

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "B", MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.398/M/2023
Assessment Year: 2013-14**

**ITA No.400/M/2023
Assessment Year: 2014-15**

**ITA No.396/M/2023
Assessment Year: 2015-16**

**ITA No.399/M/2023
Assessment Year: 2016-17**

**ITA No.397/M/2023
Assessment Years: 2017-18**

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| Deputy Commissioner of Income-Tax, Circle – 5(2)(1), 5 th Floor, Room No.571, Aayakar Bhavan, M.K. Road, Mumbai - 400020 | Vs. | M/s. Nahar Builders, B-1, Mahalaxmi Chambers, 22, Bhulabhai Desai Road, Mahalaxmi, Mumbai – 400 026 PAN: AADCN8065A |
| (Appellant) | | (Respondent) |

Present for:

Assessee by : Shri Vimal Punmiya, A.R.
Shri Prakash Bohra, A.R.
Shri Tushar Udani, A.R.

Revenue by : Dr. Mahesh Akhade, D.R.

Date of Hearing : 01 . 06 . 2023

Date of Pronouncement : 22 . 06 . 2023

ORDER

Per Bench :

For the sake of brevity aforesaid appeals filed by the appellant Deputy Commissioner of Income-Tax, Mumbai (hereinafter referred to as 'the Revenue') are taken up to be disposed of by way of composite order as the identical grounds have been raised bearing common question of law and facts in the same.

2. The Revenue by filing the present appeals, sought to set aside the impugned orders dated 13.12.2022, 21.12.2022, 21.12.2022, 13.12.2022, 13.12.2022 pertaining to A.Y. 2013-14, 2014-15, 2015-16, 2016-17 & 2017-18 respectively passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)] qua the assessment years 2013-14, 2014-15, 2015-16, 2016-17 & 2017-18 on the identical grounds except the variation in the amount of disallowance (grounds of A.Y. 2013-14 are taken up for the sake of brevity) inter-alia that:-

"1. Whether the Ld CIT(A) is erred in directing the AO to delete the disallowance of deduction u/s 801B(10) of the Income Tax Act, 1961, amounting to Rs 1,00,66,56,818/- for AY 2013-14, relying on the decision of Hon'ble ITAT in ITA No. 2853 to 2855/Mum/2015 and ITA No. 3572 to 3574/Mum/2015 for AY 2010-11 to 2012-13 dated 07.04.2017 in the assessee's own case wherein the Hon'ble ITAT has directed the AO to exclude Service Area, Window projection, Cupboard Projection, Flower Bed Area & Common Wall Area while calculation of Built Up Area (BLIA) for purpose of claim of deduction u/s 801B(10).

The appellant prays that the order of the Ld.CIT(A) be set aside and the order of the AO be restored.

The appellant craves leave to add, alter, modify or amend any ground(s) of appeal which may be necessary."

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee company is into the business of a developer of residential and commercial construction. During the years under consideration the assessee company has filed its return of income claiming a deduction to the tune of Rs.1,16,16,45,271/-, Rs.87,14, 45,981/-, Rs.32,20,39,665/-, Rs.56,93,52,096/- & Rs.20,59,34,431/- under section 80IB(10) of the Income Tax Act, 1961 (for short 'the Act') for A.Y. 2013-14, 2014-15, 2015-16, 2016-17 & 2017-18 respectively. Thereafter a search operation was carried out on the assessee's group company on 02.02.2022 wherein the Revenue department noticed that the assessee has violated the provisions of section 80IB(10) of the Act in claiming deduction. Notices under section 143(2) & 142(1) of the Act along with questionnaire were issued. The assessee filed requisite details/explanations before the Assessing Officer (AO). Declining the contentions/explanations made by the assessee company the AO proceeded to disallow the part claim of deduction claimed by the assessee under section 80IB(10) of the Act by making disallowance of Rs.15,49,88,543/-, **Rs.5,00,000/-**, **Rs.2,27,11,842/-**, **Rs.15,05,07,574/-** & **Rs.77,80,000/-** for A.Y. 2013-14, 2014-15, 2015-16, 2016-17 & 2017-18 respectively and thereby framed the assessment under section 143(3) of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the disallowance made by the AO in all the assessment years viz. A A.Y. 2013-14, 2014-15, 2015-16, 2016-17 & 2017-18 by following the order passed by the Tribunal in assessee's own case for A.Y. 2010-11 to 2012-13 order dated 07.04.2017. Feeling aggrieved with the impugned orders

passed by the Ld. CIT(A) the Revenue has come up before the Tribunal by way of filing present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. Undisputedly in the earlier assessment years from A.Y. 2008-09 to A.Y 2012-13 identical issue has already been decided by the Tribunal in favour of the assessee. It is also not in dispute that the Revenue has already accepted the order passed by the Tribunal in A.Y. 2008-09 to 2012-13 in assessee's own case by not challenging the same in the higher forum.

7. In the backdrop of the aforesaid undisputed facts the Ld. CIT(A) has decided the issue as to the allowability of deduction claimed by the assessee under section 80IB(10) of the Act by returning following findings:

"5.2. It is a fact that the AO has based his findings on the discussions of AY 2012-13 and other years. The Hon'ble ITAT vide order No. ITA No. 2853 to 2855/Mum/2015 and ITA No. 3572 to 3574/Mum/2015 for AY 2010-11 to 2012-13 dated 07.04.2017 has held in para 39 that the appellant succeeds even on merits. Similarly, in ITA No. 5851/Mum/2015 AY 2008-09, ITA No. 207/Mum/2016 AY 2008-09, ITA No. 516/Mum/2016 AY 2009-10 and ITA No. 12725/Mum/2016 AY 2009-10 dated 02.01.2019, the Hon'ble ITAT has held in favour of the appellant on merits except on the issue as regards the role of Department Valuation Officer in the search action.

5.3. In the order dated 07.04.2017, the Hon'ble Tribunal has held as under:

"26. We find considerable force in the submissions of the assessee that the flower bed area and common wall area are not

includible in the definition of built up area while calculating the eligible limit of 1000 sq. ft for the purpose of allowing deduction u/s 801B(10) of the Act. The flower bed area is open to sky and not covered by any sides whereas balcony is covered with three sides. The flower bed area is few inches below floor level. It is the submission of the assessee that the flower bed area is outside the balcony area and the starting point for the flower bed area is a point where the balcony area ends.

27.

28. *Therefore as could be seen from the above, the coordinate Bench held that chajjas, floor bed, dry balcony etc which are below floor level shall not be Included in the definition of built up area.*

29.

30. *After considering the rival submissions and materials placed before us including the decisions of the rival parties we find that the flower beds which are below the floor level can not form part of constructed area of flat for the purpose of determining the eligibility of the assessee to deduction u/s 80(1B)(10) of the Act.*

31.

32. *On going through the above findings of the Id. CIT(A), we do not find any valid reason to include service area, window area, window projections and cupboard projection in the built up area for calculating eligible built up area of 1000 sq.ft for the purpose of computation of deduction u/s 801B(10) of the Act."*

5.4. *Once the Hon'ble Tribunal has given factual finding regarding the eligible area of 1000 sq. ft. BUA of the flats, the same is required to be respectfully followed.*

5.5. *In view of the same, the AO's stand of disallowing deduction u/s 801B(10) on the ground that similar deduction in AY 2012-13 and other years were not allowed cannot be sustained. Hence, the appellant succeeds in its claim of deduction u/s 801B(10). This ground of appeal is ALLOWED"*

(Emphasis supplied from order dated 13.12.2022 passed by the Ld. CIT(A) for A.Y. 2013-14)

8. We have perused the findings returned by the Ld. CIT(A) which are in consistent with earlier order passed by the Tribunal

from A.Y. 2008-09 to 2012-13 on the identical issue in favour of the assessee. The Tribunal has already decided the issue by holding that while calculating the eligible limit of 1000 sq. ft. for the purpose of deciding the allowability of deduction claimed by the assessee under section 80IB(10) of the Act, the floor bed area, which is open to the sky and not covered by any sides and outside the balcony area, which is below the floor level cannot form part of the constructed area of the flat.

9. The Ld. D.R. for the Revenue has not brought on record any order if passed by the higher judicial forum laying down different proposition of law and fact than settled by the Tribunal in assessee's own case for A.Y. 2008-09 to 2012-13. So we find no illegality, infirmity or perversity in the impugned orders passed by the Ld. CIT(A) allowing the deductions claimed by the assessee under section 80IB(10) of the Act for A.Y. 2013-14 to 2017-18.

10. Resultantly, all the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 22.06.2023.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 22.06.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.