

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, I, मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "I", MUMBAI**

**श्री संजय गर्ग, न्यायिक सदस्य एवं**

**श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष**

**Before Shri Sanjay Garg, Judicial Member, and  
Shri Ashwani Taneja, Accountant Member**

**ITA NO.1139/Mum/2011  
Assessment Year: 2003-04**

Kamala Brothers, Kuber Chamber, CTS 141-A, Next to COD, Dutt Mandir Road, Malad (E) Mumbai -400097	<b><u>बनाम/</u></b> Vs.	ITO 24(2)(1) C-13 Bandra Kurla Complex, Bandra(E) Mumbai
(Assessee)		(Revenue)
P.A. No.AAAFk0111D		

**ITA NO.1334/Mum/2011  
Assessment Year: 2003-04**

ITO 24(2)(1) C-13 Bandra Kurla Complex, Bandra(E) Mumbai	<b><u>बनाम/</u></b> Vs.	Kamala Brothers, Kuber Chamber, CTS 141- A, Next to COD, Dutt Mandir Road, Malad (E) Mumbai -400097
(Revenue)		(Respondent)
P.A. No. AAAFk0111D		

**C.O. No.180/Mum/2013  
(Arising out of ITA No.1334/Mum/2011)  
Assessment Year: 2003-04**

Kamala Brothers, Kuber Chamber, CTS 141-A, Next to COD, Dutt Mandir Road, Malad (E) Mumbai -400097	<u>बनाम/</u> Vs.	ITO 24(2)(1) C-13 Bandra Kurla Complex, Bandra(E) Mumbai
(Revenue)		(Respondent)
P.A. No. AAAPK0111D		

**ITA NO.1140/Mum/2011**  
**Assessment Year: 2006-07**

Kamala Brothers, Kuber Chamber, CTS 141-A, Next to COD, Dutt Mandir Road, Malad (E) Mumbai -400097	<u>बनाम/</u> Vs.	ACIT RG 24(2) C-13 Bandra Kurla Complex, Bandra(E) Mumbai
(Assessee)		(Revenue)
P.A. No. AAAPK0111D		

**ITA NO.1335/Mum/2011**  
**Assessment Year: 2006-07**

ACIT RG 24(2) R.NO.606 6 <sup>th</sup> Floor, Bandra Kurla Complex, Bandra(E) Mumbai-400051	<u>बनाम/</u> Vs.	Kamala Brothers, Kuber Chamber, CTS 141- A, Next to COD, Dutt Mandir Road, Malad (E) Mumbai -400097
(Revenue)		(Respondent)
P.A. No. AAAPK0111D		

**C.O. No.181/Mum/2013**  
**(Arising out of ITA No.1335/Mum/2011)**  
**Assessment Year: 2006-07**

Kamala Brothers, Kuber Chamber, CTS 141-A, Next to COD, Dutt Mandir Road, Malad (E) Mumbai -400097	<u>बनाम/</u> Vs.	ITO 24(2)(1) C-13 Bandra Kurla Complex, Bandra(E) Mumbai
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(Revenue)		(Respondent)
P.A. No. AAAFK0111D		

**ITA NO.1160/Mum/2011**  
**Assessment Year: 2007-08**

Kamala Brothers, Kuber Chamber, CTS 141-A, Next to COD, Dutt Mandir Road, Malad (E) Mumbai -400097	<u>बनाम/</u> Vs.	ITO 24(2)(1) C-13 Bandra Kurla Complex, Bandra(E) Mumbai
(Assessee)		(Revenue)
P.A. No.AAAFK0111D		

**ITA NO.1336/Mum/2011**  
**Assessment Year: 2007-08**

ITO 24(2)(1) C-13 Bandra Kurla Complex, Bandra(E) Mumbai	<u>बनाम/</u> Vs.	Kamala Brothers, Kuber Chamber, CTS 141- A, Next to COD, Dutt Mandir Road, Malad (E) Mumbai -400097
(Revenue)		(Respondent)
P.A. No. AAAFK0111D		

**C.O. No.182/Mum/2013**  
**(Arising out of ITA No.1336/Mum/2011)**  
**Assessment Year: 2006-07**

Kamala Brothers, Kuber Chamber, CTS 141-A, Next to COD, Dutt Mandir Road, Malad (E) Mumbai -400097	<u>बनाम/</u> Vs.	ITO 24(2)(1) C-13 Bandra Kurla Complex, Bandra(E) Mumbai
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Appellant by	Dr. K. Shivram Shri Devang Shah Mrs. Neelam Jadhav (AR)
Revenue by	Shri B. Yadagiri ( DR)

सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>02/12/2015</b>
<b>आदेश की तारीख /Date of Order:</b>	<b>8/01/2016</b>

**आदेश / O R D E R**

**Per Bench:**

These appeals have been filed by the assessee and revenue against the order of Ld. Commissioner of Income Tax (Appeals), Mumbai {(in short 'CIT(A)}}, for the assessment years 2003-04, 2006-07 and 2007-08 decided against the assessment order passed by the Assessing Officer (in short 'AO') u/s 143(3) of the Act.

**2.** During the course of hearing, arguments were made by Shri Dr. K. Shivram, Shri Devang Shah & Mrs. Neelam Jadhav, Authorised Representative (AR) on behalf of the Assessee and by Shri B. Yadagiri, Departmental Representative (DR) on behalf of the Revenue.

**First we take up ITA No.1139/Mum/2011 for A.Y. 2003-04.**

**3.Ground No.1:** In this ground the assessee has challenged the action of Ld. CIT(A) in holding that lease of immovable property was governed by section 2(47) of the Act and in

holding that sec.50C would be applicable on the transactions of lease done by the assessee.

**3.1.** During the course of hearing Ld. Counsel has stated that on this issue the assessee is satisfied with the decision of Hon'ble Ld. CIT(A). Thus, without going into the controversy that whether a lease transactions would be covered u/s 50C, this ground is dismissed.

**4. Ground No.2:** In this ground the assessee has challenged the action of Ld. CIT(A) in confirming the estimate made by the AO of lease rent at Rs.13,74,353/- as against the actual amount received by the assessee.

**4.1.** The brief facts are that the assessee is partnership firm which was formed for the purpose of developing and constructing the building at Malad, Mumbai. During the year under consideration, the assessee firm had shown lease rent from the Shradha Gyanpeeth Trust for consideration of Rs.251/- and 125/- for the portion of land given on lease to the send entity bearing no. 141B and 141C respectively, in pursuance to the lease deed dated 18.10.2002 entered with the said entity for a period of 99 years. The said transaction was treated as 'transfer' covered u/s 2(47) by the AO. The AO also estimated the lease rent received by the assessee.

**4.2.** The assessee challenged all the actions of AO before Ld. CIT(A). It was inter alia held by Ld. CIT(A) that value of

consideration was to be taken as the value as was adopted by the Stamp Valuation Officer. However, Ld. CIT(A) also estimated the lease rent on the basis of fair market value in substitution of the lease rent actually received by the assessee.

**4.3.** Being aggrieved, the assessee has filed an appeal before the Tribunal challenging the order of Ld. CIT(A).

**4.4.** During the course of hearing, it has been argued by the Ld. Counsel that once it has been accepted by the Ld. CIT(A) that stamp value assessed by Stamp Valuation Officer was to be adopted as full value of consideration on deemed basis, as per law, as there was no scope of substitution of any other estimated value under the law. It was also submitted that even otherwise, impugned land was reserved for the school building and therefore the lease rentals could not have been presumed on the basis of market rates. Reliance has been placed on the judgment of Jodhpur Bench of ITAT in the case of Lake Palace Hotels & Motels Ltd. 83 TTJ 1031 which was later confirmed by Hon'ble Rajasthan High Court reported at 321 ITR 165, for the proposition that there is no provision under the law to tax notional amount of lease rent on deemed or presumptive basis.

**4.5.** On the other hand, Ld. DR has submitted that impugned transaction is a transaction of sale, which has been disguised as a lease transaction. It was also submitted that lower authorities have rightly treated the transaction as transactions

of sale. It was further submitted that since the lease rentals were too low, therefore, lease income has been rightly estimated at an appropriate higher value by the lower authorities.

**4.6.** We have gone through the submissions made by both the sides and orders of the lower authorities. It is noted by us that Ld. CIT(A) has held, after recording detailed findings in his order, that amount of consideration was to be determined as per the value as assessed by Stamp Valuation Officer. The relevant findings from the order of Ld. CIT(A) are reproduced below:

*“From the above, it is again clear that out of the total stamp duty paid by the appellant to the tune of Rs.3,420/- first Rs.1250/- pertains to the value of Rs.2,50,000/- and the rest of Rs.2,170/- is 3% of the value of Rs.72,233.33 and in this way the total value to arrive at the stamp duty of Rs.3,420/- adopted by the stamp valuation authority is Rs.3,22,334/- only. It is a conscious decision of the parliament while inserting the provisions of Sc.50C through Finance Act 2002 w.e.f. 1/4/2003 that the value adopted or assessed by any authority of State Government i.e. Stamp Valuation Authority for the purpose of payment of stamp duty in respect of such transfer would be deemed to be the full value of consideration received or accruing as a result of such transfer for the purposes of Section 48 unless*

that valuation is disputed in any appeal or revision before the higher authorities than the stamp valuation authority, court or high court. Since the value adopted by the stamp duty authority to the tune of Rs.3,22,334/- for arriving at stamp duty @ Rs.1250/- plus 3% of the value excess over Rs 250,000/- of the total value is not challenged or disputed in any appeal or revision before any authority under the Bombay Stamp Act 1958 or court or High Court, the value of the impugned land for the purposes of stamp valuation is frozen with the amount of Rs.3,22,333/- and becomes final and inter and it becomes the full value of consideration for the purposes of sec. 48 by virtue of the provisions of Sec.50C. There is no material on record to suggest that this valuation has been revised by any authority u/s 53A of the Bombay Stamp Act 1958 too. Thus, I do not find any merit in the part of ground of the appellant that Assessing Officer has erred in not referring it to District Valuation Officer (DVO) for valuing the same as the value of the land on which stamp duty is paid and the rates of stamp duty in the instant case are not challenged by any person before any court of law or any appellate authority under the state legislature. **Therefore, I find that the value of the impugned land adopted by the stamp valuation authority at Rs.3,22,334/- on which stamp duty of Rs.3,420/- is paid becomes final and cannot be tinkered with.** Accordingly, the Assessing Officer is directed to re-compute the capital

*gains by taking the full value of consideration of the asset under transfer to be Rs.3,22,334/- . However, since this deemed value u/s 50 C is not the actual value of the impugned land as there is no transfer of absolute title of the land to lessee and the ownership is retained by the appellant, there is no question of allowing any cost or indexed cost of acquisition along with other expenses such as cost of improvement or the expenses incurred in relation to such transfer against the same while computing the capital gains within the meaning of Sec. 49 of the IT Act, 1961 except the stamp duty paid to the tune of Rs. 3,420/-Accordingly, this ground is partly allowed.*

**4.7.** From the above findings, it is clear that full value of consideration of the impugned asset has been determined at Rs. 3,22,334/- based upon value as was assessed by the stamp valuation authority. The action of Ld. CIT(A) has been accepted by the assessee. Under these circumstances, once the amount of sales consideration has been determined keeping in view particular provisions of law which were applicable in a given situation, then no further question arises of estimating the value of consideration once again. Thus, in our view, the action of Ld. CIT(A) in estimating lease rent was not only self-contradictory but also beyond the provisions of law.

**4.8.** It is further noted by us that impugned plot of land was under reservation, and thus, the only utility for the assessee for this plot was that it could have been used for development and construction of school building. The assessee firm was not able to construct the school building and develop play ground upon the said land. The partners of the assessee firm felt that they did not have requisite experience to run an educational institute or school and they found it appropriate for a charitable trust to do this job. Under these circumstances, the assessee firm gave said land to charitable trust that could run school effectively. It is further noted that the said lease was approved by the BMC and Maharashtra Government. The property records were still in the name of the assessee firm, indicating that the assessee firm did not transfer full-fledged rights and interest in the said land to the lessee. Detailed discussion in this regard has been made by us at Para 7.1. of this order, which should read here also. Thus, keeping in view these facts also, we find that estimation of lease rent in substitution of actual lease rent received by the assessee was not justified in the given facts and circumstances of the case.

**4.9.** Thus, taking into account all the facts and circumstances of the case and the judgments in the case of Lake Palace Hotels & Motels Ltd. (supra) and also keeping in view the decision of Ld. CIT(A) in determining the full value of consideration of the asset at Rs.3,22,334/-, we find that action of the Ld. AO in estimating the lease rent at Rs.13,74,353/-

was self contradictory and unjustified, and therefore the same is reversed. Ground no.2 of assessee's appeal is allowed.

**5. Ground No.3:** This ground is general and does not require any specific adjudication.

**Cross Objection No.180/Mum/2013 for A.Y. 2003-04**

**6.** In the cross objections, the assessee has challenged the action of Ld. CIT(A) in assessing the lease rental as income from house property u/s 22 of the Act.

**6.1.** Since, we have held in our order while deciding the appeal of the assessee that AO was not justified in estimating lease rental of the assessee and action of Ld. AO in this regard has been reversed by us and action of Ld. CIT(A) in adopting full value of consideration at Rs.3,22,334/- for the purpose of computation of capital gains has been upheld, and therefore, we find there is no grievance left to be addressed, as has been raised in its cross objection by the assessee. The same is treated as infructuous and dismissed as such.

**ITA No. 1334/Mum/2011 Revenue's appeal for A.Y. 2003-04:**

**7. Ground No.1:** In this ground, the Revenue has challenged the action of Ld. CIT(A) in holding the lease transactions entered into by the assessee with Shradha Gyanpeeth Trust as

a genuine transaction and not a sham transactions as was held by the AO.

**7.1.** In this regard, we have heard both the parties. It is noted by us that Ld. CIT(A) has recorded detailed findings for holding that impugned transaction was a transactions of lease only. Taking into account facts on record, it has been noted by the Ld. CIT(A) that lease deed is properly registered and stamp duty was paid as per Bombay Stamp Act, 1958. The lease deed was approved by BMC and State Government Authorities. The title of the property continued to remain in the name of the assessee. Nothing has been brought before us to negate the detailed findings of the Ld. CIT(A). The transactions cannot be held to be sham merely on the basis of some doubts and apprehensions. Duly registered documents cannot be brushed aside or rewritten by the revenue authorities that too without bringing any contrary material on record. It is further noted that as per terms of the lease deed, if any additional TDS/FSI is allowed by the Government on the said land, then, the same shall be within the exclusive right and ownership of the lesser assessee. All these facts indicate that the absolute title has not yet been transferred by the assessee to the lessee. Thus, taking into account all the facts of the case, material placed before us for our consideration and detailed and well reasoned findings of Ld. CIT(A), we find that no interference is called for in the order of Ld. CIT(A) and same is upheld on this issue. Ground no.1 of Revenue's appeal is dismissed.

**8. Ground No.2:** In this ground, the Revenue has challenged the action of Ld. CIT(A) in directing the AO to adopt the market value of the property at Rs.3,22,334/- on the basis of stamp value of the lease deed as was assessed by the Stamp Valuation Authority as per Bombay Stamp Duty Act, 1958.

**8.1.** During the course of hearing, it has been argued by the Ld. DR that value for transfer of immovable property if the same is transferred by way of sale is different from the value if same is transferred by way of lease. He submitted that as per section 50C, value of sales consideration should be adopted as if the transfer is by way of sale.

**8.2.** We have gone through these submissions made before us and provisions of law as contained in section 50C in this regard. We do not find force in the arguments made by the Ld. DR on this issue. We have already held that the impugned transaction is a transaction of lease, executed through a Lease Deed duly registered with the concerned authorities after payment of stamp duty as determined by the Stamp Valuation Authority according to Bombay Stamp Act, 1958. In the earlier part of this order, it has been mentioned that the assessee has accepted the action of the AO in holding that impugned lease transaction would be covered under the provisions of section 50C. Thus, we have refrained ourselves from going into the controversy that whether a lease transaction would be covered under section 50C or not. In the aforesaid facts, the limited question to be decided by us here is that whether full value of

consideration within the meaning of section 50C shall be the value adopted by the Stamp Authorities for the lease deed as registered or the value that would have been adopted by the stamp authorities if the same would have been registered as sale deed, as if it was a case of 'transfer' by way of 'sale'. As per the AO, the value should be adopted as if it was a case of transfer by way of 'sale', whereas as per the Ld. CIT(A), the value would be that as has been actually adopted for the lease deed actually registered. In our considered view, the provisions of section 50C are clear. It lays down that the value adopted or assessed by the Stamp Valuation Authority shall be deemed to be full value of consideration in a given case. Section 50C creates a deeming fiction. Law is well settled that scope of deeming fiction cannot be extended beyond what has been mentioned clearly in the law. Deeming provisions have to be construed strictly and applied literally. It is further noted by us that the word 'assessable' has been added in section 50C by Finance Act 2009, w.e.f. 01.10.2009. This word has been added to take care of those situations, where no deed whatsoever, is registered by the parties, to evade the taxes. With a view to take care of such kind of situations, it was prescribed by the legislature that if no deed is registered by the parties, then in such a case if the deed would have been registered then whatever value would have been adopted, the same shall be adopted u/s 50C. But in the case before us, Lease Deed has been registered on which Stamp Valuation Officer has assessed the value for the purpose of ascertaining amount of stamp duty payable and therefore the same value

should be adopted in the case before us. The clear mandate of the law is that the value adopted or assessed by the Stamp Valuation Authority shall be adopted for determining full value of consideration. Even, otherwise the word 'assessable' has been added w.e.f. 01.10.2009, and the case before us pertains to A.Y. 2003-04 i.e. prior to 01.10.2009 and therefore only pre-amended law shall be applied in the case before us.

**8.3.** Thus, keeping in view the facts of the case and the clear position of law before us, we find that action of Ld. CIT(A) in adopting the value as adopted by the Stamp Valuation Authority under the Bombay Stamp Act 1958, for the purpose of determining full value of consideration is justified, and the same is upheld. Ground no. 2 of Revenue's appeal is dismissed.

**9. Ground No.3:** This ground is general does not require any specific adjudication, and therefore dismissed.

**ITA No. 1140/Mum/2011 Assessee's Appeal for A.Y. 2006-07:**

**10.** The Grounds raised and issues arising in this appeal are identical to A.Y. 2003-04. No distinction has been made out by either party before us. Thus, AO is directed to follow our order for A.Y. 2003-04 here also.

**11.** The assessee has raised additional ground which is reproduced as under:

*“On the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of AO in assessing the sales proceeds from residential housing project (alleged to be received as donation) in AY 2006-07, ignoring the fact the Appellant was following project completion method, of accounting in respect of the said residential housing project, which was only completed in December 2006, and hence the income arising from the project accrued only in A.Y. 2007 - 2008 i.e. subsequent year and not in the impugned year. Hence, the addition of Rs,62,39,236/- may be deleted.*

*Without prejudice to above, assessee has undertaken housing project which is the eligible for deduction u/s 80-IB(10) and hence, if the amount of Rs.62,39,236/- is held to be taxable in the impugned year i.e. A.Y. 2006 - 2007, then the consequential deduction u/s 80-IB(10) may be granted.”*

**11.1.** During the course of hearing, it was argued by the Ld. Counsel that the aforesaid ground is purely legal and can be decided on the basis of facts already on record. No serious objections were raised by the Ld. DR for admission of the legal ground.

**11.2.** It is noted by us that the ground raised by the assessee is purely legal and can be decided on the basis of facts on records of the lower authorities. Therefore, keeping in view the decision of Hon'ble Supreme Court in the case of NTPC 229 ITR 383, this ground is admitted. It is noted by us that there is no adjudication or application of mind by the lower authorities on this issue. Therefore, in the interest of justice and fair play, we send this issue back to the file of the AO for deciding the same in accordance with law and facts. The AO shall give adequate opportunity of hearing to the assessee before deciding this issue. The assessee shall also extend requisite cooperation to the AO by furnishing required details and documents, as may be required by the AO and as may be considered appropriate by it, as per law and facts. Thus, this ground is partly allowed for statistical purposes.

**ITA No.1335/Mum/2011 Revenue's appeal and C.O. No.181/Mum/2013 for AY 2006-07:**

**12.** The Grounds raised and issues arising in this appeal and CO are identical to A.Y. 2003-04. No distinction has been made out by either party before us. Thus, AO is directed to follow our order for A.Y. 2003-04 here also.

**Assessee's appeal in ITA No.1160/Mum/2011 & CO No.182/Mum/2013 for A.Y. 2007-08:**

**13.** It is noted that grounds raised in assessee's appeal and Cross Objection filed by it are identical to the grounds raised for A.Y. 2003-04. The AO is directed to follow our order for A.Y. 2003-04 here also.

**14.** The assessee has raised additional ground as under:

*“Without prejudice to above, assessee has undertaken housing project which is the eligible for deduction u/s 80IB(10) and hence, if the amount of Rs.62,39,236/- is held to be taxable in the impugned year i.e. A.Y. 2007-08 (as per the project completion method), then the consequential deduction u/s 80-IB(10) may be granted.”*

**15.** The additional ground raised is identical to the ground raised in A.Y. 2006-07, therefore, following our order for A.Y. 2006-07, this ground is admitted and sent back to the AO for afresh adjudication with the same directions as are given above in our order. Additional ground is partly allowed for statistical purposes.

**ITA No.1336/Mum/2011 Revenue's Appeal for A.Y. 2007-08:**

**16. Ground No.1:** In this ground, the Revenue has challenged the action of Ld. AO in allowing the claim of deduction u/s 80-IB(10).

**16.1.** During the course of hearing, it has been submitted by the Ld. DR that assessee did not fully comply with the requirements of section 80-IB(10) and therefore, it was not eligible for claiming the deduction and Ld. CIT(A) has wrongly allowed the same. It has been submitted that the project of the assessee was not having sufficient minimum areas that was required for the eligibility for claiming deduction u/s. 80-IB(10). He has relied before us order of the AO, wherein reasoning has been given by the Ld. AO for denying the benefit of deduction u/s 80-IB(10) to the assessee.

**16.2.** On the other hand, Ld. Counsel of the assessee has drawn our attention to various documents filed in the paper book to demonstrate that facts were not properly appreciated by the AO and benefit of deduction was denied under some confusion and wrong understanding of facts. He has relied upon the order of Ld. CIT(A) and detailed findings contained therein and requested for upholding the order of Ld. CIT(A) on this issue.

**16.3.** We have heard both the sides and gone through the orders of lower authorities. It is noted by us that Ld. CIT(A) has gone through all the facts and circumstances of the case and has examined all the documentary evidences, and thereafter only he has recorded detailed findings with proper reasoning for allowing the claim of the assessee and reversing the action of Ld. AO. The CIT(A) has met each and every adverse observation of the AO with proper reasoning. It was

observed by the Ld. AO in the assessment order that the assessee did not fulfill first condition as prescribed u/s 80-IB(10) (a) of the Act, as it had commenced development and construction of the project prior to 1<sup>st</sup> October 1998, as the land was purchased on 2<sup>nd</sup> May 1996 and substantial development expenses were incurred during the F.Y. 1996-97. The Ld. CIT(A) analysed these observations and found that requisite plans were approved by MCGB on 15<sup>th</sup> March 2002. It is well known fact that no project can be started without requisite approval. Under these circumstances, it has been held by the Ld. CIT(A) that it cannot be inferred that housing project was commenced prior to 1<sup>st</sup> October 1998. During the course of hearing before us, Ld. Counsel has drawn our attention to the commencement certificate exhibited in the paper book showing that the same was granted by the local authority on 15.03.2002 and a separate notice was given to BMC thereafter only. It has been further shown to us that the land was earlier an agricultural land, which was got converted to non-agricultural land, vide permission dated 15<sup>th</sup> September 2001. Thus, development and constructions work was not permissible unless such conversion was done. It has been further shown to us that development/construction expenses were incurred from A.Y. 2002-03 on words. It is further shown that payment to BMC or property tax or architect fee etc. have been incurred only after the commencement, development and construction of the project. We find that findings recorded by the Ld. CIT(A) are in accordance with law and facts on this issue. Our view finds support from the decisions of the

Tribunal in the case of Smt. Manju Gupta vs. ACIT 134 ITD 503 (Mum) and Nirmiti Constructions v. DCIT 4 SOT 383 (Pune).

**16.4.** Other objection of the Ld. AO was that housing project was constructed on plot of land admeasuring 3,200 sq. meters, and thus, not meeting the stipulated minimum areas of one acre as prescribed u/s 80-IB(10)(b) of the Act. It is noted by us that Ld. CIT(A) has met this objection of the AO on the basis of findings recorded by him in his order. During the course of hearing before us it has been submitted that the requirement of the law is that project should be on the size of plot of land of minimum one acre, and here the area 'project' means project as proved by the local authority. It was shown to us on the basis of the document enclosed in the paper book that entire plot admeasuring 8612.40 sq. mts. was approved by the local authority as 'housing project', and commencement certificate was issued in respect of the entire plot. It was further shown to us that plot was sub-divided by BMC and some portion out of the total land was segregated for the purpose of common amenities in terms of rules and regulations of a local body. It was submitted that when a portion has been earmarked as per the mandate of the law for the purpose of common amenities then that portion of land should also to be considered as part of the project. It has been further submitted that limits on the extent of commercial area of housing project was inserted w.e.f. 01.04.2005 and does not apply to projects approved before that date, and since project

of the assessee was approved prior to 01.04.2005, therefore, these restrictions were not applicable on the case of the assessee. It is noted that reliance in this regard has been rightly placed on the judgment of **Hon'ble Bombay High Court in the case of CIT vs. Happy Home Enterprise 372 ITR 1 (BOM)** which has been affirmed by the **Supreme Court** in a subsequent judgment in the case of **CIT vs Sarkar Builders 375 ITR 392**. These judgments apply on the facts of the case before us.

**16.5.** It is further noted by us that Ld. CIT(A) has observed that it was wrongly presumed by the AO that construction and development activity was carried out on a plot which was less than one acre. It has also been held by him that housing project was consolidated project that was approved through single approval for the whole plot consisting of portion such as 141A, 141B, 141C & 141D. We find that findings given by the Ld. CIT(A), are legally correct. Our view finds support from the decision of the Tribunal in the case of Sigma Construction vs. ITO 59 SOT 83( Hyd) wherein it has been held that where a portion of plot area was earmarked for laying Roads, same should be considered as part of housing project in order to determine the prescribed limit u/s 80IB. Similar view has been taken in the case of Bunty Builders vs ITO 127 ITD 286 (Pune) and Haware Engineers & Builders P. Ltd. v. ACIT 46 SOT 27 (Mum)(URO). Thus, keeping in view the facts, the documentary evidences brought before us, un-assailed factual findings of Ld. CIT(A) and aforesaid judgments placed before us, we find

that no interference is called for in the order of Ld. CIT(A) and therefore same is upheld, and therefore ground no. 1 of Revenue's appeals is dismissed.

**17. Ground No.2:** This ground deals with action of Ld. CIT(A) in directing to take ALV of Rs.13,74,353/-. It has already been held by us while adjudicating the appeal of the assessee that it was not permissible under the law to make estimate of lease rent in the given fact of this case and the addition made by the AO in this regards was deleted in full, and therefore, this issue raised by the Revenue becomes academic in nature, and therefore, ground no.2 of Revenue's appeal is dismissed.

**18. Ground No3:** This ground is general and does not require any specific adjudication, therefore dismissed.

**19.** In the result, appeal filed by the Revenue is dismissed, and assessee's appeal as well as and CO filed by the assessee are partly allowed.

Order pronounced in the open court on 8<sup>th</sup> January, 2016.

Sd/-  
(Sanjay Garg )

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-  
(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 8/01/2016

*Patel, P.S.* नि.स.

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**