आयकर अपीलीय अधीकरण, न्यायपीठ –"B" कोलकाता,

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA**

[BeforeHon'bleShriJ.Sudhakar Reddy, AM and Hon'bleShri A. T. Varkey, JM

**ITA No. 158/Kol/2019**

Assessment Year: 2012-13

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| D.C.I.T, Central Circle-2(4), Kolkata | Vs. | M/s. Ideal Heights Pvt. Ltd<br>PAN: AAACI8291A |
| Appellant | | Respondent |

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| Date of Hearing (Virtual) | 25.08.2020 |
| Date of Pronouncement | 02.09.2020 |
| For the Appellant | Shri Imokaba Jamir, CIT/Ld.DR |
| For the Respondent | Shri Arvind Agarwal, Advocate, Ld.AR |

**ORDER**

**Shri A. T. Varkey, JM**

This is an appeal preferred by the revenue against the order of Ld. CIT(A)-3, Kolkata dated 05-11-2018for the assessment year 2012-13.

2. At the outset it is noted that there is a delay of three (3) days in filing the impugned appeal. The revenue has filed an application for condonation of delay. After going through the contents of the said application as well as after hearing the Ld. DR, we are of the opinion that there is reasonable cause for delay in filing the appeal and, therefore, we condone the delay and proceed to adjudicate the appeal/grounds of appeal on merits.

3. Ground nos. 1 and 2 of revenue's appeal reads as under:-

*1. Whether on the facts and circumstances of the case, the Ld. CIT(A) erred in allowing the claim in deduction u/s 80lB(10) attributable to Car parking space and preferential location charges aggregating to Rs. 7,02,58,296/- on the fact that the assessee does not qualify for exemption beyond 1500 sq. ft. if car parking space and PLC are included and thereby violating sec. 80IB(10).*

*2. Whether on the facts and circumstances of the case, the Ld. CIT(A) erred by allowing car parking space and PLC , the sale proceeds of which were charged differently from sale proceeds of flats measuring upto 1500 sq. ft. and hence it is income attributable and does not qualify for 80IB and as per various* *judgments in the case of ACIT Vs. Bengal Housing Development Ltd. and Kolkata Bench, ITAT and Liberty India vs. CIT(2009) 317 ITR 218 (SC).*

4. Facts as noted by the AO are that the assessee has claimed the benefit of deduction u/s. 80 IB(1) of the Income-tax Act, 1961 ( hereinafter referred to as the 'Act') to the tune of Rs. 46,93,10,980/-. Accordingly, the assessee was directed by the AO to furnish the details with regard to the housing-project along with the necessary mandatory permissions granted by the Municipal Corporation and other authorities for the commencement of the project. The AO notes that the housing-project in question in the instant case **'Ideal Heights'**situated at 302, A.P.C Road, Kolkata-700 009. The AO notes that during the course of hearing the Ld.AR (Authorized representative of assessee) produced the certified copy of the Sanction Plan of the project and list of flats on for which deduction u/s. 80IB(10) has been availed by the assessee. And the project consists of three (3) towers namely, Stratus, Nimbus and Cumulus on which deduction u/s. 80IB(10) has been availed by the assessee. The AO noted that the fourth ($4^{th}$ ) tower was under construction and no sales were recorded. Thereafter the AO reproduces the provision of section 80IB(10) of the Act and thereafter directed the assessee to furnish the details of computation of deduction u/s. 80 IB(10) of the Act as claimed by the assessee along with specific query as to whether the (i)**car-parking space** *sale proceeds,* (ii)customers preferential location charges (PLC) and (iii)Height Escalation Charges (HEC)were also included in the deduction claimed and after noting the reply of assessee, the AO found that the assessee had claimed the deductions u/s. 80IB(10) of the Act on sale proceeds received from sale of car parking space, PLC and HEC. The AO, therefore, issued show cause notice to the assessee as to why the sale proceeds received from car parking space to the extent of Rs. 8,80,22,801/- (Rs. 2,95,33,401 + Rs. 3,11,49,453 + Rs. 37,31,39,947) and on PLC and HEC should not be disallowed. Thereafter, the AO reproduces the ld. AR's submissions in his order and thereafter, he notes down the reasons for not accepting the contention of the assessee and, thereafter, concluded as under:-

> "2.5 On perusal of the 80IB(10) computation, it is seen that the assessee has claimed deduction to the tune of Rs. 14,20,33,832/- [Rs.4,12,67,591/- + Rs.5,51,99,286/- + Rs.4,55,66,955/-] for Preferential Location Charge (PLC) and Height Escalation cost (HE) earned by the assessee PLC or Preferential Location charge is the extra charge paid to book a unit which has a better location Within a particular layout or complex. So In order to

get an apartment with a view of a park, lake, etc. one needs to pay higher cost. Generally PLC is charged on the super built area of the unit and not on the carpet area This implies that to findthe total PLC for the unit, one would need to multiply the size of the apartment with the PLC fate provided in the builder's rate card or mentioned by the builder Hence, the PLC will be higher for a larger flat PLC also changes depending on the quality of construction the floor on which the unit is located, and the location of the unit.

The assessee has claimed deduction on the above amount which is a mere charged by thereal estate sector on the purchasers who prefer a particular location commensurateto the flat/residential unit booked by them. Such charges do not qualify for any deduction u/s. 80 IB(10) for reasons similar to those discussed above in relation to car parking charges. PLC is moreof decorative charge. As far as HE cost is concerned the same is concerned with thein height/increase in floors as it allows a better view to the customer from theresidential unit concerned.

Hence on the basis of the above discussion, it is determined that the abo e charges on account of car parking and PLC, to the tune of Rs 23,00,56,633/-( Rs 14,20,33,832/-, Rs.8, 80,22 801/-, is no eligible for deduction u/s 80IB(10). Total deduction claimed-by the assessee u/s. 80IB is Rs 46,93,10,980/- and the total sales of the undertaking is Rs 53,678, ,484/- as per Form 10CCB submitted by the assessee. Applying the same ratio the deduction us 80IB disallowed with respect to sales on account of Car Parking and PLC comes to Rs 7,.02,.59, 296/- . Accordingly, an amount of Rs 702,59,2961- is disallowed u/s 80IB(10) of ne Act.

[Disallowance u/s 80IB: Rs. 7,02,58,296/-]

5. Thus, the AO made disallowance of Rs. 7,02,58,296/- from the assessee's claim made u/s. 80IB(10) of the Act to the tune of Rs. 46,93,10,980/-. Aggrieved, by the said disallowance as made by the AO, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to allow the same by holding as under:-

"I have gone through the submissions of the assessee and the findings of the Assessing Officer. The basic issue is whether the realization on account of car parking charges, preferential location charges and height escalation charges qualify for the deduction u/s. 80IB or not. The Hon'ble Mumbai ITAT in the case of Vaman Estate ITA No. 7570/Mum/2011 has examined this issue regarding the eligibility of deduction u/s. 80IB on profits realized by sale of car parking charges. The Hon'ble ITAT in this case has observed as under:-

"We have carefullyconsidered the submissions of the rival parties and perused material available on record We find merit In the plea of the Id Counsel for the assessee that the issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case. The Tribunal in ITA No. 30161/Mum/2008 for A. y. 2004-05 dtd. 28/10/2009 has held vide para 12 of the order as under :- As regards ground No. 2 of the revenue, relating to the income from car parking spaces. we agree with the findings of the CIT(A) that they are the integral part of the housing project and hence it is EO he include for deduction u/s. 80IB(10) of the Act. In the result, ground no. 2 is allowed.

The above order has been followed by the Tribunal in the subsequent assessment yearsi.e 2005-6 and 2006-07. In the absence of any distinguishing feature brought on record by the Revenue, we respectfully following the consistent view of the Tribunal, decline la interfere with the order passed by the ld.CIT(A) on this account and accordingly the ground taken by the Revenue is rejected.

Further the Hon'bleMumbai ITAT in the case of Gundecha Builders (ITANo.2087/2010) on the issue of parking charge has observed as follows :

"We have heard both (he parties. The issue involve d is whether the assessee is eligible for the deduction on sale proceeds of the parking outside the purview of section 80IB(10) admittedly it is not the case of the revenue that the assessee is not eligible or deduction uls.80IB(10) of the Act. The plain reading of section 80IB(10) had clearly indicated that the amount of deduction in the case of all undertaking developing and building housing projects approved before the 31$^{st}$day of March, 2007 by a local authority and fulfillment of other conditions. In the present case, stilt parking is part and parcel of the housing project, which was approved by the competent authority stilt parking was sold and therefore, there is no case for denying the claim of theassessee. Even in the assessee 's own case, in ITA No.7223/Mum/200 for the assessment year 2005-06. the Tribunal allowed the claim a/the assessee i811 issue of stilt parking. We, therefore, in view of the above findings of the Tribunal, find no infirmity in the order of the CIT(A).

On perusal or the above it is observed that the Hon 'ble Mumbai ITAT has given a clear finding that profit attributable to the car parking charges are eligible for deduction u/s. 81B(10). Further preferential location charges and height escalation charges charged by the builder are for residential units which are occupying a preferential location or a better floor on higher location. Not all flats can be sold at the same rate. Therefore the flats which are in an advantageous location are sold by the builder for a premium which is part and parcel of the realization of the projectrevenue. This is common trade practice that apartments having more coveted location are sold for a premium. The premium charged therefore is basically for realization n of project revenue. Therefore the profits derived on this account, in my considered opinion is also eligible for deduction u/s.80IB. In view of tile above the claim of the appellant for deduction u/s.80IB of Rs.7,02,58,296/- is hereby allowed."

6. Aggrieved, by the aforesaid decision of the Ld. CIT(A) the Revenue is before us and raised the aforesaid ground nos. 1 & 2, which we have already mentioned hereinabove.

7. Assailing the said decision of the Ld. CIT(A), Shri Imokoba Jamir, Ld. CIT, Learned Departmental Representative ( hereinafter referred to as the 'Ld. CIT DR') contended that the sale proceeds from car parking space and preferential location charges cannot be given the benefit of deduction u/s. 80IB(10) of the Act since it has nothing to do with the residential unit for which the deduction can be allowed and according to him, if the car parking area is also included as part of the residential unit, then it may breach the threshold limit of 1500 sq. ft stipulated by the Parliament and, therefore, the deduction u/s. 80IB (10) of the Act cannot be allowed. The Ld. CIT/DR relied on the contention of the AO and submitted that the impugned decision of the Ld. CIT(A) may be reversed and that of the AO's order be restored.

8. Per contra, Shri Arvind Agarwal, Advocate, Learned Authorized Representative (hereinafter referred to as the 'Ld. AR') contended that the *Lis* in dispute is no longer *res-integra* and the Ld. CIT(A) has decided the issue by relying on the decision of the Mumbai Tribunal in the case of M/s.Vaman Estate & M/s.Gundeecha Builders (supra), which decisions has been upheld by the Hon'ble Bombay High Court and also he relied upon the decisions of Kolkata Tribunal in the matter of DCIT Vs. South City Projects [ ITA No. 1543/Kol/2014 and ITA No. 1544/ Kol/2014 order dated 21-06-2019]. According to him, it is not the case of the AO that the assessee is not eligible for deduction under section 80IB of the Act. However, according to him, the AO was of the opinion that for the sale proceeds of car parking space and preferential location charges, the benefit of deduction u/s. 80IB of the Act cannot be given. According to the Ld. AR, therefore, the order of the Ld. CIT(A) should not be disturbed by this Bench. It has also been pointed out by him that the judgments cited by the AO in respect of ground no. 2 is not applicable in the instant case. According to him, the Tribunal's decision of ACIT Vs. Bengal Ambuja Housing Development is pertaining to deduction u/s. 80IA of the Act and therefore, the same is not applicable to this present case. It has also been contended by the Ld. AR that the case law in respect of Liberty India Vs. CIT reported in 317 ITR 218 decided by the Hon'ble Supreme Court is in fact, applicable in favour of assessee since the first degree nexus has been proved by the assessee for claiming the deduction. According to the Ld. AR, the car parking space is sold along with the residential unit and without car parking space/area for the residential unit the local authority would not have given the permission to build the

housing project, which is essential from the angle of usage as well as for selling the flats because without car space, the buyers won't buy the flats and thus it was pointed out by the Ld. AR that the case laws of Bengal Ambuja Housing Development as cited by the AO is applicable in favour of the assessee and not in support of the Revenue. Therefore, he does not want us to interfere with the impugned order of the Ld. CIT(A).

9. We have heard both the parties and perused the records. We note from a perusal of the statement of facts that the assessee is a company engaged in the business of Real Estate Development. During the relevant previous year, the assessee completed the construction of a housing project named Ideal Heights situated at 302 A.P.C Road, Kolkata-700 029. In respect of income received from this housing project, the assessee claimed deduction u/s. 80IB(10) of the Act to the tune of Rs. 46,93,10,980/-. It was noted by the AO that the accounts of the assessee are audited. And such Audited Accounts along with Audit Report [Form-10 CCB Report, (refer page 1 to 10 of PB] as required u/s. 80IB(10) of the Act were filed before him. It was noted by the AO that apart from the residential units, the assessee had also constructed and sold car parking spaces to the purchasers of such residential units and realized the prices of such car parking aggregating to Rs. 8,80,22,801/-. The AO has disallowed the claim of deduction u/s. 80IB(10) of the Act attributable to such car parkings on the ground that the Income Tax Act has not contemplated such deduction. According to AO, the deduction is confined to the residential units and since the Act has laid down and restricted the area of residential units to only 1500 sq. ft built up area in places other than in Delhi/Bombay, it cannot be allowed. According to assessee, car-parking are part and parcel of the housing project and it was pointed out by the assessee that as per the local Municipal Laws, the builder has to compulsorily provide/construct Car Parking in specified ratios to the residential flats. The AO also noted that the assessee has charged from its customers premium amount on account of preferential location charges (PLC) and Height Escalation Charges (HEC) aggregating to Rs. 14,20,33,832/- and included it as part & parcel of the cost of the flats and claimed deduction. The AO has disallowed the claim for deduction u/s. 80IB (10) of the Act on such PLC & HEC on the ground that the same also does not qualify for deduction u/s. 80IB(10) of the Act. The AO taking note that the total sales of the undertaking is Rs 153,67,87,484/- and the assessee had claimed total deduction of Rs 46,93,10,980/-, he applied the same ratio and disallowed Rs 7,02,58,296/-. On appeal the Ld

CIT(A) allowed the deduction as claimed by the assessee and we have to see whether the decision of Ld CIT(A) is legally tenable. We note that it is not the case of the AO that the assessee is not eligible for deduction u/s. 80IB(10) of the Act on the housing project for which the assessee has claimed deduction [Ideal Heights]. The only objection of the AO is that the profits derived from sale of car parking space, preferential location charges (PLC) & Height Escalation Charges (HEC)to the tune of Rs. 7,02,58,296/- cannot be allowed, since it is not part and parcel of the residential unit and if car parking is included it will exceed 1500 sq. ft as envisaged u/s. 80 IB of the Act. We note that the car parking space has been allotted only to those persons, who has purchased residential units/flats which is part & parcel of the housing project on which the assessee has claimed deduction u/s. 80IB (10) of the Act. According to us, car parking space is insisted by the buyers/persons, who intends to reside in the flats of housing project. And since car parking space was part and parcel of the housing project and has to be provided for as required by local Municipal law, the profit derived from sale of car parking area/space is also eligible for claiming deduction u/s. 80IB (10) of the Act as it was derived from the same source i.e, housing project Ideal Heights. We note that the Ld. CIT(A) while giving relief to the assessee has relied on the decisions of the Co-ordinate Bench of Mumbai Tribunal in the case of M/s.Vaman Estate (supra) and in the case of M/s.Gundeecha Builders (supra). Therefore, we are bound by the decisions (supra) as well as we take note of the decision of Kolkata Tribunal in the case of M/s. South City Projects (supra), wherein this Tribunal taking note of the Hon'ble Bombay High Court, wherein the Hon'ble Bombay High in the case of M/s Purvankara Projects Ltd has held as under:-

> *"The finding of facts recorded by the CIT(A) and approved by ITAT is that, In present case, it is not in dispute that the assessee is entitled to deduction u/s.80IB. The only dispute is whether the assessee is entitled ITA Nos. 1543/Kol/2014 and other appeals M/s. South City Projects to deduction in respect of amount received towards car parking space. The finding of fact recorded by the CIT(A) and approved by ITAT is that the car parking space forms part and parcel of the housing project, without which even approval for housing project could not have been obtained from competent authority. Therefore, the decision of the Tribunal in holding that assessee is entitled to deduction u/s. 80IB in respect of housing project inclusive of the amount received on account of car parking cannot be faulted".*

10. Taking note of the decision of the Hon'ble Bombay High Court 's decision in the case of Purvankara Projects Ltd (supra) and the aforesaid decision of the Tribunal we find that the car parking space sold to the owners of the residential unit of the housing projects are eligible for claiming of deduction u/s. 80IB(10) of the Act and it has been rightly claimed by the assessee because the profits derived from sale of car parking space as well as preferential location charges (PLC) &Height Escalation Charges (HEC) are part and parcel of the housing projects. And since these are integral part of the housing project, the profit derived from sale of car parking space as well as on PLC & HEC is eligible for deduction u/s. 80IB (10) of the Act since deduction u/s 80 IB is available in respect of eligible housing project. Therefore profits derived by assessee from eligible housing project including the profit from sale of car-parking/PLC&HEC as discussed has been rightly allowed by the Ld CIT(A). Therefore, we do not deem it necessary to interfere in the impugned order of the ld. CIT(A) and accordingly, ground No.1 & 2 raised by the revenue are dismissed.

11. Ground no. 3 reads as under:-

> *"3. Whether on the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition for compensation paid of Rs. 28 lacs u/s. 37(i) and 40(a)(ia) without remand report from AO and any speaking order by Ld. CIT(A)"*

12. The fact as noted by the AO are as under:-

> It is observed from the records that the assessee had paid an amount of Rs. 28,00,000/- on account of 'Occupant Compensation'. During the assessment, the Ld. A/R made a submission that such expenditure was made on account of procuring of space/land from persons occupying the same, who would otherwise not have vacated the concerned area resulting in failure of the project. However, Ld. A/R was neither able to provide any specific reason for payment of such compensation nor furnish any justification of the quantification of such compensation. Furthermore, the assessee had not deducted TDS on the said amount. Therefore, an amount of Rs. 28,00,000/- is disallowed u/s. 371(1) read with 40(a)(ia) and added back to the total income of the assessee. [Addition: Rs. 28,00.000]

13. Aggrieved, the assessee preferred an appeal before the ld. CIT(A), who was pleased to allow the same by holding as under:-

> "I have gone through the submissions of the appellant carefully. The appellant has paid Rs. 28 lacks as compensation to ShriBimal Kumar Das and BijanSaha for vacating the space occupied by them. The payment has been made on account of an agreement signed by the appellant with them. Further the payment has been made through banking channels. The Authorised Representative of the appellant has denied any liability to deduct tax at source arose in this case. In my opinion no TDS is required to be done on the compensation for booking the premises. Accordingly the addition made of Rs. 28 laks for non deduction of TDS is hereby deleted."

14. Aggrieved, the revenue is before us. We note that the assessee has given compensation of Rs. 28 lakhs to S/Shri Bimal Kumar Das and BijanSaha, who were tenants and had occupied the portion of the premises on which the housing project has been constructed. This amount of Rs. 28 lakhs was paid to them as compensation to evict them, so that assessee could complete the housing project. We note from the statement of facts that the assessee had paid a sum of Rs. 28 lakhs to Mr. Bimal Kr. Das and Mr. BijanSaha, who were occupying a portion of the premise on which the housing project has been constructed. The amount was paid to them as compensation for eviction of the space occupied by them. The AO has disallowed the expenditure on the ground that the specific reason for payment of such compensation or the justification for the quantum of compensation was not furnished before him. It was brought to our notice that during the course of the assessment proceedings, the agreement entered to by the assessee with the above occupants (S/Shri Bimal Kumar Das and Bijan Saha) were filed before the AO, which fact is discernible from a perusal of the pages 10-22 of the P/B. We note that the assessee has filed the said documents which goes on to show that the assessee has paid an amount of Rs. 28 lakhs to Mr. Bimal Kr. Das and Mr. BijanSaha, the tenants who occupied space in the proposed housing project and which needed to be vacated or else assessee's housing project would not have been completed and moreover, we note that the payment has been made through banking channel, which fact has not been disputed by the revenue. The assessee has given justification for compensation of payment to the said persons. The AO has alleged that the assessee failed to deduct TDS on such payment. And the AO disallowed the expenditure u/s. 37(1) read with section 40(a)(ia) of the Act. However, we note that there is no specific provision specified in Chapter XVII(B) of the Act by virtue of which assessee is obliged to deduct tax at source. We note that if these two persons were not evicted the assessee could not have completed the housing project and these two would

not have vacated unless they were paid compensation as agreed between them. Therefore the compensation paid to these two persons was on account of commercial expediency, so it is an allowable deduction. Therefore, the Ld. CIT(A) has rightly deleted the same. Therefore, we do not want to interfere with the impugned order of the Ld. CIT(A) on this issue and so we uphold the same. This ground of revenue is dismissed.

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

Order is pronounced in the open court on 2nd September 2020.

Sd/- Sd/-

( J. Sudhakar Reddy) (Aby. T. Varkey)
Accountant Member JudicialMember

Dated : 2nd September 2020

**PP(Sr.P.S.)
Copy of the order forwarded to:

1. Appellant –The DCIT, Central Cir-2(4), AaykarBhawanPoorva, Room No. 406, 4th Fl., 110 Shantipally, Kolkata-107.
2 Respondent –M/s. Ideal Heights Pvt. Ltd 50 J.L Nehru Road, 11th Fl., Kolkata-71.
3. CIT(A)-, Kolkata (sent through e-mail)
4. CIT- , Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

By order,

/True Copy, Assistant Registrar