

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHE "A", PUNE**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND SHRI R.S. PADVEKAR, JUDICIAL MEMBER**

**ITA Nos.2296 to 2298/PN/2012
(Assessment Years : 2008-09 to 2010-11)**

M/s Malpani Estates,
S.No.150, Malpani House,
Indira Gandhi Marg,
New Nagar Raod,
Sangamner – 422 605.

PAN : AALFM6549D Appellant

Vs.

Asstt. Commissioner of Income Tax,
Central Circle 1(1), Pune. Respondent

Assessee by	:	Mr. Nikhil Pathak
Department by	:	Mrs. M. S. Verma (CIT)
Date of hearing	:	09-01-2014
Date of pronouncement	:	30-01-2014

ORDER

PER G. S. PANNU, AM

The three captioned appeals relate to the same assessee and involve a common issue, therefore, they have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. The captioned three appeals by the assessee are directed against a consolidated order dated 25.09.2012 passed by the Commissioner of Income Tax (Appeals)-I, Pune which, in turn, has arisen from the respective assessment orders passed by the Assessing Officer dated 19.12.2011 u/s 153A r.w.s. 143(3) of the Income-tax Act, 1961 (in short "the Act") for assessment year 2008-09 and 2009-10 and u/s 143(3) of the Act for assessment year 2010-11.

3. Substantially speaking in all the appeals the solitary issue relates to assessee's claim for deduction u/s 80IB(10) of the Act in respect of income

which was declared by the assessee in the course of search conducted u/s 132(1) of the Act.

4. In the context of controversy before us, the relevant facts can be summarized as follows. The appellant is a partnership firm engaged in construction business which was subject to a search action u/s 132(1) of the Act on 06.10.2009. In the course of search, Shri Rajesh Malpani, partner of the assessee firm in a statement recorded u/s 132(4) of the Act on 03.12.2009 admitted certain undisclosed income in relation to housing project undertaken by the firm i.e. 'The Crest' at Pimple Saudagar, Pune. The assessee duly reflected such additional income in the returns of income filed for the captioned assessment years as the profits from its housing project, and since the said housing project was eligible for deduction u/s 80IB(10) of the Act, it claimed deduction u/s 80IB(10) of the Act even in relation to such additional income. Such claim of the assessee has been denied, which is the subject-matter of dispute before us.

5. As the facts and circumstances pertaining to the aforesaid dispute are common in all the assessment years, the appeal for assessment year 2008-09 is taken as a lead case in order to appreciate the rival contentions. In assessment year 2008-09, assessee had originally filed a return of income on 28.09.2008 declaring 'NIL' income which, *inter-alia*, included profits from execution of a housing project amounting to Rs.2,10,86,083/-, which was claimed as exempt u/s 80IB(10) of the Act. Thereafter, on 06.10.2009 there was a search action u/s 132(1) of the Act and in response to a notice issued u/s 153A(1)(a) of the Act, assessee furnished a return of income on 24.06.2010 disclosing total income of Rs.'NIL' after claiming deduction u/s 80IB(10) of the Act of Rs.2,46,89,494/-, as against a deduction of Rs.2,10,86,083/- claimed in the return of income originally filed u/s 139(1) of the Act. The enhanced claim of deduction u/s 80IB(10) of the Act was on account of an additional income of Rs.36,03,411/- declared by the assessee in

the return filed in response to notice issued u/s 153A(1)(a) of the Act. The said additional income was declared on account of on-money received by it from its customers on sale of flats. The claim of the assessee was that the additional consideration received from the customers which was hitherto not declared in the regular books of account but declared in the statement deposited u/s 132(4) of the Act during the course of search, was nothing but an income in respect of the project 'The Crest' at Pimple Saudagar, Pune, which was eligible for deduction u/s 80IB(10) of the Act. The claim of the assessee was that the additional income, which was on-money received on sale of flats was eligible for deduction u/s 80IB(10) of the Act.

6. The Assessing Officer has not allowed the claim of the assessee for deduction u/s 80IB(10) of the Act with respect of the aforesaid component of on-money on sale of flats received by the assessee. The Assessing Officer accepted the additional income of Rs.36,03,411/- as a part of total income but did not treat it as 'business income' of the assessee and therefore he did not allow deduction u/s 80IB(10) of the Act with respect to such sum. Firstly, as per the Assessing Officer, assessee had claimed deduction u/s 80IB(10) of the Act, of Rs.2,10,86,083/- in the original return which was enhanced to Rs.2,46,89,494/- in the return filed u/s 153A of the Act, and, according to the Assessing Officer enhancement of claim u/s 80IB(10) of the Act, was not permissible in an assessment u/s 153A of the Act. Secondly, according to the Assessing Officer, the on-money received by the assessee on sale of flats was not taxable as 'business income' and hence assessee was not eligible for deduction u/s 80IB(10) of the Act. On being denied u/s 80IB(10) of the Act on the component of the on-money declared in the return filed u/s 153A(1)(a) of the Act, assessee carried the matter in appeal before the CIT(A).

7. In appeal, assessee assailed the action of the Assessing Officer in law and on facts. Assessee canvassed that there was no justification for not allowing the claim u/s 80IB(10) of the Act with respect to the impugned income

which was ostensibly derived from the execution of the housing project, 'The Crest' at Pimple Saudagar, Pune, which was eligible for deduction u/s 80IB(10) of the Act. On facts, assessee canvassed out that the additional income in question was unaccounted sale consideration received from customers to whom flats were sold and accordingly the same was liable to be assessed as 'business income' and not as 'income from other sources'. The CIT(A) has since disagreed with the stand of the assessee and has affirmed the action of the Assessing Officer in denying the deduction u/s 80IB(10) of the Act with respect to the impugned income. As per the CIT(A), the claim of the assessee is not maintainable because (i) the undisclosed income declared by the assessee cannot be assessed under the head 'business income' but under the head 'income from other sources'; and, (ii) the benefits of Chapter VIA, which include section 80IB(10), are not applicable to an assessment made under sections u/s 153A to 153C of the Act. For the aforesaid reasons, the CIT(A) has upheld the action of the Assessing Officer. Not being satisfied with the order of the CIT(A), assessee is in further appeal before us.

8. Before us, the learned counsel for the assessee has vehemently pointed out that the lower authorities are not justified in denying the claim of deduction u/s 80IB(10) of the Act. The learned counsel pointed out that the additional income of Rs.36,03,411/- was declared in the course of search as consideration received from customers on sale of flats. Accordingly, it was nothing but additional sale price received by the assessee which was liable to be taxed as 'business income' relating to its housing project, 'The Crest' at Pimple Saudagar, Pune and therefore the same is eligible for benefits of section 80IB(10) of the Act. It is further pointed out that there is no bar either in the provisions of section 80IB(10) or section 153A of the Act that the deduction u/s 80IB(10) is not allowable in respect of income by way of on-money received on sale of flats. In support of his submissions, the learned counsel has relied upon the judgment of the Bombay High Court in the case of

CIT vs. Sheth Developers (P) Ltd., (2012) 254 CTR 127 (Bom) and in the case of CIT vs. Gem Plus Jewellery India Ltd., (2010) 330 ITR 175 (Bom).

9. On the other hand, the learned Departmental Representative appearing for the Revenue has relied upon the orders of the authorities below in support of the case of the Revenue.

10. In the present case, it is not in dispute that the assessee has derived income from undertaking a housing project, 'The Crest' at Pimple Saudagar, Pune, which is eligible for section 80IB(10) benefits. In the return of income originally filed u/s 139(1) of the Act, assessee had claimed deduction u/s 80IB(10) of the Act in relation to the profits derived from the said housing project and the same stands allowed even in the impugned assessment which has been made u/s 153A(1)(b) of the Act as a consequence of a search action u/s 132(1) of the Act.

11. In the course of search, in a statement deposed u/s 132(4) of the Act, assessee declared certain additional income pertaining to the housing project in question. The additional income declared was on account of on-money received from the customers to whom flats were sold in the said project. At the time of hearing, learned counsel referred to the copy of statement recorded u/s 132(4) of the Act of Shri Rajesh Malpani, a partner of the assessee firm and also copies of some of the seized papers, which indicated receipt of on-money, and the same have placed in the Paper Book at pages 35 to 52. A perusal of the seized material shows that a complete detail of that on-money received is enumerated, viz. name of the customers, amount and the respective flat sold in the project. Even in the deposition made u/s 132(4) of the Act, the partner of the assessee firm made a yearwise detail of additional income declared on account of on-money received on sale of flats in the project. Accordingly, the impugned sum has been declared as unaccounted income from the housing project in question. In the return of

income filed in response of notice issued u/s 153A(1)(a) of the Act, assessee has declared such additional income as income from housing project, 'The Crest' at Pimple Saudagar, Pune. The declaration made in the return of income has not been disputed by the Assessing Officer. The only dispute raised by the Assessing Officer is with regard to nature of such income, which according to the Assessing Officer *"does not fall under of the any heads of income as described u/s 14 of the I.T. Act"*. In coming to such conclusion, he has disagreed with the stand of the assessee that such additional income was a 'business income' of the assessee relating to the housing project, 'The Crest' at Pimple Saudagar, Pune. However, as per the CIT(A), the income in question is assessable under the head 'income from other sources'. Ostensibly, the CIT(A) has not agreed with the inference of the Assessing Officer that the impugned income does not fall under any heads of income u/s 14 of the Act because according to her such income is liable to be assessed under the head 'income from other sources. Thus, as of now, before us the inference of the Assessing Officer does not survive any longer since the order of the Assessing Officer has merged in the order of the CIT(A) and in any case the Revenue is not in appeal on this aspect. Be that as it may, factually speaking, it cannot be denied that the additional income in question relates to the housing project, 'The Crest' at Pimple Saudagar, Pune undertaken by the assessee. The material seized in the course of search; the deposition made by the assessee's partner during search u/s 132(4) of the Act; and, also the return of income filed in response to notice issued u/s 153A(1)(a) of the Act after the search, clearly show that the source of impugned additional income is the housing project, 'The Crest' at Pimple Saudagar, Pune. The aforesaid material on record depicts that the impugned income is nothing but unaccounted money received by the assessee from customers on account of sale of flats of its housing project, 'The Crest' at Pimple Saudagar, Pune. Clearly, the source of the additional income is the sale of flats in the housing project, 'The Crest'. Therefore, once the source of income is established the assessability thereof has to follow. The nature of income, thus on facts, has to

be treated as 'business income' albeit, the same was not accounted for in the account books. In this manner, we are unable to accept the stand of the Assessing Officer or of the CIT(A) that the said income is not liable to be taxed as 'business income'.

12. Now, coming to the point as to whether such 'business income' qualifies to be eligible for deduction u/s 80IB(10) of the Act in the course of an assessment made u/s 153A(1)(b) of the Act. On this aspect, the learned Departmental Representative submitted that the assessment in cases of search action or requisition are made u/s 153A or 153C of the Act in order to assess undeclared incomes and such provisions are for the benefit of the Revenue and therefore a claim u/s 80IB(10) of the Act cannot be considered in such proceedings, especially when such a claim was not made in the return of income originally filed under section 139 of the Act. In this regard, the learned Departmental Representative has referred to the judgment of the Hon'ble Supreme Court in the case of CIT vs. Sun Engineering Works Pvt. Ltd., 198 ITR 297 (SC) to point out that even in the cases of re-assessment u/s 147/148 of the Act fresh claims cannot be raised by the assessee. Secondly, it is pointed out by the learned Departmental Representative that even if the claim was to be considered then it was not allowable because the requisite condition that the return of income has to be accompanied by the prescribed audit report has not been complied with by the assessee. On the basis of aforesaid reasons, the claim of the assessee has been opposed.

13. Sections 153A to 153C of the Act contain provisions relating to assessments to be made in cases where search is initiated u/s 132 or a requisition is made u/s 132A of the Act after 31st May, 2003. Clause (b) of sub-section (1) of section 153A postulates assessment or re-assessment of total income of six assessment years preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made.

Shorn of other details, it would suffice for us to notice clause (i) of the Explanation below section 153A(2) of the Act, which reads as under :-

“Explanation. – For the removal of doubts, it is hereby declared that, -

- (i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section.”*

14. In terms of the above referred clause (i) of the Explanation, it is evident that all the provisions of the Act shall apply to an assessment made u/s 153A of the Act save as otherwise provided in the said section, or in section 153B or section 153C of the Act. In the background of the expression *“all other provisions of this Act shall apply”* contained in Explanation (i) below section 153A of the Act, and in the context of the controversy before us, the moot point to be examined is as to whether or not deductions enumerated in Chapter VIA of the Act are to be considered in making an assessment made u/s 153A(1)(b) of the Act. Section 153A(1)(b) of the Act requires the Assessing Officer to assess or reassess the ‘total income’ of the assessment years specified therein. Ostensibly, section 80A(1) of the Act prescribes that in computing the ‘total income’ of an assessee, there shall be allowed from his ‘total income’ the deductions specified in Chapter VIA of the Act. The moot point is as to whether the aforesaid position prevails in an assessment made u/s 153A(1)(b) or not? In our considered opinion, having regard to the expression *“all other provisions of this Act shall apply to the assessment made under this section”* in Explanation (i) of section 153A of the Act, it clearly implies that in assessing or reassessing the ‘total income’ for the assessment years specified in section 153A(1)(b) of the Act, the import of section 80A(1) of the Act comes into play, and there shall be allowed the deductions specified in Chapter VIA of the Act, of course subject to fulfillment of the respective conditions. Therefore, we are unable to subscribe to the stand of the CIT(A) to the effect that the benefits of Chapter VIA of the Act, which *inter-alia* include section 80IB(10) of the Act, are not applicable to an assessment made under sections 153A to 153C of the Act. In our considered opinion, the phraseology

of section 153A r.w. Explanation (i) as noted above, does not support the premise arrived at by the CIT(A) and accordingly, the same is rejected. Therefore, assessee's claim for deduction u/s 80IB(10) of the Act even with regard to the enhanced income was well within the scope and ambit of an assessment u/s 153A(1)(b) of the Act and the Assessing Officer was obligated to consider the same as per law.

15. The other argument of the Ld. CIT-DR to the effect that the return of income was not accompanied by the prescribed audit report on the enhanced claim of deduction is too hyper-technical, and superficial. Pertinently, the Assessing Officer has not altogether denied the claim of deduction and in any case, the claim was initially made in the return originally filed, which was duly accompanied by the prescribed audit report.

16. The argument set-up by the learned Departmental Representative on the basis of the judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra), in our view, is also untenable having regard to the facts of the present case. No doubt the Hon'ble Supreme Court has observed that reopening of an assessment u/s 147/148 is for the benefit of the Revenue. In the case before the Hon'ble Supreme Court, assessee wanted to set-off loss against the escaped income which was taxed in the re-assessment proceedings and the claim of such set-off was not made in the return of income originally filed. According to the Hon'ble Supreme Court, the claim was not entertainable because the said claim not connected with the assessment of escaped income. In-fact, the judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra) is not an authority to say that assessee cannot raise a claim pertaining to an issue which is connected to the assessment of escaped income. In-fact, if a claim which is connected to the escaped income is set-up before the Assessing Officer in the course of re-assessment proceedings, the same is liable to be considered and the judgment of the Hon'ble Supreme Court in the case of Sun

Engineering Works Pvt. Ltd. (supra) only precludes such new claims by the assessee which are unconnected with the assessment of escaped income. In the present case, we are dealing with an assessment u/s 153A of the Act and the scope of such an assessment has already been examined by us in the context of the relevant specific provisions, which do not leave any scope for ambiguity. The judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra) has been rendered on a different footing and is strictly not applicable to the present proceedings. So, however, even if one were to import the reasoning raised by the learned Departmental Representative based on the judgment of the Hon'ble Supreme Court, to the present case, yet we do not find that it would debar the assessee from claiming deduction u/s 80IB(10) of the Act on the impugned additional income declared in the return filed in response to notice u/s 153A(1)(a) of the Act. In the present case, the claim of deduction u/s 80IB(10) of the Act was made in the return of income originally filed and in the return filed in pursuance to the notice u/s 153A(1)(a) of the Act, the claim u/s 80IB(10) of the Act is only enhanced and therefore, it is not a fresh claim. Therefore, in our view, the judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra) does not help the Revenue in the present case.

17. In-fact, the Hon'ble Bombay High Court in the case of Sheth Developers (P) Ltd. (supra) was considering the claim of deduction u/s 80IB(10) of the Act in relation to the undisclosed income declared consequent to the search action. In the case before the Hon'ble High Court, it was factually emerging that undisclosed income was earned by the assessee in the course of carrying on his business activity of a 'builder' and the same was accepted by the Department, but the claim of the deduction u/s 80IB(10) was denied in relation to such income. However, the claim was upheld by the Hon'ble Bombay High Court. In the present case, factually, there is no material to negate the assertion of the assessee, which are borne out of the material on record, that the additional income in question has been received in

the course of carrying on its business activity of developing the housing project, 'The Crest' at Pimple Saudagar, Pune, which is eligible for section 80IB(10) benefits. Therefore, in terms of the parity of reasoning laid down by the Hon'ble Bombay High Court in the case of Sheth Developers (P) Ltd. (supra), the claim of the assessee is justified.

18. In-fact, once it is factually explicit that the additional income in question is derived from the housing project, 'The Crest' at Pimple Saudagar, Pune, which is eligible for section 80IB(10) benefits, such an income merely goes to enhance the 'business income' derived from the eligible housing project and shall be entitled for section 80IB(10) benefits, even as per the ratio of the judgment of the Hon'ble Bombay High Court in the case of Gem Plus Jewellery India Ltd. (supra).

19. In the result, on the basis of the aforesaid legal position and the material and evidence on record, assessee is eligible for deduction u/s 80IB(10) of the Act in relation to impugned additional income offered in a statement u/s 132(4) of the Act in the course of search and subsequently declared in the return filed in response to notice u/s 153A(1)(a) of the Act. In the result, appeal of the assessee for assessment year 2008-09 is allowed.

20. In the other assessment years also the substantive dispute is similar to that adjudicated in the earlier paragraphs for assessment year 2008-09. Therefore, our decision in assessment year 2008-09 shall apply *mutatis-mutandis* in other two assessment years also.

21. Pertinently, in so far as the assessment year 2010-11 is concerned, the assessment has been completed u/s 143(3) of the Act in pursuance to return of income filed u/s 139 of the Act on 13.10.2010 and it is not an assessment made u/s 153A(1)(b) of the Act. Even in this assessment, claim of the assessee has been denied. In our considered opinion, the claim for deduction

u/s 80IB(10) of the Act with regard to the additional income declared for assessment year 2010-11 stands on an even stronger footing than in the other assessment years because in assessment year 2010-11 there was no return of income originally filed but only a single return has been filed on 13.10.2010 as per the provisions of section 139 of the Act, though after the search action on 06.11.2009.

22. For all the above reasons, we therefore, deem it fit and proper to set-aside the order of the CIT(A) and direct the Assessing Officer to allow deduction u/s 80IB(10) of the Act for the captioned assessment years.

23. In the result, the captioned three appeals of the assessee are allowed, as above.

Order pronounced in the open Court on 30th January, 2014.

Sd/-
(R.S. PADVEKAR)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Pune, Dated : 30th January, 2014

Sujeet

Copy of the order is forwarded to: -

- 1) The Assessee;
- 2) The Department;
- 3) The CIT(A)-I, Pune;
- 4) The CIT-I, Pune;
- 5) The DR, "A" Bench, I.T.A.T., Pune;
- 6) Guard File.

//True Copy//

By Order

Sr. Private Secretary
I.T.A.T., Pune