आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.2035/PUN/2014
निर्धारण वर्ष / Assessment Year: 2010-11

The Dy. Commissioner of Income Tax,
Circle – 9, Pune .... अपीलार्थी/Appellant

Vs.

M/s. Akshay Builders & Associates,
S.No.15/2, Akshay Park,
Aunch, Chinchwad Road,
Thergaon, Chinchwad,
Pune – 411033 .... प्रत्यर्थी / Respondent

PAN: AAKFA9511G

प्रत्याक्षेप सं./CO No.45/PUN/2016
निर्धारण वर्ष / Assessment Year : 2010-11
(out of ITA No.2035/PUN/2014)

M/s. Akshay Builders & Associates,
S.No.15/2, Akshay Park,
Aunch, Chinchwad Road,
Thergaon, Chinchwad,
Pune – 411033 ... प्रत्याक्षेपक/ Cross objector

PAN: AAKFA9511G

Vs.

The Dy. Commissioner of Income Tax,
Circle – 9, Pune .... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.2055/PUN/2014
निर्धारण वर्ष / Assessment Year: 2008-09

The Income Tax Officer,
Ward 9(1), Pune .... अपीलार्थी/Appellant

Vs.

M/s. Akshay Builders & Associates,
S.No.15/2, Akshay Park,
Aunch, Chinchwad Road,
Thergaon, Chinchwad,
Pune – 411033 .... प्रत्यर्थी / Respondent

PAN: AAKFA9511G

प्रत्याक्षेप सं./CO No.44/PUN/2016
निर्धारण वर्ष / Assessment Year : 2008-09
(out of ITA No.2055/PUN/2014)

M/s. Akshay Builders & Associates,
S.No.15/2, Akshay Park,
Aunch, Chinchwad Road,
Thergaon, Chinchwad,
Pune – 411033 ... प्रत्याक्षेपक/ Cross objector

PAN: AAKFA9511G

Vs.

The Income Tax Officer,
Ward 9(1), Pune .... प्रत्यर्थी / Respondent

Assessee by : Shri Suhas P. Bora
Revenue by : Shri Anil Chaware

सुनवाई की तारीख / **Date of Hearing : 01.02.2017**		घोषणा की तारीख / **Date of Pronouncement: 15.02.2017**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Both the appeals filed by the Revenue are against separate orders of CIT(A)-V, Pune, both dated 18.08.2014 relating to assessment year 2010-11 and 2008-09 against respective orders passed under section 143(3) and 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act'). The assessee has also filed Cross Objections against the appeals of Revenue.

2. Both the appeals filed by the Revenue and the Cross Objections filed by the assessee were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. First, we shall take up the appeals filed by the Revenue. However, in order to adjudicate the issue, we make reference to the facts in ITA No.2035/PUN/2014.

4. The Revenue in ITA No.2035/PUN/2014 has raised the following grounds of appeal:-

> *1. Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in not rejecting the assessee's claim of deduction u/s 80IB(10) of the IT Act, 1961, when the CIT(A) himself has agreed that the built up area of 2 dwelling units i.e. RH/D-6 and RH-3 in the project exceeded the restriction resulting into clear violation of clause (c) of sub-section (10) of Section 80IB rw clause (a) of Sub-section (14) of Section 80IB of the IT Act, 1961 ?*
>
> *2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in holding that the assessee was entitled to deduction u/s 80IB(10) of the I.T. Act, 1961 on pro-rata basis in respect of eligible units, when there is no such provision in the Act?*
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> *3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in granting deduction u/s 80IB(10) on proportionate basis to individual dwelling units whereas as per section 80IB(10), the deduction is allowable to the project as a whole on the fulfilment of prescribed conditions by the entire project.*

5. The assessee in CO No.44PN/2016 has raised the following grounds of objections:-

> *1] The learned CIT(A) erred in holding that the built up area of row house No.D6 and 3 was more than 1500 sq. ft. and hence, the entire profits of the housing project constructed by the assessee is not eligible for deduction under section 80IB(10).*
>
> *2] The learned CIT(A) failed to appreciate that the assessee had commenced the housing project named 'Akshay Park' prior to 01.04.2005 and as per the D.C. Rules of the local authority, the built up area of all the units in the housing project was less than 1500 sq. ft. and accordingly, the assessee was entitled to claim deduction u/s. 80IB(10) in respect of the entire profits of the said project.*

6. Briefly, in the facts of the case, the assessee was engaged in the business of construction, land development, etc. and also constructing residential housing projects. During the year under consideration, the assessee had claimed deduction under section 80IB(10) of the Act on the profits derived from the housing project 'Akshay Park'at Rs.44,92,866/-. The assessee was asked to furnish the details as to fulfillment of conditions laid down in section 80IB(10) of the Act for eligibility of the said claim. The Assessing Officer noted that the assessee had undertaken a project which was claimed as 80IB(10) and another project as non-80IB(10). He also noted that during the course of assessment proceedings relating to assessment year 2009-10, the deduction claimed under section 80IB(10) of the Act was denied to the assessee because of non-fulfillment of conditions with respect to built up area. During the earlier assessment proceedings, reference was made to the Government Valuation Officer, Solapur to ascertain the built up area and he reported that the built up area including projections and area pertaining to projected terrace in respect of two units i.e. R.H./D6 and R.H-3 was in excess of permissible limit of 1500 sq.ft. The Assessing Officer noted that the position with respect to built up area was still prevailed during the year under consideration and the assessee was asked to explain as to why the said deduction claimed under section 80IB(10) of the Act should not be disallowed. In response, the assessee stressed that all the units of housing project were less than 1500 sq.ft. and were completed within stipulated period. The Assessing Officer rejecting the claim of assessee and in view of excess area in respect of two units, denied the claim of deduction under section 80IB(10) of the Act.

7. The CIT(A) allowed the claim of assessee in view of the order relating to assessment year 2009-10. In the order relating to assessment year 2009-10, the CIT(A) had held that the area of units with terrace exceeded the permissible

limits and project itself was not eligible for deduction under section 80IB(10) of the Act. However, prorata deduction for balance flats excluding two units i.e. R.H./D6 and R.H-3 was allowed to the assessee.

8. The Revenue is in appeal against the order of CIT(A) in allowing prorata deduction under section 80IB(10) of the Act, where the built up area of two dwelling units exceeded the limits prescribed.

9. The assessee has filed Cross Objections in not allowing deduction on the Row houses D6 and 3 holding that the built up area was more than 1500 sq.ft. including projections.

10. The Cross Objections filed by the assessee are filed after delay of 37 days. The learned Authorized Representative for the assessee has filed an application for condonation of delay of 37 days along with an Affdiavit, wherein he has pointed out that due to illness and hospitalization of his brother, the document could not be handed over to the Counsel. We find merit in the said plea of the assessee and accordingly, condone the delay in filing the Cross Objections late by period of 37 days relating to assessment years 2010-11 and 2008-09.

11. It may be clarified herein that pursuant to disallowance made in assessment year 2009-10, the assessment proceedings for assessment year 2008-09 were reopened under section 147 of the Act by the Assessing Officer and the deduction claimed under section 80IB(10) of the Act was denied to the assessee.

12. The only issue raised by the Revenue is against the prorata deduction allowable to the assessee in case two of the units are held to be exceeding the permissible covered area. The Cross Objections raised by the assessee are against the orders of authorities below in holding that for projects which were approved prior to 01.04.2005, the projections are to be considered as part of built up area. In this regard, the learned Authorized Representative for the assessee pointed out that the Tribunal in assessee's own case for assessment year 2009-10 in ITA No.563/PN/2014 and in CO No.22/PN/2015, vide order dated 03.02.2016, had held the assessee eligible for pro-rata deduction. Further the Tribunal has given finding that prior to insertion of definition of built up area by the Finance (No.2) Act, 2004 w.e.f. 01.04.2005, projections, balconies and open terrace could not be considered as part of built up area of residential units. Admittedly, the project of assessee was sanctioned prior to 01.04.2005 and the learned Authorized Representative for the assessee has stated during the course of hearing that the project was completed within stipulated period i.e. by 31.03.2008, hence, the assessee was entitled to claim the deduction under section 80IB(10) of the Act.

13. The Tribunal while dismissing the appeal of Revenue in assessment year 2009-10 had in turn, relied on the ratio laid down by the Hon'ble Madras High Court in CIT Vs. Arun Excello Foundations (P.) Ltd. reported in 86 DTR (Mad) 99 and the Pune Bench of Tribunal in M/s. Rohan Homes Vs. ACIT in ITA No.423/PN/2011 relating to assessment year 2007-08, order dated 31.01.2013 to hold that any project where some of residential units exceeded the built up area then also proportionate deduction is to be allowed to the eligible units. In view thereof, we find no merit in the grounds of appeal raised by the Revenue against the order of CIT(A) in allowing proportionate deduction. However, since the assessee is held to be entitled to claim the deduction on the two units as

projections and open terrace are not to be included in built up area for such projects which were sanctioned before 01.04.2005, the assessee is held to be entitled to claim the deduction on such units also and consequently, where all the units of project are eligible units, the assessee is entitled to the deduction claimed under section 80IB(10) of the Act in respect of whole project. Accordingly, we hold so. The grounds of appeal raised by the Revenue are thus, dismissed and the Cross Objections filed by the assessee are allowed.

14. The appeal relating to assessment year 2008-09 is pursuant to re-assessment proceedings initiated against the assessee pursuant to the order passed in assessment year 2009-10 and the issue raised in the said appeal by the Revenue is identical to the issue raised in assessment year 2010-11 and following the same parity of reasoning, we dismiss the appeal filed by the Revenue. However, the grounds of objections raised in Cross Objections by the assessee in assessment year 2008-09 are identical to the grounds of objections in assessment year 2010-11 and following the same parity of reasoning, we allow the claim of assessee.

15. In the result, both the appeals of Revenue are dismissed and both the Cross Objections of assessee are allowed.

Order pronounced on this 15th day of February, 2017.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 15th February, 2017.

GCVSR

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u> :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-V, Pune;
4. आयकर आयुक्त / The CIT-V, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक पंजीकार / Assistant Registrar,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune