IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

Before: Shri Waseem Ahmed, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member

ITA Nos: 2060 & 2194/Ahd/2018
Assessment Year: 2013-14

Takshashila Realities Pvt. Ltd. Block-A, Ground Floor, Manav Mandir Flats, Nr. Raman Nagar, Maninagar, Ahmedabad PAN: AAACY1535D	Vs	The DCIT, Circle-4(1)(2), Ahmedabad
The DCIT, Circle-4(1)(2), Ahmedabad (Appellant)	Vs	Takshashila Realities Pvt. Ltd. Block-A, Ground Floor, Manav Mandir Flats, Nr. Raman Nagar, Maninagar, Ahmedabad PAN: AAACY1535D (Respondent)

Assessee Represented: Shri Sudhir Mehta, A.R.
Revenue Represented: Shri Pushpendra Singh Chaudhary, CIT & Shri Rakesh Jha, Sr. D.R.

Date of hearing : 04-08-2023
Date of pronouncement : 01-09-2023

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

These cross appeals are filed by the Assessee and the Revenue as against appellate order dated 24.08.2018 passed by the Commissioner of Income Tax (Appeals)-8, Ahmedabad arising out of

the assessment order passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year (A.Y) 2013-14.

2. The Grounds of Appeal raised by the Assessee in ITA No. 2060/Ahd/2018 in the case of M/s. Takshashila Realities Pvt. Ltd. for A.Y. 2013-14 reads as follows:

> 1. The Learned CIT(A) has erred in law and on facts to confirm the addition of Rs. 3,95,504/-on account of difference in prior period expenses.
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> 2. The Learned CIT(A) has erred in law and on facts to confirm the addition of Rs. 17,52,252/- on account of negative cash balance treated as unexplained cash credit u/s 68 of the Act.
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> 3. The Learned CIT(A) has erred in law and on facts to confirm the addition of Rs. 33,24,796/- u/s 22 of the act towards computed ALV @ 5% onclosing stock of finished flats though the assessee has allotted the flats/bungalows/units to purchaser and amount of consideration is received as advance which is shown in the balance sheet as "Advance from customer" in view of the 'agreement of sale'.
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> 4. The Learned CIT(A) has erred in law and on facts to confirm the addition of Rs. 12,33,712/- u/s 40(a)(ia) of the Act.
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> 5. The Learned CIT(A) has erred in law and on facts to confirm the addition of Rs. 6,07,48,187/- u/s 801B of the Act
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> [a] where out of the Eleven blocks, Eight blocks were completed within five years as per completion certificate issued by the competent authority and for remaining three blocks [block E, F and G), not claimed any deductions u/s 80IB of the act. Therefore, no reason to disallow to claim deduction.
>
> [b] in respect of area of commercial establishment included in the Housing Project where there were no disallowance in earlier years.
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> [c] in respect of violates the condition u/s 801B(10)(f) of act to allot the housing unit to individual where prohibition for allotment to

spouse or minor child, even otherwise the entire claimed cannot be denied for deduction u/s 80IB of the Act.

6. The Learned CIT(A) has erred in law and on facts to confirm the addition of Rs.5,56,29,995/- u/s 115JB of the Act, on account reserve of erstwhile partnership firms, converted in private limited companies under the Companies Act, 1956 and subsequently four transferor companies merged into transferee company under the scheme of arrangement in the nature of amalgamation approved by the Hon'ble Gujarat High Court w.e.f. 01.04.2010, therefore the reserve were transferred in view of the scheme of arrangement in the nature of amalgamation and such reserves are not the part of the profit for the purpose of ascertaining the book profit u/s 115JB of the Act for the year under consideration.

7. The impugned order is even otherwise bad, illegal and contrary to law and hence the same is liable to be quashed and set aside.

8. The Appellant has a prima facie strong case in his favour, on the merits of the case and the order of CIT [A] rejecting the application has caused miscarriage of justice.

3. The Grounds of Appeal raised by the Revenue in ITA No. 2194/Ahd/2018 reads as follows:

1) "that the Ld. CIT (A) has erred in law and on the facts in deleting the addition made on account of disallowance of prior period expenses of Rs. 25,64,398/-.

2) "that the Ld. CIT (A) has erred in law and on the facts in deleting the addition made on account of disallowance on overstatement of loss of Rs.5,00,000/-.

3) "that the Ld. CIT (A) has erred in law and on the facts in deleting the addition u/s. 22 of the Income Tax Act, 1961 towards ALV of finished stock of Rs. 53,19,672/-.

4) "that the Ld. CIT (A) has erred in law and on the facts in deleting the addition made on account of disallowance u/s. 40(a) (ia) of the Income tax Act, 1961 of Rs. 36,49,865/-.

5) "that the Ld. CIT (A) has erred in law and on the facts in deleting the addition on account of difference in the cost of construction amounting to Rs. 1,13,62,412/-."

4. The Brief facts of the case is that the assessee is a dealer and developer of lands, real estates, Hotel Business Operations including Restaurant and Banquet facilities. For the Assessment Year 2013-14, the assessee filed its Return of Income on 28-09-2013 declaring income of Rs.50,00,379/-. The return was taken up for scrutiny assessment, after detailed enquiry, the Assessing Officer made the following disallowances/additions:

(a) Disallowance of Prior Period Expenses of Rs. 25,64,380/-
(b) Addition on account of Negative Cash Balance of Rs. 17,52,252/-
(c) Over statement of loss of Rs. 5,00,000/-
(d) Addition u/s. 22-ALV of finished stock of Rs. 53,19,672/-.
(e) Disallowance u/s. 40(a)(ia) of Rs. 36,49,865/-.
(f) Difference in cost of construction of Rs. 1,13,62,412/-
(g) Deduction u/s. 80IB(10) of Rs. 2,15,18,887/-.
(i) Addition on account of revaluation of land u/s. 115JB of Rs.5,56,29,995/-.

5. Aggrieved against the same, the assessee filed an appeal before Ld. CIT(A). The Ld. CIT(A) dealt with each disallowance/addition observing as follows:

6. **Disallowance of prior period expenses:** A sum of Rs. 25,64,398/- was disallowed and added to the total income of the assessee company on account of prior period expenses on the basis of Special Auditor Report. The assessee submitted the details of expenses amounting to Rs. 21,68,894/- in the form of additional evidence. These expenses amounting to Rs.21,68,894/- are not debited to the Profit & Loss account during the year, as they are

taken to the WIP of the respective project. This fact even though was submitted by the assessee before the AO in the assessment proceedings, however the Ld. CIT(A) called for a Remand Report from the AO. This fact could not be denied or rebutted by the A.O. In this view of the matter the Ld. CIT(A) held that there is no justification for adding this sum of Rs.21,68,894/- which has not been claimed at all during the previous year. Hence, the addition to the extent of Rs.21,68,894/- out of the total addition of Rs.25,64,398/- was deleted by Ld CIT[A], but the balance addition of Rs.3,95,504/- was confirmed.

6.1. Aggrieved against the partial relief given by the Ld. CIT(A) both the Assessee and the Revenue are in appeal before us. Ld. Counsel Shri Sudir Metha for the assessee submitted that all the direct expenditures incurred on particular project are debited to the cost of that project, irrespective of the year to which it pertain to current year or prior year. In other words, for direct expenses incurred for a particular project; the year in which it is incurred is immaterial for the reason that the profit of each project is being worked out separately considered the overall cost of particular project. The indirect expenditure, which are not directly related to the project are being considered whether they are of current year period or prior year period, accordingly disclosure is made in the books of accounts, which is correct one. The expenditure pointed out by the Auditor is in relation to various projects, which have been debited to respective project account and claimed as deduction as and when the sale of goods are made. The disclosures as regards indirect expenses are made in the audit report. Total prior period

expenses incurred are Rs 33,68,539/- but in computation of income only as a sum of Rs. 8,09,608/- is disallowed as noted from the Audit Report. In this connection, the assessee relied upon various case laws:

i. [2016] 74 taxmann.com 163 (Gujarat) Commissioner of Income- tax-l v. Indian Petrochemicals Corporation Ltd.

Section 37(1), read with section 145, of the Income-tax Act, 1961 - Business expenditure - Allowability of (Prior period expenses) - Assessment year 1999-2000 Whether prior period expenses - quantified and paid during current year would be allowed as business expenditure in relevant assessment year even though assessee was following mercantile system of accounting - Held, yes [Para 3] [In favour of assessee]

ii. [1995] 80 Taxman 61 (Gujarat) Saurashtra Cement & Chemical Industries Ltd. v. Commissioner of Income-tax

Section 37(1), read with section 145, of the Income-tax Act, 1961- Business expenditure - Year in which deductible - Whether, where any liability though relating to earlier years, depends upon making a demand and its acceptance by assessee and has been actually claimed and paid in later previous years, such a liability can be disallowed as deduction merely on basis that accounts were maintained on mercantile system and that it related to a transaction of previous year - Held, no

iii. [2010] 194 TAXMAN 158 (DELHI) Commissioner of Income-tax v. Jagatjit Industries Ltd.

Section 37(1), read with section 145, of the Income-tax Act, 1961- Business expenditure Year in which deductible Whether if a particular accounting system has been followed and accepted and there is no acceptable reason to differ with same, **doctrine of consistency** would come into play Held, yes Assessee was following mercantile system of accounting During relevant assessment year, it claimed prior period expenses on ground that vouchers of such expenses from employees/branch employees were received after 31st March of financial year - Assessing Officer disallowed expenses holding that nature of expenses was such that they had occurred and crystallized during earlier years - On appeal, Commissioner (Appeals) and Tribunal allowed said expenses on ground that as per accounting practice consistently followed by assessee, it had been debiting

> expenditure spill over to subsequent years and Assessing Officer had been allowing same for past so many years - Whether in absence of any material to show that there had been distortion of profit or books of account did not reflect correct picture, there was no justification to depart from accounting system which was accepted by department in respect of previous years and, therefore, Tribunal was justified in allowing prior period expenses claimed by assessee.

6.2. Per contra, the Ld. D.R. appearing for the Revenue could not contravent the above submissions of the assessee. We find that there is legal force in the arguments placed by the assessee. The Ld. CIT(A) deleted the addition to the extent of Rs. 21,68,894/- which were not claimed during the previous year. However the balance of Rs. 3,95,504/- is confirmed.

6.3. Jurisdictional High Court in the case of Indian Petrochemicals Corporation Ltd. held that prior period expenses quantified and paid during current year would be allowed as business expenditure in relevant assessment year even though assessee was following mercantile system of accounting. Respectfully following the Jurisdictional High Court Judgments (cited supra), we hereby delete the addition of Rs. 3,95,504/- which has been confirmed by Ld. CIT(A). Thus the Ground No. 1 raised by the Assessee is hereby allowed and Ground No. 1 raised by the Revenue is hereby dismissed.

7. **Negative Cash Balance of Rs. 17,52,252/**-: The assessee has not pressed this ground no. 2, hence the same is hereby dismissed.

8. **Addition on account of over statement of loss of Rs. 5,00,0000/-:** Auditors in the Special Audit Report observed that

though during the year the assessee sold five shops of the hotel building for a consideration of Rs.40,03,000/- but the sale consideration of only Rs.35,03,000/- was adopted while working out the profits on such sales. Accordingly a sum of Rs.5,00,000/- was proposed to be added by the AO. Before the AO assessee pleaded that out of the sum of Rs.40,03,000/- sales worth Rs.5,00,000/- was recognized in the earlier year's income, hence, the profits are worked out by taking the sale of the current year amounting to Rs.35,03,000/- correctly and enclosed the computation of income of A.Y. 2008-09 in support of its claim. However AO was not convinced and he added the sum of Rs.5,00,000/- to the total income.

8.1. The Ld. CIT(A) after considering the material records and held that he do not find any reason why this sum of Rs.5,00,00/- should again be added in the total income, accordingly the addition amounting to Rs.5,00,000/- made by the AO is deleted.

8.2. The Ld. D.R. could not submit any contra evidence on the above findings of the Ld CIT [A]. Thus the ground no. 2 raised by the Revenue is devoid of merits and hereby dismissed.

9. **Addition u/s. 22 – ALV of finished stock at Rs. 53,19,672:** The AO noticed that assessee has the following finished stock of unsold flats in various buildings.

(i) Takshashila Colonial	Rs.1,09,39,670/-
(ii) Takshashila Habitate	Rs.1,49,47,704/-
(iii) Takshashila Residency	Rs.4,12,79,761/-
(iv) Takshashila Orient	Rs.2,78,27,017/-
Total	Rs.9,49,94,152/-

AO issued a show cause to the assessee as to why the as per the provisions of section 23 of the Act, Annual Letting Value (ALV) should not be computed and added to the total income, relying on the judgment of Hon'ble Delhi High Court in the case of CIT v. Ansal Housing Finance & Leasing Co. Ltd. The assessee replied that these flats for which B.U. (Building Use) Permission have been received from the Competent Authority are shown as closing stock, since the sale deed of the same were executed in the subsequent year, even though substantial advances have already been received on sale of these flats from the buyers. However the AO was not convinced and determined 8 % ALV to the value of this closing stock of finished flats. Consequently, the A.O. made addition amounting to Rs.53,19,672/-.

9.1. The Ld. CIT(A) after considering the submissions of the assessee determined the ALV at 5% of the book value of the flats and determined the income as Rs. 33,24,796 observing as follows:

> "….Appellant furnished copies of three sample agreements as per which the following is the rental receipts by the owners in the F.Y. 2013-14.

Flat No/Block	Name of member	Sales con sideration	Rental income	ROI
Flat No.12- O Block of Takshashila Colonials	Shaileshbhai Arjanbhai Patel	35,74,200/-	144000/-	4%
Flat No.11- I Block of Takshashila Eco Green	Manisha Ashish Patel	19. 12,650/-	72,000/-	3.76%

Flat No. A/30 of Takshashila Residency	Rajendraprasad Palaram Jangid	18,51,000/-	72,000/-	3.89%

On careful consideration I find that AO in the assessment order has computed the ALV @ 8% per annum without any basis whatsoever. Appellant has contended that the reasonable rent is not more than 4% and also furnished copies of actual agreements as above. Keeping in view the entirety of the facts including the agreements as above the rental in the areas in which the buildings are located are estimated to be around 5% of the value of the property. Accordingly, the ALV is computed @ 5% of the book value of the flats which comes to Rs.47,49,708/-. After allowing deduction @ 30% u/s.23 of the Act amounting to Rs.14,24,912/- the income under the head house property comes to Rs.33,24,796/-. Thus, appellant gets a relief of Rs.19,94,876/-. Ground of appeal No. 4 is partly allowed.

10. Aggrieved against the same, both the Assessee and the Revenue are in appeal before us. The Ld. Counsel for the assessee submitted that the unsold property of various project to the extent Rs.9,49,94,152/- have been constructed and completed in all respect and the assessee has obtained BU permission from the Competent Authority. The amount standing in the balance sheet as work in progress is the amount for which sale deed is yet to be executed. However the assessee has allotted the same flats/ bungalows or units to the Purchases and substantial amount of consideration received as advance, which is shown in balance sheet under the group of current liabilities as “Advance from Customer". The customers/purchasers have applied for the housing loan and bank/financial institution has sanctioned their home loan on the base of allotment letter issued to the customers and disbursed the amount to the company. The sale deed was executed in the subsequent year due to delay on the part of the customers. Since

the nature of business of the company is to develop, build and construct housing and commercial project. The intention of the company is to sale of constructed property and not to give on lease/rent. In this connection the Ld Counsel relied on the following case laws:

i. [1997] 92 Taxman 541 (SC) Commissioner of Income-tax v. Podar Cement (P.) Ltd.

Section 22, read with sections 27 and 56, of the Income-tax Act, 1961 Income from house property - Chargeable as - Assessment years 1975-76 and 1976-77 Whether for purpose of section 22 'owner' is a person who is entitled to receive income in his own right and as such, where a 'house property' is handed over to a purchaser to enjoy fruits of that property by contractor/builder the purchaser is to be treated as 'owner' of that property for purpose of section 22 even though no registered documents as required under section 54 of the Transfer of Property Act or the Registration Act are executed - Held, yes

ii. [1999] 107 TAXMAN 51 (GUJ.) Commissioner of Income- tax v. Suresh Amichand Shah

Section 22 of the Income-tax Act, 1961 Income from house property - Chargeable as - Assessment year 1980-81 - Whether as held by Supreme Court in CIT v. Podar Cement (P.) Ltd. [1997] 226 ITR 625/92 Taxman 541, and having regard to object of Income-tax Act, namely, to tax income, 'owner' is a person who is entitled to receive income from property in his own right and requirement of registration of sale deed in context of section 22 is not warranted- Held, yes Whether, therefore, income from flats whose possession had been handed over by assessee to prospective buyers under agreement to sell but final deeds were not executed and registered, would be brought to tax in hands of assessee Held, no.

iii. [2007] 164 TAXMAN 342 (GUJ.) Commissioner of Income-tax -Vs- ***Neha Builders (P.) Ltd.***

> **"…. 7.** From the order passed by the learned CIT(A), it would clearly appear that the case of the assessee was that the company was incorporated with the main object of purchase, take on lease, or acquire by sale, or let out the buildings constructed by the assessee. Development of land or property would also be one of the businesses for which the company was incorporated.
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> **8.** True it is, that income derived from the property would always be termed as 'income' from the property, but if the property is used as 'stock-in-trade', then the said property would become or partake the character of the stock, and any income derived from the stock, would be 'income' from the business, and not income from the property. If the business of the assessee is to construct the property and sell it or to construct and let out the same, then that would be the 'business' and the business stocks, which may include movable and immovable, would be taken to be 'stock-in-trade', and any income derived from such stocks cannot be termed as 'income from property'."

10.1. Ld CIT DR appearing for the Revenue heavily relied on the judgement of the Delhi High Court in the case of Ansal Housing Finance & Leasing Co Ltd. [cited supra] and pleaded to sustain the addition made by the AO.

10.2. We have heard the rival submissions and perused the relevant materials on record. On the above issue, we come across judgements both in favour of the assessee and the Revenue. The judgements in Suresh Amichand Shah and Neha Builders (P.) Ltd. (cited *supra*) are in favour of the assessee and from Jurisdictional High Court of Gujarat, whereas the judgement in *Ansal Housing Finance & Leasing Co. Ltd.'s* case (*supra*) is in favour of the Revenue from Delhi High Court. The Hon'ble Supreme Court in the case of *CIT* v. *Vegetable Products Ltd.* [1973] 88 ITR 192 has held that "if two reasonable constructions of a taxing provisions are

possible, that construction which favours the tax payer must be adopted." In view of the above position of law, we respectfully follow the jurisdictional High Court judgements in Suresh Amichand Shah and Neha Builders (P.) Ltd. (cited *supra*).

10.3. Further we find that the basic condition for charging income under section 22 of the Act is that the assessee should be 'owner' of the house property, it is immaterial whether the owner is in possession and enjoyment of house property or has been let out to third person. The word 'Owner' means legal owner. In other words, the owner must be that person who can exercise the rights of the owner, not on behalf of the owner, but in his own right and possession. Where a property is handed over to a Purchaser to enjoy fruits of that property by the builder, the Purchaser is treated as the "owner" of that property, even though no registered documents have been executed in his favour. As per section 53A of the Transfer of Property Act, a person acquired a property becomes deemed owner of the property, although he may not the "registered owner" of the property.

10.4. Merely because income in respect of said units has not been recognized during the year on account of NON-Execution of Sale Deed, it cannot be held that units are vacant and owned by the assessee for the purpose of taxing notional income u/s.22 of the Act. The assessee is in business of real estate & flats in question are the part of the "stock in trade". Therefore the ALV computed by the lower authorities at 8% and 4% are against the provisions of section 22 and the addition made on this account is illegal. There is no rental income as such because no flat is been given on rent, also

flat are stock in trade and mere holding of stock cannot be assessed as "income from house property.

10.5. We now look to the relevant provisions and amendment in the Act. The following sub-section (5) has been inserted after sub-section (4) of section 23 by the Finance Act, 2017, w.e.f. 01.04.2018:

> *"(5) Where the property consisting any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to one year from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to nil."*

Thus, in order to give relief to Real Estate Developers, section 23 has been amended w.e.f. AY 2018-19 (FY 2017-18). By this amendment, it is provided that if the assessee is holding any house property as his stock-in-trade which is not let out for the whole or part of the year, the annual value of such property will be considered as Nil for a period up to one year from the end of the financial year in which a completion certificate is obtained from the competent authority.

10.6. In view of the above amendment to section 23, in the instant case, the assessee is a builder and developer. The issue of taxability is with regard to unsold flats relating to the A.Y. 2013-14. In view of the insertion of sub-section (5) in section 23 by the Finance Act, 2017, w.e.f. 01.04.2018 narrated hereinbefore, we hereby delete the addition made on account of ALV.

10.7. As we have **allowed the Ground No. 3 in favour of the assessee**, consequently the **Ground No.3 raised by the Revenue** in estimating ALV from unsold units **is hereby dismissed.**

11. **Disallowance u/s. 40(a)(ia) of Rs. 36,49,865/-:** In the Special Audit Report, the Auditors pointed out that the assessee have not effected TDS on payments made towards interest, rent, commission etc., totally amounting to Rs.36,49,865/-. Before the AO assessee contended that the amounts are charged to WIP of hotel building and reflected in the block of assets and the same has not been claimed as revenue expenditure during the previous year. However, AO was not convinced and applied the provision section 40(a)(ia) of the Act disallowing a sum of Rs.36,49,865/-.

11.1. In the appellate proceedings appellant contended that out of this sum of Rs.36,49,865/- the major payment amounting to Rs.24,16,153 is made to a Government company namely Housing & Urban Development Corporation Ltd. (HUDCO) which was 100% government owned company during the relevant period and applying provisions of the notification of CBDT dated 22.10.2017 i.e. Notification S.O.3489 [No.170(F.No.12/164/68-ITCC/ITJ)] dated 22.10.1970, the payments to HUDCO is exempt from TDS. For the other expenses assessee claimed that since they are charged to the WIP of hotel building the same cannot be disallowed as no claim has been made under the revenue head.

11.2. After considering the facts and the submissions, the Ld CIT[A] deleted the sum of Rs. 24,16,153/- paid to HUDCO is clearly out of the purview of TDS and hence no disallowance can be made of this

amount. As regards the balance amount, since the same has not been charged to revenue account the same cannot be disallowed from revenue account. However, as the applicable TDS has not effected by the assessee, thus following the provisions of section 40(a)(ia) of the Act, the WIP has to be reduced. Thus Ld CIT[A] directed the AO to reduce the WIP by Rs.12,33,712/- and partly allowed the appeal.

12. Aggrieved against the same, both the Assessee and the Revenue are in appeal before us raising Ground no.4 in their respective appeals. We do not find any infirmity in the order passed by the Ld CIT[A] that the sum of Rs.24,16,153/- paid to HUDCO is clearly out of the purview of TDS and directed the AO to reduce the WIP by Rs.12,33,712/-. Therefore the **Ground No.4 raised by the Assessee and Revenue are hereby dismissed.**

13. **Disallowance of deduction u/s.80IB(10) of Rs.6,07,48,187:** The assessee claimed deduction u/s.80IB of the Act amounting to Rs.6,07,48,187/- being the income of residential/commercial projects constructed by it. In the SAR the auditors pointed out that the assessee has not fulfilled the conditions stipulated in section 80IB of the Act and hence, is not eligible for deduction so claimed. Briefly, the assessee claimed deduction u/s.80IB on the income of following three housing projects:

> (a) Takshshila Coloneal: As per the auditors the construction of this project has not been completed within the time limit of 5 years prescribed in section 80(IB) of the Act.

(b) Takshshila Habitat: In this project the auditors have found out that the commercial construction is more that the prescribed limit of 3% of the aggregate built-up area of the housing project.

(c) Takshshila Residency: As per the auditors assessee has sold units to more than one person of a family which is not allowed as per section 80(IB) of the Act. This condition is also violated in the other projects mentioned above.

13.1. On being show caused assessee submitted before the AO that in Takshshila Colonial Project only three blocks namely E.F & G could not be completed within the specified time line. As regards the project Takshshila Habitat assessee contented that commercial construction is carried out by a separate entity namely Chankya Bincon Pvt. Ltd. With regard to the project Takshshila Residency assessee contented that law is now settled to the effect that non-fulfillment of one condition cannot make the assessee dis-entitled to benefits of section 80(IB). AO was not convinced and denied the deduction of Rs. 6,07,48,187/-.

13.2. The Ld CIT[A] after careful consideration of the findings of the auditors and the AO as well as after considering the reply of the assessee held that the assessee has not fulfilled the condition for becoming eligible to deduction u/s.80IB(10) of the Act. Section 80IB (10) provides for deduction upto 100% of the profits derived from the business of an undertaking developing and building housing projects approved before specified period and completed within four/five years of the end of the financial year in which the approval was given. There are other conditions as regards the

maximum build-up area and restriction on allotment of more than one unit to members of the same family. The section was introduced as an incentive for affordable cost housing. Further in the case at hand appellant in Takshshila Colonial Project have not been able to complete the project approved as one project within the specified time. Four blocks namely N, E, F & G could not been completed even within five years. In Habitat Bungalow Scheme the commercial area is around 80% as against the ceiling of 3% provided in section 80IB(10) of the Act. In all three projects more than one unit has been sold to members of same family. The Appellant has taken the plea that it may be allowed proportionate deduction on the profits of this project. In other words appellant has accepted the findings of AO but has contended that proportionate deduction be allowed from the income on such units/ buildings. However, plain reading of section 80IB(10) makes it abundantly clear that if any one of the conditions specified therein are not fulfilled, deduction u/s.80IB(10) of the Act cannot be allowed. Hence, Ld CIT[A] did not find any merit in the arguments of the assessee and denial of deduction u/s.80IB(10) amounting to Rs.6,07,48,187/- by AO is upheld.

14. Aggrieved against the same, the Assessee is in appeal before us raising Ground no.

> 5.a. Project has not been completed within the time limit of 5 years prescribed in section 80(IB)
>
> 5.b.Commercial construction is more that the prescribed limit of 3% of the aggregate built-up area of the housing project

5.c. Sold units to more than one person of a family which is not allowed as per section 80(IB) of the Act

14.1. Regarding Takshshila Coloneal project was not completed within the time limit of 5 years prescribed in section 80(IB) of the Act. This issue was considered by this very same Bench of this Tribunal in ITA No.1401/Ahd//2019 vide order dated 23-08-2023 and held as follows:

"... 7. The solitary issue in this appeal is confirmation of addition of Rs. 31,64,266/- on account of denying deduction u/s. 80IB(10) of the Act on the ground that the housing projects were not completed by the assessee within five years period.

7.1. The Brief facts of the case is that the assessee developed 11 Blocks of residential housing projects under the scheme of Takshashila Colonial starting with Block Nos. C to Q. The assessee obtained separate planning permission for construction of residential building from the local authority namely Ahmedabad Municipal Corporation (AMC) and the date of commencement of the project and also completion of construction Building Usage permission obtained from AMC for the 8 Blocks (except) 3 Blocks namely E, F & G are as follows:

Sr. No.	*Block Nos.*	*Commencement Letter dated*	*B.U. Permission dated*
1	*Block-C*	*23-11-2006*	*31-07-2009*
2	*Block-D*	*10-08-2009*	*19-03-2011*
3	*Block-E*	*10-08-2009*	*-*
4	*Block-F*	*10-08-2009*	*-*
5	*Block-G*	*10-08-2009*	*-*
6	*Block-L*	*01-03-2007*	*16-07-2009*
7	*Block-M*	*10-08-2009*	*19-09-2011*
8	*Block-N*	*01-03-2007*	*15-03-2010*
9	*Block-O*	*01-03-2007*	*02-01-2012*
10	*Block-P*	*01-03-2007*	*02-01-2012*
11	*Block-Q*	*01-08-2009*	*02-03-2012*

8. The Assessing Officer held that as per Section 80IB(10), the housing project should have been completed within five years from the end of the financial year in which the housing project is approved by the Local Authority. The assessee obtained housing project for Blok Nos. C to Q from the Local Authority on 01-03-2007, therefore the entire housing projects should have been completed on or before 31-03-2012. But no construction was started in Block Nos. E, F & G by the assessee. Therefore the A.O. issued a show cause notice, why the entire deduction claimed u/s. 80IB(10) should not be disallowed.

8.1. The assessee replied that the Block Nos. E, F & G of the housing project was not started by the assessee, but however other 8 Blocks namely, C, D, L, M, N, O, P & Q were completed within five years period. Further for every Block, the assessee obtained separate planning permission from AMC. Thus the assessee claimed deduction u/s. 80IB(10) only to the 8 blocks. However the above explanation of the assessee was rejected by the Assessing Officer and thereby denied the claim of deduction u/s. 80IB(10) of the Act of Rs. 31,64,266/- and added as the total income of the assessee.

9. Aggrieved against the same, the assessee filed an appeal before Ld. CIT(A). The Ld. CIT(A) after considering the submissions of the assessee held that the assessee has not fulfilled the conditions laid down in section 80IB(10) of the Act and thereby upheld the addition made by the Assessing Officer.

10. Aggrieved against the same, the assessee is in appeal before us. Ld. Counsel Mr. Sudhir Mehta submitted before us a Paper Book running to 36 pages, wherein from Page Nos. 7 to 22 placed copies of the Commencement Letter (Rajachitthi) issued by Ahmedabad Municipal Corporation (AMC) and Building Usage permission certificate issued by the AMC for Block Nos. C, D, L, M, N, O, P & Q. Thus the Ld. Counsel for the assessee submitted the Lower Authorities failed to consider that separate building planning permission obtained by the assessee for each Block as separate housing project and completed the same less than five years period and therefore eligible for claim of deduction u/s. 80IB(10) of the Act. The Ld. Counsel further submitted that the assessee has not claimed deduction u/s. 80IB(10) for Block Nos. E, F & G and the Lower Authorities are not correct in denying the deduction u/s. 80IB(10) of the Act for the remaining Blocks of the housing project.

10.1. In this connection, the Ld. Counsel relied upon Hon'ble Madras High Court Judgment in the case of Viswas Promoters (P.) Ltd. Vs. ACIT [2013] 29 taxmann.com 19 (Madras) and Hyderabad Tribunal decision in the case of Vertex Homes (P.) Ltd. Vs. DCIT [2015] 62 taxmann.com 285 (Hyderabad-Trib.)

10.2. Per contra, the Ld. D.R. appearing for the Revenue supported the order passed by the Lower Authorities and pleaded to uphold the same.

11. We have given our thoughtful consideration and perused the materials available on record. It is an admitted fact that separate building planning permission were obtained by assessee from Local Authority namely AMC for each Block as a separate housing project. Further Building Usage permission was also obtained by the assessee from the Local Authorities namely Ahmedabad Municipal Corporation well within the period of 2 to 5 years. This is evidence from the table extracted at Para 7.1 of this order. The Lower Authorities without appreciating the above facts denied the claim of deduction u/s. 80IB(10), solely on the ground that the assessee has not started the building project relating to Block Nos. E, F & G and thereby wrongly held that the assessee has not completed the housing projects.

11.1. The Hon'ble High Court of Madras in the case of Viswas Promoters (P.) Ltd. (cited supra) held that each residential block is a 'housing project' in itself for the purpose of claiming deduction u/s. 80IB(10) of the Act and thereby given the claim of deduction to the assessee observing as follows:

"…11. It is an admitted fact that each one of blocks had separate sanction from the competent authority. Even though the larger area comprised in the name and style of "Agrini" and "Vajra" is stated to be the master plan of the project, it is not denied by the Revenue that each block in each of the projects has its own specification; hence, had gone for planning approval by the competent planning authority. In the background of this, the question that arises for consideration is as to whether the assessee would lose its claim for deduction in respect of those blocks which satisfied the conditions under Section 80IB(10) of the Act by reason of some of the stocks not satisfying the condition under Section 80IB(10) of the Act.

12. It is not denied by the Revenue that there is no definition of the expression "Housing project" under Section 80IB of the Act. The said expression is defined under Explanation to Section 80HHBA of the Income Tax Act, which reads as under:

> *"Section 80HHBA. - Deduction in respect of profits and gains from housing projects in certain cases.*
> ** ** **
>
> *Explanation: For the purposes of this section, - (a) "Housing project" means a project for - (1) The construction of any building, road, bridge or other structure in any part of India"*

13. Section 80IA of the Act is a specific provision which deals with deduction in respect of profits and gains from industrial undertakings or enterprises engaged in the development of infrastructural facilities such as roads, bridges and other structure as regards the grant of deduction in respect of development and construction of a housing project. Section 80IB is a specific provision in respect of profits and gains from undertakings engaged in developing and constructing housing projects other than infrastructure development undertakings. Thus, housing projects considered herein under Section 80IB refers to any building other than road, bridge or other structure. Thus, going by the definition of "housing project" to mean the construction of "any building" and the deduction under Section 80IB of the Act is hundred per cent of the profits derived in the previous year relevant to the assessment year from such housing project complying with the condition, each block in the larger project by name "Agrini" and "Vajra", has to be taken as an independent building and hence a housing project, for the purpose of considering a claim of deduction. Section 80IB(10) begins by stating:

> *"(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2007 by a local authority shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if,*
>
> *(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes such construction,*

Thus the undertaking qualifying for deduction under Section 80IB of the Act is an "undertaking developing and building housing projects" and the deduction is in respect of "profits and gains derived from" such housing project, satisfying the conditions stipulated in the clause therein. Thus, within a composite housing project, where there are eligible and ineligible units, the assessee can claim deduction in respect of eligible units in the project and even within the block, the

assessee is entitled to claim proportionate relief in the units satisfying the extent of the built-up area."

11.2. Similarly Co-ordinate Bench of Hyderabad Tribunal in the case of Vertex Homes (P.) Ltd. (cited supra) held that the assessee, a builder, had not completed construction of all blocks of housing project, within stipulated period, would not deprive assessee from availing of deduction u/s. 80IB(10) in respect of each of completed block on stand alone basis as follows:

> *"….8.1 Thus, the principle which emerges from the aforesaid judicial precedents is, even a single building consisting of a number of residential units can be considered to be a housing project by itself, hence, will be eligible for deduction u/s 80IB(10), if it otherwise fulfills the conditions of section 80IB(10). Applying the aforesaid principles to the facts of the present case, it is very much evident that blocks A, B & F in respect of which assessee has claimed deduction u/s 80IB(10) are fulfilling all the conditions of the said provision. It is also a fact that municipal authorities have also issued completion certificate certifying that the buildings are complete in all respects. In the aforesaid view of the matter, assessee, since has fulfilled all conditions of section 80IB(10) in respect of blocks A, B & F, it is eligible for deduction u/s 80IB(10). Provisions of section 80IB(10) being beneficial in nature, too technical an approach, would defeat the purpose for which provision has been brought into the statute. Moreover, as far as Ld. CIT(A)'s observation that the housing project should have been completed by 31/03/2011, we do not find the same to be acceptable. As assessee's housing project has been approved after 1st April, 2005, the stipulated period within which assessee has to complete the project is five years. Assessee having completed blocks A, B & F within five years from the date of approval, in our view, it is eligible to claim deduction u/s 80IB(10) in respect of blocks A, B & F."*

11.3. Respectfully following the above judicial precedents and separate planning permission obtained by the assessee for each Block separately and after construction obtained separate Building Usage permission from the Local Authority within 5 years period, therefore the assessee cannot be denied the claim of exemption u/s. 80IB(10) of the Act. Thus the order passed by the Lower Authorities on this issue is hereby set aside and the Assessing Officer is directed to allow the claim of deduction u/s. 80IB(10) of the Act amounting to Rs. 31,64,266/-. Thus the ground raised by the Assessee is hereby allowed.

12. In the result, the appeal filed by the Assessee in ITA No. 1401/Ahd/2019 is allowed."

14.2. Respectfully following the above decision the assessee is eligible for deduction u/s.80IB [10] of the Act on the Takshshila Coloneal project.

14.3. Commercial construction is more that the prescribed limit of 3% of the aggregate built-up area of the housing project. This issue is also no more integra since the same is settled by the following judicial precedents of Hon'ble Supreme Court and High Courts:

> ***7. [2018] 96 taxmann.com 273 (SC) Commissioner Of Income Tax v. Suyog Shivalaya***
>
> *"Section 80-IB of the Income-tax Act, 1961- Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing project) - Assessment year 2006-07 - Assessee, engaged in construction business, claimed deduction under section 80-1B(10) - Assessing Officer denied same on ground that project comprise of building having commercial shops and, thus, same could not be treated as housing project eligible for deduction under section 80-1B - High Court in impugned order held that local authorities can approve a project as housing project along with commercial user to extent permitted under DC Rules/Regulations framed by respective local authorities and, once approved, it has to be treated as housing project and, thus, same is to be granted deduction under section 80-1B(10)- Whether, on facts, SLP against said decision was to be dismissed-Held, yes [Para 2] [In favour of assessee)"*
>
> ***5. [2013] 29 taxmann.com 149 (Madras) Commissioner of Income-tax, Chennai v. Arun Excello Foundations (P.) Ltd.***
>
> *"Section 80-IB, read with section 80HHBA, of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings - other than infrastructure development undertakings Housing projects - Assessment years 2003-04 and 2004-05 - Whether housing project under section 80-IB(10) includes commercial units - Held, yes - Whether where both commercial and residential units are built, proportionate deduction to extent of compliance, would be allowed - Held, yes [Paras 39 & 47] [In favour of assessee]"*

14.4. Respectfully following the above judicial precedents the assessee is eligible for deduction u/s.80IB [10] of the Act on the commercial construction which was approved by the Local Authority within the frame work of Development Control Rules and Regulations. Thus this ground raised by the assessee is hereby allowed and the disallowance made by the AO is hereby deleted.

14.5. Assessee sold units to more than one person of a family which is not allowed as per section 80(IB) of the Act. This issue is also considered by the co-ordinate Benches of the Tribunal in the following cases as follows:

> ***3. [2018] 90 taxmann.com 267 (Mumbai Trib.) Om Swami Smaran Developers (P.) Ltd. v. income-tax Officer, Ward- 8 (2) (4), Mumbai***
>
> *Section 80-IB of the Income-tax Act, 1961- Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing project) Assessment year 2011-12-Assessee, a developer, had developed a housing project and claimed deduction under section 80-1B(10) - Assessing Officer disallowed same on grounds that assessee had allotted three flats a single person, thus, violated conditions of section 80-1B(10)(f) which provides that more than one residential unit in a housing project cannot be sold to one person/individual - Whether merely because assessee had violated conditions of section 80-1B(10)(f) in respect of three flats, deduction under section 80-IB(10) could not be disallowed for entire housing project and, assessee was entitled to deduction proportionately in respect of flats which fulfilled all conditions of section 80-1B(10) - Held, yes [Para 8] [In favour of assessee]"*
>
> ***6. [2015] 58 taxmann.com 286 (Pune Ward-2, Ratnagiri v.Paras Builders Trib.) Income-tax Officer,***
>
> *Section 80-IB of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing project) - Assessment year 2007-08 - Assessee, engaged in business of construction, constructed a housing project against which it claimed deduction under section 80-1B(10) Assessing Officer disallowed deduction on ground that assessee had violated provisions of section 80- 18(10)(c) by amalgamating two row houses, covered area of which was more than 1500 sq. ft. which is condition stipulated in section 80-1B(10) (c) Whether merely because assessee had violated provisions of section 80-18(10) (c) in respect of two units, deduction under section 80-1B(10) could not be denied in entirety and assessee was entitled to said deduction in respect of balance units which had been constructed as per conditions laid down in section 80-1B(10)(c)-Held, yes [Para 11] [In favour of assessee]"*

14.4. Respectfully following the above decisions of the co-ordinate Benches of the Tribunal, the assessee cannot be denied the deduction u/s.80IB [10] of the Act on the entirety and the assessee is eligible for balance units which has been constructed as per

conditions laid down in section 80IB[10][c] of the Act. Thereby this issue is setaside to the file of the Assessing Officer with a direction to grant the deduction after giving opportunity to the assessee. **Thus Ground Nos.5 a, b, c raised by the assessee are hereby allowed.**

15. **Difference in cost of construction of Rs. 1,13,62,412/-** In the Special Audit Report the Auditors compared the cost of construction of the shops/flats adopted by the assessee in the current year to the earlier years and pointed out that the cost adopted in the current year is much higher in comparison to the cost taken in earlier years after adjusting the addition to cost of construction during the year. As per the Auditors the cost of the construction during the current year is taken at Rs.42,500/- per square yard, whereas the same can at the most be Rs. 18,173/- per sq yd. Before the AO the assessee contended that for the purpose of determination of cost of the construction cost of the project is estimated in advance and hence the cost in earlier year was on estimation basis which cannot be compared with the actual cost for this year. It was the contention of the assessee that this fact was also recorded by the Auditors in the SAR, however, the AO was not convinced and adopted the cost at Rs.18,173/- and worked out the difference of Rs.1,13,62,412/- and added the same to the profits under the normal provision of the Act as well as to the book profits computed as per section 115JB of the Act.

15.1. The Ld CIT[A] after careful consideration of the findings of the Auditors and the AO as well as after considering the reply of the

assessee held that the Auditors have arrived at the cost of construction on the basis of what was debited in earlier years and have not found any false expense or any part of the cost debited in the books of accounts of the current year despite the extensive special audit carried out. When the accounts of the assessee are subjected to special audit disallowance or addition cannot be made without impeaching the entries in the books of accounts or without any income/expense found not entered in the books of accounts, which has not been done in this case. Further in the SAR the Auditors pointed out that the assessee company has incurred various expenses pertaining to the projects eligible for deduction u/s.80IB of the Act, but they were charged to the projects which were not so eligible. Also certain common expenses were not proportioned between the projects eligible for deduction u/s. 80IB and other projects. Hence, the CIT[A] do not find any merit in the action of AO and the addition amounting to Rs.1,13,62,412/- was deleted.

15.2. The Ld. D.R. could not submit any contra evidence on the above detailed findings of the Ld CIT [A]. **Thus the ground no. 5 raised by the Revenue is devoid of merits and the same is hereby dismissed.**

16. **Addition on account of revaluation of land u/s. 115JB of the Act of Rs. 5,56,29,995/-:** As the assessee is NOT PRESSED this Ground No.6, the same is hereby dismissed.

17. Ground Nos. 7 & 8 raised by the assessee are general in nature the same does not require specific adjudication.

18. **In the combined result the appeals filed by the assessee and the Revenue are Partly allowed.**

Order pronounced in the open court on 01-09-2023

Sd/- **Sd/-**

(WASEEM AHMED) **(T.R. SENTHIL KUMAR)**
ACCOUNTANT MEMBER **True Copy** **JUDICIAL MEMBER**

Ahmedabad : Dated 01/09/2023

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद