IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.7520/Mum./2013
(Assessment Year : 2006–07)

Rupvakula Properties Pvt. Ltd.
Kailash Plaza, Vallabh Baug Lane
Ghatkopar (E), Mumbai 400 053
PAN – AABCR7425A

……. Appellant

v/s

Income Tax Officer
Ward–10(2)(3), Aayakar Bhawan
101, M.K. Road, Mumbai 400 020

……. Respondent

Assessee by : Shri Dharan Gandhi
Revenue by : Shri B.S. Bist

Date of Hearing – 26.04.2016	Date of Order – 30.06.2016

O R D E R

PER SAKTIJIT DEY, J.M.

Instant appeal of the assessee is directed against the order dated 10th October 2013, passed by the learned Commissioner (Appeals)-22, Mumbai, for the assessment year 2006–07.

Following grounds have been raised by the assessee:–

1. *On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in confirming the actions of the Assessing Officer in disallowing deduction of ₹ 1,61,800 claimed under section 80IB(10 of the Income Tax Act, 1961.*

2. *On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in failing to consider the alternate submissions / arguments made by the appellant.*

3. Brief facts are, the assessee company is engaged in developing housing projects. For the assessment year under consideration, the assessee filed its return of income on 15th November 2006, declaring nil income after claiming deduction under section 80IB(10) of the Income Tax Act, 1961 (for short *"the Act"*). In the course of assessment proceedings, the Assessing Officer found that assessee was developing a housing project named *"Flower Valley"* consisting of eleven buildings in a locality known as Rameshwar Nagar at Ghatkopar (West), Mumbai. However, from the accounts of the assessee, it was noticed by the Assessing Officer that out of eleven buildings, the assessee had undertaken construction activities in four buildings as on 31st March 2006. He, therefore, called upon the assessee to justify its claim of deduction under section 80IB. In response to the query raised by the Assessing Officer, it was submitted by the assessee that it was supposed to construct eleven buildings, however, if could complete construction of four buildings by 31st March 2008 and construction of other buildings were put on hold due to Metro Railway project. It was submitted by the assessee that it has undertaken the project under the SRA scheme and the project was approved by the local authority on 31st October 1996. It was submitted, the construction started in

August 1999 and the project is on area of 1.13 acres. The built–up area of each flat was not exceeding 1,000 sq.ft. There are no shops in any of the building constructed. Therefore, as all the conditions of section 80IB are fulfilled, assessee is eligible for deduction. The Assessing Officer, however, was not convinced with the submissions of the assessee. He was of the view that as per the statutory provisions, the assessee had to complete the project before 31st March 2008. He observed, the assessee had obtained approval before 1st April 2004, but it had not completed the project before 31st March 2008. Hence, the condition of section 80IB(10) are not satisfied. He also observed, as the assessee has failed to satisfy the eligibility criteria deduction under section 80IB cannot be allowed. Accordingly, he disallowed the deduction claimed by the assessee. Being aggrieved of such disallowance, assessee preferred appeal before the learned Commissioner (Appeals). The learned Commissioner (Appeals), having confirmed the disallowance assessee went in further appeal before the Tribunal. The Tribunal, however, restored the matter back to the file of the Assessing Officer for deciding afresh keeping in view the CBDT notification no.67/2010 dated 3rd August 2010 and any other notification in respect of SRA project. In the fresh assessment proceedings, the Assessing Officer again disallowed assessee's claim of deduction under section 80IB(10) stating that the notification dated 3rd August 2010 issued by the CBDT would be applicable from the date of

its issuance and not to the preceding assessment year. Against the assessment order so passed, assessee preferred appeal before the learned Commissioner (Appeals). Though, before the first appellate authority, it was submitted by the assessee that in the assessment year 2008–09, the learned Commissioner (Appeals) taking into consideration CBDT notification dated 3rd August 2010, had allowed assessee's claim of deduction 80IB(10), but the learned Commissioner (Appeals) did not accept the contention of the assessee. He observed, the assessment order and appeal orders for assessment year 2008–09 were passed subsequent to the notification issued by the CBDT, hence, the claim of the assessee as far as assessment year 2008–09 is allowable. He observed, since in the impugned assessment year the original assessment order as well as appeal order were passed before the CBDT notification was issued it will not apply. Accordingly, without examining the issue on merit the learned Commissioner (Appeals) dismissed the ground raised by the assessee. Being aggrieved, assessee is in appeal before us.

4. Learned Authorised Representative submitted, though the entire housing project was consisting of eleven buildings, the assessee could complete four buildings before 31st March 2008 as the work in respect of other buildings could not be started due to Metro Railway project. He submitted, assessee's project was approved by the local authority

on 31st October 1996 and the construction of the project started in August 1999. He submitted, plot on which the project was being constructed also exceeded the minimum required area of one acre and none of the flats were exceeding the area of 1,000 sq.ft. He submitted, that being the case, the assessee has fulfilled all the conditions of section 80IB(10) as it existed during the relevant period, hence, it is eligible for deduction. Learned Authorised Representative submitted, since the assessee's project was approved prior to 1st April 2004, before the provisions of section 80IB(10), was amended by bringing in the condition of completion of project within specified period, the conditions imposed under the amended provisions would not apply to assessee's project. For such proposition, he relied upon the decision of the Hon'ble Supreme Court in CIT v/s Sarkar Builders, 375 ITR 392 (SC). Learned Authorised Representative submitted, even assuming that the amended provisions will apply to the assessee, still assessee would be eligible to avail deduction under section 80IB(10) in view of CBDT notification no.67 of 3rd August 2010, as the notification would apply retrospectively. It was submitted, as the assessee has carried out the project under SRA scheme, assessee's case falls within the proviso to section 80IB(10), hence, the condition / restriction imposed under clause (a) and (b) of section 80IB(10) would not apply. For such proposition, he relied upon the following decisions:–

i) ITO v/s Asha Kashi Prasad Ringshia, 56 SOT 340 (Mum.); and

ii) Ramesh Gunshi Dedhia v/s ITO, 148 ITD 346.

5. The learned Authorised Representative submitted, though, assessee's project consisted of eleven buildings, however, local authority has issued commencement certificate for each building separately. He, therefore, submitted that each building in a larger housing project would by itself constitute a separate housing project, hence, each building completed on / or before 31st March 2008 being a separate housing project would be eligible for deduction under section 80IB(10). In this regard, he relied upon the following decisions:–

i) CIT v/s Vandana Properties, 353 ITR 36 (Bom.); and

ii) Vishwas Properties P. Ltd. v/s ACIT, 255 CTR 149 (Mad.).

6. Learned Authorised Representative further submitted, though as per the Assessing Officer the assessee may not have fulfilled the condition of completing the entire housing project consisting of eleven projects but still the assessee would be eligible to claim deduction in respect of four buildings which were constructed within the time limit and are fulfilling the condition of section 80IB(10). For such proposition, he relied upon the following decisions:–

i) CIT v/s B.M. and Bros., 86 CCH 194 (Guj.);

ii) CIT v/s Arun Excello Foundation Pvt. Ltd., 212 Taxman 342 (Mad.)

iii) CIT v/s Srecvatsa Real Estate Pvt. Ltd., 42 Taxmann.com 329 (Mad.).

7. Learned Authorised Representative submitted, non–completion of the project was beyond the control of the assessee as it did not get the commencement certificate from the competent authority due to Metro Railway project. He submitted, commencement certificate of 5th building was received only on 16th October 2012. He, therefore, submitted as the delay in completion of building was not due to assessee he cannot be penalised for the same. Thus, it was submitted, the deduction claimed under section 80IB(10) should be allowed to the assessee.

8. Learned Departmental Representative on the other hand supporting the view expressed by the Assessing Officer and the learned Commissioner (Appeals), submitted as the notification issued by the CBDT relaxing the conditions of clause (a) and (b) of section 80IB(10), in respect of SRA project was issued on 3rd August 2010, it will be valid from that date and cannot apply to projects completed earlier to that date.

9. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. As far as the factual position is concerned, there is no dispute that assessee's housing project was approved by the local authority on

31st October 1996. The commencement of construction of the housing project also started in August 1999 i.e., after 1st October 1998. There is also no dispute that before 31st March 2008, the assessee has completed four buildings out of eleven buildings to be completed under the housing project. The Department has disallowed assessee's claim of deduction under section 80IB(10) primarily for the reason that the entire housing project comprising of eleven buildings was not completed prior to 31st March 2008, thereby not fulfilling the condition of clause (a) of section 80IB(10). Though, the assessee had contended by virtue of CBDT notification no.67 dated 3rd August 2010, the conditions of clause (a) of section 80IB(10) would not be applicable in respect of SRA project but the Department has rejected such argument stating that the notification will apply from the date of its issue and will not apply to projects completed prior to that date. Therefore, two issues arise for consideration before us. Firstly, whether the condition imposed under clause (a) and (b) of amended provisions of section 80IB(10) which were brought into the statute w.e.f. 1st April 2005, would be applicable to a project approved prior to that date and secondly, assuming that the amended provisions would apply to the assessee's housing project whether in view of the CBDT notification no.67 dated 3rd August 20910, the conditions of clause (a) of section 80IB(10) would not be applicable to SRA project. In this context, it needs to be observed, the Hon'ble Supreme Court in Sarkar

Builders (supra) while considering issue relating to applicability of certain clauses of the amended provision of section 80IB(10) to a project approved prior to 1st April 2005, had held that such amended provision would not apply to a project approved prior to insertion of such provision into the Act. On a careful reading of the conditions of section 80IB(10) as it existed prior to 1st April 2005 when assessee's project was approved it is noticed that there was no condition imposed therein specifying a time limit for completion of the project. By virtue of the amended provisions brought into the statute w.e.f. 1st April 2005, conditions were imposed under clause (a) specifying the time limit for completion of the housing project. However, whether such condition brought into the statute under the amended provision would be applicable to a housing project approved prior to 1st April 2005, needs to be examined in the light of principle laid down in case of Sarkar Builders (supra). However, as it appears, this argument was neither taken by the assessee either before the Assessing Officer or before the learned Commissioner (Appeals) or even in the earlier round of litigation before the Tribunal. Even the decision of the Hon'ble Supreme Court in Sarkar Builders (supra), was not available when the orders were passed by the Departmental Authorities. Therefore, this plea taken by the assessee was never examined by the Departmental Authorities in the context of the decision of the Hon'ble Supreme Court referred to above. The second contention of the assessee is, even

assuming that the amended provision would apply to the projects of the assessee, however, in view of the CBDT notification no.67/2010 dated 3rd August 2010 r/w the proviso to section 80IB(10), the condition imposed under clause (a) of section 80IB(10) would not apply as the project developed by the assessee is under SRA scheme. In this context, it is to be noted that under the amended provisions of section 80IB(10) brought into the statute w.e.f. 1st April 2005, a condition was imposed under clause (a) regarding completion of housing project within a specified time limit for availing deduction . Similarly, under clause (b), a condition was put that land on which housing project is proposed to be built should have minimum area of one acre. However, proviso to section 80IB(10), carved out an exception by stating that the conditions imposed under clause (a) and (b) under section 80IB(10) would not be applicable in respect of SRA projects to be notified by the Board. Thus, as could be seen, the condition imposed under clause (a) and (b) are not applicable in respect of SRA project in terms of the proviso to section 80IB(10). As it appears, CBDT in terms of proviso to section 80IB(10) issued notification notifying the SRA project vide notification no.67 of 2010 dated 3rd August 2010. It is the plea of the assessee that the notification applies retrospectively to projects approved even prior to 1st April 2005, whereas, it is the stand of the Department that it will only apply to the projects approved after the date of issuance of the

notification. In this regard, it needs to be mentioned that the co–ordinate bench of the Tribunal in Ms. Asha Kashi Prasad Ringshia (supra) after interpreting notification no.67/2010dated 3rd August 2010 and notification no.2/2011 dated 5th Nov 2011, held that as the notifications only clarify the statutory provision, the time limit prescribed in the notification will not be applicable in case of proviso to section 80IB(10). As it appears, these legal aspects have not been considered either by the Assessing Officer or by the learned Commissioner (Appeals). In fact, the order passed by the learned Commissioner (Appeals) reveals complete non–application of mind and appears to be on misconception of facts, which is evident from Para–2.1 of his order, wherein, order of the Tribunal referred to by him is in respect of assessment year 2008–09 and not assessment year 2006–07. Moreover, his finding in Para–2.5 of the order while dismissing the ground raised by the assessee is confusing and defies logic. We fail to understand his reasoning that the notification of the Board will apply to assessment year 2008–09 only because the first appeal order and assessment orders were passed after the date of notification. If we agree with the aforesaid reasoning of learned Commissioner (Appeals) applying the same logic assessee will be eligible to deduction under section 80IB(10) as the impugned assessment order and first appeal orders were passed after issuance of CBDT notification, since, the earlier assessment order and first appeal order have legally no

existence after being set aside by the Tribunal. In fact, as seen from the record, the order of the learned Commissioner (Appeals) for assessment year 2008–09, has been restored back to the file of the first appellate authority by the Tribunal vide order dated 1st May 2013 in ITA no.6248/Mum./2011. Thus, as the learned Commissioner (Appeals) had not properly considered the plea taken by the assessee with regard to claim of deduction under section 80IB(10) on the basis of arguments put before us on behalf of the assessee and particularly in the light of the decision of the Hon'ble Supreme Court in Sarkar Builders (supra) and other decisions which probably were not available before the first appellate authority when he disposed off the appeal, we are inclined to restore the issue back to the file of the learned Commissioner (Appeals) for deciding afresh after considering the submissions of the assessee in the light of the decisions relied upon.

10. In the result, assessee's appeal is allowed for statistical purpose.

Order pronounced in the open Court on 30.06.2016

Sd/- **RAJESH KUMAR** **ACCOUNTANT MEMBER**	**Sd/-** **SAKTIJIT DEY** **JUDICIAL MEMBER**

MUMBAI, DATED: 30.06.2016

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Dy./Asstt. Registrar)
ITAT, Mumbai