IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.922/Bang/2013: Asst.Year 2006-2007
ITA No.923/Bang/2013: Asst.Year 2008-2009
ITA No.924/Bang/2013: Asst.Year 2009-2010

The Dy.Commissioner of Income-tax, Circle 11(3) Bangalore.	v.	M/s.Gopalan Enterprises (India) Pvt.Ltd. No.5, Richmond Road No.48, Museum Road Bangalore – 560 025. **PAN : AABCG3197L.**
(Appellant)		(Respondent)

Appellant by : Sri.Priyadarshi Mishra, Addl.CIT
Respondent by : Sri.K.R.Pradeep, CA & Miss.Girija G.P., CA

Date of Hearing : 30.07.2021		**Date of Pronouncement : 10.08.2021**

O R D E R

Per George George K, JM

These appeals were disposed of by the ITAT vide its consolidated order dated 18.07.2014. On further appeal by the Revenue u/s 260A of the I.T.Act, the Hon'ble High Court vide judgment dated 09.11.2020 in ITA Nos.3/15, 10/15 and 11/15 restored these cases to the files of the Tribunal. The Hon'ble High Court directed the ITAT to give a factual finding whether the assessee had complied with the conditions laid down in the Industrial Park Scheme, 2002 and whether the assessee is eligible to claim deduction u/s 80IA(4)(iii) of the I.T.Act. The relevant finding of the Hon'ble High Court reads as follow:-

"8. In the backdrop of aforesaid factual position, when we advert to the facts of the case, we find that the order of the Tribunal is cryptic and no finding has been recorded by the

Tribunal whether or not the assessee has fulfilled the conditions laid down in the scheme. In paragraph 4 of the order, the Tribunal has recorded a finding that an identical issue has been dealt by it in the case of PIRAMAL PROJECTS P. LTD. and the case of the assessee is also similar. However, no reasons have been assigned by the Tribunal. The Tribunal is the final fact finding authority and has to record the reasons for its conclusions. Since the Tribunal has failed to assign any reasons for recording the finding with regard to the fact whether or not the assessee has fulfilled with the terms and conditions laid down in the scheme, we are left with no option but to quash the order passed by the Tribunal. Therefore, it is not necessary to answer the substantial question of law. The Tribunal shall decide the matter afresh and shall after affording an opportunity of hearing to the parties shall record a finding whether the assessee has complied with the conditions laid down in the Industrial Park Scheme, 2002 and whether the assessee is eligible to claim deduction under Section 80IA(4)(iii) of the Act."

2. The revenue had filed revised grounds, which is identical for all the assessment years, except for variance in figures. The revised grounds pertaining to assessment year 2006-2007, read as follow:-

"1. The order of the Learned CIT(Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.

2 The learned CIT(A) erred in allowing the deduction claimed by the assessee U/S 80IA(4)(iii) of Rs.2,13,81,501 though the assessee had not fulfilled the conditions for the approval granted by the Ministry of Commerce and Industry.

3. The Ld. CIT(A) erred in holding that the objections of the Assessing Officer that there were less than 4 tenants in the industrial park and the super built up area of 1,38,000 sq.ft was leased to M/s I-Flex Solutions Ltd., which is more than 60% of the total allocable area, are found to be invalid.

4. The learned CIT(A) erred in not appreciating the fact that as against the first condition that 4 units should be located in the industrial park on physical verification it was seen that only three companies were in the industrial park.

5. The learned CIT(A) erred in not appreciating the fact that out of the three companies found to be available, M/s Transworks Information Services Ltd. and M/s Transworks IT

Services were one and same company amalgamated by the order of Hon'ble High Court of Mumbai.

6. The learned CIT(A) erred in allowing relief for the assessment year 2004-05 holding that the assessee had four independent functional units ignoring his own averment that the assessee started with one tenant in the period relevant to the assessment year 2004-05 and that it had four units by the period relevant to the assessment year 2008-09.

7. The learned CIT(A) erred in holding that the criteria relating to restriction of leasing of 'allocable area' becomes redundant.

8. The learned CIT(A) erred in not appreciating the fact that as against the second condition that no single unit shall occupy more than 50% of the allocable industrial area, I-Flex Solutions Ltd. had been allocated a super built up area of 1,38,000 sq. ft.

9. The Ld. CIT(A) erred in directing to grant deduction u/s 80IA(4)(iii) of the LT. Act in view of the decision of the jurisdiction Bench of the ITAT in the case of Primal Projects Pvt. Ltd. (139-TTJ-233) which has not yet reached finality.

10. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.

11. The appellant craves leave to add, to alter, to amend or to delete any of the grounds that may be urged at the time of hearing of the appeal.

3. The brief facts of the case are as follows:

The assessee is a company engaged in construction, promotion and development of software park. For these assessment years the claim of deduction u/s.80IA(4)(iii) of the I.T.Act was denied by the Assessing Officer on two grounds namely :-

(i) There ought to be 4 tenants in the industrial park of assessee, whereas in this case there is only three tenants.

(ii) No unit should occupy more than 50% of the allocable area, whereas in this case one tenant, namely M/s.I-Flex Solutions is occupying more than 50% of the total constructed area.

4. Aggrieved by the denial of benefit of deduction u/s 80IA(4)(iii) of the I.T.Act, the assessee preferred appeals to the first appellate authority. The CIT(A) following his order for assessment year 2004-2005, allowed the claim of benefit u/s 80IA(4)(iii) of the I.T.Act. The Tribunal confirmed the view of the CIT(A). The Hon'ble High Court on further appeal by the Revenue has restored the matter to the files of the ITAT with the above directions. On a query from the Bench, the learned Departmental Representative submitted that for assessment years 2004-2005, 2005-2006 and 2007-2008, the appeals were not preferred to the Hon'ble High Court on account of the tax effect being less than the monetary limit. The learned DR has filed a written submission. The gist of the written submission reads as follow:-

"(i) The Govt. of India, Ministry of Finance in its Notification No.212/207 dated 31.07.2007 had given approval to the assessee company for claiming deduction u/s 80IA(4)(iii) subject to two conditions.

(a) There should be 04 units in the Undertaking;
(b) Each unit should occupy less than 50% of the total built-up area.

Both these conditions have not been complied with the assessee and resultantly the assessee's claim of deduction was rejected by the AO as being legally untenable.

(ii) The Assessing Officer had conducted physical verification of the assessee company's premises and found that the building was occupied by only 02 companies as against the approved number 04 companies and that according to IPS-2, i.e., the Six monthly return filed for 31.12.2005, there are only 03 company names, one company M/s.I Flex Solutions was occupied 1,38,000 sq.ft. of the total constructed built up area / allocable area of the project of 2,54,110 sq.ft. (as per IPS-2 return submitted to the Ministry of Commerce & Industry). One tenant, i.e., one unit was found to be in occupation of more than 50% of total allocable area, which was in clear contravention of the conditions laid down under both the Industrial Park Scheme, 2002 and also the CBDT Notification issued under Rule 18c(4), resulting in the denial of 80IA(4)(iii) deduction claimed for the Assessment years 2004-2005, 2006-2007, 2008-2009 & 2009-2010."

5. The learned AR has also filed a brief written submission. The gist of the submission is that -

(i) What is relevant is whether there is four units and each of the units is in a position to carry on its activity independently and separately from other units. It does not matter even if the entire developed area has been leased out to a single company. The Hon'ble jurisdictional High Court in the case of CIT v. M/s.Primal Projects Pvt. Ltd. in ITA 196/2011 dated 10.11.2020 has approved the functional test. It was

further submitted that so long as the project developed is with the requisite approvals and which complies the conditions for granting the deduction will be eligible for relief u/s 80IA(4)(iii) of the I.T.Act. The assessee, according to the learned AR, has complied with all the conditions and also was in conformity with the functional test.

6. We have heard rival submissions and perused the material on record. The assessee-company developed an IT park called "Millennium Tower" at Kundanahalli, Broke field, Bangalore. The assessee-company, originally made an application on 05.01.2004, in Form No.IPS-1 for approval before the Investment Promotion and Infrastructure Development Cell, Ministry of Commerce and Industries, Department of Industrial Policy and Promotion and for the setting up of Industrial Park on 2 acres of land, in question, for 32 number of Industrial Units. Later, on 8.12.2004, it filed a revised application for setting up of Industrial Park reducing the number of Industrial Units to be located from 32 to only 4 units. On the basis of the revised application and the documents, the Ministry of Commerce and Industrial has approved the proposal of 4 units to be located in the Industrial Park vide their letter No.15/07/04-IP & ID dated 31.12.2004 on certain terms and conditions, viz..

(a) That the conditions mentioned in the approval letter as well as those included in the Industrial Park Scheme 2002 should be adhered to during the

period when benefits under the scheme are to be availed.

(b) That the income tax benefits u/s 80IA(4)(iii) of the I.T.Act will be available only after the 4 proposed number of Industrial units mentioned in the approval letter are located in the Industrial Park.

(c) That the assessee company shall submit half yearly report to the Ministry of Industry and Commerce in IPS-2 Form on 1st Jan and 1st July each year during the period in which the benefits u/s 80IA(4)(iii) of the I.T.Act are to be available.

6.1 Further, as per the provisions of Rule 18C(4) of the Income Tax Rules, 1962, for the purpose of getting eligibility of benefits u/s 80IA(4)(iii) of the I.T.Act to the Industrial Park, the CBDT has to notify the Industrial Park on approval from the Ministry of Commerce and Industry, Government of India. The CBDT has notified this Industrial Park for obtaining the benefits u/s 80IA(4)(iii) of the Income tax Act 1961 vide Notification No.212/2007 in F No.178/82/2007 – ITA I dated 31st July 2007 and copy of the same is on record. The said Notification contains an annexure giving the terms and conditions on which the approval of the Govt. of India has been accorded for setting up of an Industrial Park by the assessee company. The assessee has filed tenancy wise comparative statement on percentage basis of super built up area which contain the details of floor wise area of tenancy in "Millennium Tower" situated on the land at Survey No.133 of Kundalahalli Mahadevapura, Bangalore. Similarly, the assessee has filed break-up details of floor wise constructed

area of tenancy in "Millennium Tower", as per sanctioned plan LP.No.81/2001-02 dated 10.07.2002 situated in Sy.No.133 of Kundalahalli, Mahadevapura, Bangalore.

6.2 The Hon'ble jurisdictional High Court in the case of CIT v. M/s.Primal Projects Pvt. Ltd. (supra) has laid down the functional test, i.e., whether each unit is in a position to carry on its activities independently and separately from other units. If such was the case, the Hon'ble High Court held that each of such units should be considered as an independent unit. It was further held by the Hon'ble Court that it does not matter even if the entire developed area has been leased out to a single company. The Hon'ble High Court confirmed the factual finding of the ITAT and the relevant portion of the Hon'ble High Court judgment at para 3 reads as follow:-

> *"3……..with separate facilities, instrumentation, power connection, door number and capacity to function independently. It was further held that since, the units are functioning independently on different floors even though are situated under the same roof, the assessee has successfully complied the functional test of five independent units."*

6.3 It was further held by the Hon'ble High Court at para 9 of the judgment as follows:-

> *"9……..The tribunal has recorded a finding tht even though, assessee has leased out five / four floors to a particular tenant, but the tenants are carrying on their operations as independent units and their activities are functionally different. It has further been held that each floor is physically identified for all functional purposes."*

6.4 Viewed from the ratio *decidendi* laid down by the Hon'ble High Court in the case of CIT v. M/s.Primal Projects Pvt. Ltd. (supra), let us examine the facts of the instant case and

whether the assessee has satisfied conditions as stipulated under the provisions of section 80IA(4)(iii) of the I.T.Act read with Rules 18C of the I.T.Rules and Notification dated 31.07.2007. The two reasons of the A.O. for the denial of benefit of deduction u/s 80IA(4)(iii) of the I.T.Act read as follows:-

(i) One Tenant,i.e., M/s.I-Flex solutions is occupying 1,38,000 sq.ft. out of total constructed built up area / allocable area of 2,54,110 sq.ft. Hence it amounts to that one tenant is in occupation of more than 50% of the total allocable area.

(ii) The Income tax benefits u/s 80IA(4)(iii) of the I.T.Act will be available only after the proposed number of Industrial units mentioned in the approval letter i.e. 4 units are located in the Industrial Park.

Let us examine each of the reasons:-

(i) <u>One Tenant,i.e., M/s.I-Flex solutions is occupying 1,38,000 sq.ft. out of total constructed built up area / allocable area of 2,54,110 sq.ft. Hence it amounts to that one tenant is in occupation of more than 50% of the total allocable area.</u>

The Industrial Park of assessee consists of 5 floors. The floor-wise measurements are as follows:-

Floor	Units	Super built up area	Allocable area	Unit-wise allocable area as % of total allocable area
Ground floor	G-1	54000 sft.	39679 sft.	21.25%
First floor	F-1	54000 sft.	39679 sft.	21.25%
Second floor	S-1	54000 sft	39679 sft	21.25%
Third floor	T-1	55000 sft	40414 sft.	21.55%

Fourth floor	F4-1	37110 sft.	27274 sft.	14.70%
Total		254110 sft.	186725 sft.	100.00%

The area leased to M/s.I-Flex Solutions Limited is admeasuring 1,38,000 sft. of super built up area. According to the assessee, the area leased out to M/s.I-Flex Solutions Limited is not one unit but consisted of 3 units with 54000 sft super built up area in Ground floor (21.25% of allocable area) and 54000 sft. in First floor (21.25%) of allocable area) and 30,000 sft. of super built up area in II floor (16.07%) of the Industrial park. Thus, according to the assessee, the lessee had taken 3 different industrial units and each unit is less than 50% of the allocable area and the AO, instead of considering them as individual functional units, treated them as one combined unit which is wrong in light of functional test laid down by Hon'ble High Court. In the instant case, even though the CIT(A) had held that the facts of Primal Projects Private Limited and that of the assessee are identical, there is no factual finding either by the AO nor by the CIT(A) that the assessee claims that each of the floors in its industrial park is an independent and separate unit, capable of functioning on its own. Therefore, there should be a factual finding by the A.O. on the above issue.

(ii) The Income tax benefits u/s 80IA(4)(iii) of the I.T.Act will be available only after the proposed number of Industrial units mentioned in the approval letter i.e. 4 units are located in the Industrial Park.

The assessee had constructed multistoried buildings for the purpose of developing infrastructure facilities as approved by the Ministry of Commerce and Industry. As mentioned

earlier, the test to be applied is the functional test, i.e., the unit must be physically independent with independent facilities and instrumentation, power connection, door number and the facility of functioning independently, i.e., every unit must be in a position to carry on its activities without depending upon other units even though all the units are situated under the same roof but in different floors. The assessee has to successfully satisfy the above stated functional test of an independent unit, which has not undertaken by the A.O. nor the CIT(A) in this case. Even for A.Y. 2004-2005, though the A.O. in his remand report, had stated that the case of the assessee and of Primal Projects Private Limited are identical had not entered a factual finding of the claim of the assessee that each of the five floors in the industrial park is separate and independent units, capable of function on its own.

6.3 Therefore, the assessee has to factually establish that it has 4 units or more and that no unit has occupied more than 50% allocable area. The criteria relating to restriction of leasing of allocable area to any particular tenant is redundant in view of the functionality test prescribed by the Hon'ble jurisdictional High Court in the case of CIT v. M/s.Primal Projects Pvt. Ltd. (supra). In the light of the aforesaid facts, we are of the view that the matter needs to be examined afresh by the A.O. Accordingly, the cases are restored to the files of the A.O. The A.O. is directed to come to a factual finding that assessee's claim of five floors of the industrial park are independent and separate units as prescribed in the judgment of Hon'ble High Court in the case of CIT v.

M/s.Primal Projects Private Limited. The assessee is directed to co-operate with the revenue for expeditious disposal of the matter. It is ordered accordingly.

7. In the result, the appeals filed by the Revenue are allowed for statistical purposes.

Order pronounced on this 10th day of August, 2021.

Sd/-	**Sd/-**
(Chandra Poojari)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 10th August, 2021.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-1, Bengaluru
4. The CIT-1,Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore