertain whether these duplex flats and 3 bedroom flats comply with requirements of s. 80-IB(10), a reference was made to DVO vide letter dt. 9th Oct., 2007. The DVO after inspection of the building, submitted a report in his letter dt. 6th Nov., 2007 stating that duplex flats bearing Nos. A-1, A-13, A-11, L-9, L-17 and L-20 have plinth area ranging between 1842 to 2614 sq. ft. When the assessee was confronted with this report the assessee vide letter dt. 6th Dec, 2007 replied that the DVO erred in giving his report by including the common areas shared with other flats and even those areas which are not part of flat measurement are included in the flat measurement. The assessee also enclosed a report from a private valuer showing plinth area of these flats as less than 1500 sq. ft. He also specifically pointed out the areas to be excluded. These submissions of assessee along with their valuers report were forwarded to the DVO, inviting their comments. After reinspection of the building, the DVO Bangalore submitted his comments in his letter dt. 28th March, 2008. With regard to built-up area i.e., plinth area he revised the figures and showed flat area excluding covered balcony/covered garden/covered passage in respect of duplex flats as ranging from 1450 to 1474 sq. ft. The A-1 flat area was given as 1474 sq. ft. With regard to balconies it was mentioned that the duplex flats bearing Nos. A-13, A-11, L-20, L-9 and L-17 have balconies but these balconies of this flat on mezzanine floor are only approachable to adjoining duplex flat A-2 owner. This balcony is about 51.71 sq. mtrs. which works out to 556.6 sq. ft. The ground floor area of 51.71 sq. mtrs. of this flat appurtenant to this flat was stated to have been covered by garden in the passage. To make it clear, the balcony in the mezzanine floor of A-1 and A-2 of 556.60 sq. ft. is so located that the bedroom doors of A-1 and A-2 open out to this big balcony and no other flat owners can walk into this balcony. The assessee's records show plinth area of A-1 duplex flat as 1484 sq. ft. and super built-up area as 1929 sq. ft. and difference is on account of inclusion of common area calculated as 30 percent over plinth area. The adjoining duplex flat A-2 is shown to have plinth area of 1485 sq. ft. and super built-up area of 1931 sq. ft. According to the assessee the plinth area is essentially the internal floor area of the flat. As per the definition provided in s. 80-IB(14), built-up area means inner and balcony as increased by the thickness of the walls but does not include common areas shared with other residential units. Since the balcony area of each flat is also to be included for arriving at built-up area as per the above definition in the Act, the floor area of A-1 duplex flat of 1484 sq. ft. would be increased with the balcony area of this flat in the mezzanine

floor. Half of the area of this balcony which comes to 278.30 sq. ft. should be clubbed with floor area and then the built-up area of A-1 duplex flat would be 1762.3 sq. ft., the built-up area adjoining duplex flat A-2 calculated in this manner would be also 1762.3 sq. ft. Similarly, if proportionate balcony area is added to flats bearing Nos. 3 and 4 of block A, 5, 6, 7 and 8 of block B, 1, 2, 3 and 4 of block C, 5, 6, 7 and 8 of block D, the built-up area including half the area of the balcony exceed 1500 sq. ft. The assessing authority refused to treat the balcony area in respect of A-1 and A-2 flats on the ground that other flat owners have no access and the access is only to the owners of these two flats. Therefore, the appellate authority denied the benefit under s. 80-IB(10) of the Act. However, the appellate authority denied the benefit only to the 16 flats whose built-up area is more than the prescribed limit of 1500 sq. ft. Therefore he directed the AO to proportionately calculate the disallowance to be made under s. 80-IB in proportion to the area of these 16 flats and restrict the disallowance under s. 80-IB of the Act only to the same. He held for the balance area the assessee would be entitled to the benefit. The Tribunal accepting the findings of the first appellate authority dismissed the appeal. It is against the said order the Revenue is in appeal.

3. The learned counsel for the Revenue contends that when once the violation of s. 80-IB(10) of the Act is established, the assessee forfeits his right to claim exemption. When that being the case the appellate authority committed a serious error in extending the benefit proportionately, which is outside the scope of s. 80-IB(10) of the Act. Therefore, he submits that the said order requires to be set aside.

4. Per contra, the learned counsel appearing for the assessee submits that as is clear from the aforesaid facts, the balconies do not exclusively belong to the owners of the flats. It has to be shared with others. Sub-s.(14)(A) of s. 80-IB where the built-up area is defined, makes it explicitly clear that the common area shared with other residential units has to be excluded for the purpose of calculating built-up area to extend the benefit of s. 80-IB(10) of the Act. Once this balcony area is excluded, none of the flats' built-up area exceeds 1500 sq. ft. Therefore, the assessee is entitled to the said provision completely, though the appellate authorities have denied the said benefits to 16 flats. Therefore, he submits that no case for interference is made.

5. Therefore the substantial question of law that arises for consideration in this appeal is:

To be eligible for exclusion from the built-up area, whether the common areas have to be shared with all the residents, who have occupied the residential units, or even if it is shared with one, the assessee would be entitled to the said benefits

6. The Circular No. 5 of 2010 dt. 3rd June, 2010 [(2010) 232 CTR (St) 289: (2010) 40 DTR (St) 9] issued by the CBDT exercising the power under s. 119 of the Act explains rationalising the provisions of deduction under s. 80-IB(10). The

principal object behind this provision is to provide for 100 per cent deduction of the profits derived by an undertaking from developing and building housing projects. In order to be eligible for the said benefit, the assessee should satisfy the following conditions :

- (a) The project has to be approved by the local authority before 31st March, 2007;
- (b) The project is constructed on a plot of land having a minimum area of one acre;
- (c) The built-up area of each residential unit should not exceed 1500 sq.ft. in the cities of Delhi and Mumbai (including areas falling within 25 kms. of municipal limits of these cities) and 1500 sq. ft. in other places;
- (d) The built-up area of the shops and other commercial establishments included in the housing project should not exceed 5 per cent of the total built-up area of the housing project or 2000 sq. ft., whichever is less.
- (e) The project has to be completed within four years from the end of the financial year in which the project is approved by the local authority.

Once these conditions are fulfilled, the assessee would be entitled to the benefit flowing from the aforesaid provision. By a subsequent amendment, the project approval by the local authority was extended to 31st March, 2008. The object of the aforesaid tax concession is to provide tax benefit to the person undertaking the investment risk i.e. the actual developer. However, any person undertaking pure contract risk is not entitled to the tax benefits. With a view to clarify accordingly, an Explanation after sub-s. (1) of s. 80IB has been inserted so as to provide that nothing contained in sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any other person including Central or State Government. This amendment has been made applicable with retrospective effect from 1st April, 2001 and will accordingly apply in relation to asst. yr. 2001-02 and subsequent assessment years. Further, the objective of the tax benefit for housing projects is to build housing stock for low and middle income households. This has been ensured by limiting the size of the residential unit. Therefore, while interpreting s. 80-IB(10) this object has to be kept in mind and if there is any ambiguity or difficulty, it is the substance, which has to be preferred to the form. Keeping in mind the fact that while implementing these projects at the ground level, the builders encountered innumerable problems. If there are minor defects in the construction put up, which is unintentional or by which they have not made any special gains of money, the benefit which is accrued to them under this provision should not be denied on that score for the main object sought to be achieved by introduction of this provision is achieved while considering the claim for benefit under this provision, the authorities should lean in favour of encouraging such housing projects and not discouraging the persons from taking up such housing projects. It is in this context probably that obstacles were put in assessee's getting the benefit, the legislature introduced the definition of built-up area, which is very

crucial factor in determining the benefit of tax to the assessee, which reads as under:

(14)(a) "built-up area" means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units;"

7. Therefore the intention is clear. In calculating the built-up area it is only the inner measurements of the residential unit on the floor level, which have to be taken into consideration. If there are any projections and balconies and if it exclusively belongs to the residential units, then, that also has to be taken into consideration for deciding the built-up area. However, if the said residential unit is provided the facility of common area shared with other residential units such common areas have to be excluded while computing the built-up area. The language employed in defining built-up area as the common area shared with other residential units, it does not mean that every common area should be shared with other residential units. If that area does not exclusively belong to the owner of the residential unit and if he has to share that common area with the owner of another residential unit, then that common area has to be excluded from the built-up area. If this principle is kept in mind and applied to the facts of this case, in respect of 16 flats, the common area is shared by these 16 owners of residential units. In respect of A-1 and A-2 the common area is shared by the owners of flats A-1 and A-2. This common area is not the subject-matter of sale as is clear from the recitals in the sale deed. In other words, the owners of the residential units do not have exclusive right to use these balconies as they have to share it with others. It is immaterial whether they have to share it with other 159 owners of the residential units or they have to share it with the adjoining owner of the residential unit, this area cannot be taken into consideration to decide the built-up area. From the facts, it is clear that if this balcony space is excluded all the 160 units are less than 1500 sq. ft. and therefore the assessee was entitled to 100 per cent tax exemption on this project. However, the appellate authority as well as the Tribunal have not extended the said benefit to 16 residential units. As the assessee has not preferred any appeal against the said order, it will not be appropriate for this Court to extend the said benefit in these proceedings. However, as the law stands today, in view of the interpretations placed by them on the aforesaid provisions, the assessee has not violated the provisions of s. 80-IB(10) of the Act and in fact was entitled to 100 per cent tax exemption on the profits derived from the project. Therefore the substantial question of law framed is answered in favour of the assessee and against the Revenue. Therefore, we do not see any merit in this appeal and accordingly the appeal is dismissed. No costs.