आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "जी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

श्री सी. एन.प्रसाद, न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष
BEFORE SHRI C.N. PRASAD, JM AND SHRI RAJESH KUMAR, AM

ITA NO.2853 to 2855/Mum/2015
(निर्धारण वर्ष / Assessment Years: 2010-11 to 2012-13)

M/s Nahar Enterprises, B-1 Mahalaxmi Chambers, 22,Bhulabhai Desai Road, Mahalaxmi, Mumbai-400026	बनाम/ Vs.	Dy. Commissioner of Income Tax (OSD-1) Central Range-7, Mumbai

ITA NO.3572 to 3574/Mum/2015
(निर्धारण वर्ष / Assessment Years: 2010-11 to 2012-13)

Dy. Commissioner of Income Tax (OSD-1) Central Range-7, Mumbai	बनाम/ Vs.	M/s Nahar Enterprises, B-1 Mahalaxmi Chambers, 22,Bhulabhai Desai Road, Mahalaxmi, Mumbai-400026

स्थायी लेखा सं./PAN : **AAAFN1599D**		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Assessee by	:	Sarvshree Vimal Punmiya, Ketan Jain and Prakash Bohra
प्रत्यर्थी की ओर से/Revenue by	:	Shri Anand Mohan

सुनवाई की तारीख /Date of Hearing	:	15.2.2017
घोषणा की तारीख /Date of Pronouncement	:	07.4.2017

आदेश / O R D E R

PER BENCH:

These six appeals are cross appeals and these are directed against the orders dated 2.3.2015 passed by the ld.CIT(A)-52, Mumbai for the assessment years 2010-11 to 2012-13. Since most lf the issues involved in all these appeals are common, these appeals were clubbed together, heard and disposed of by this common order, for the sake of convenience.

2. The assessee in all these appeals filed concise grounds and these are common, therefore, for the sake of brevity, we are reproducing the same hereunder and also we are dealing with ITA No.2853/Mum/2015:

"Concise Grounds of Appeals

1. On the facts and circumstances of the appellant case and under Law, the ld.CIT(A) erred in confirming the order of the Ld. AO which was passed Under section 143(3) r.w.s 153A on non-existing entity, is void-ab-initio and hence same is liable to be quashed under the provisions of Income Tax Act 1961.

2. On the facts and circumstances of the appellant case and under Law, the CIT(A) as well as Ld. AO erred in solely placing the reliance of the valuation report issued by the Ld. DVO, the appointment of which itself was bad in law as ld.DVO was not the member of the Search Party.

3. On the facts and circumstances of the appellant case and under the Law, Ld. CIT (A) erred in denying the claim of deduction u/s 801B(10) of Rs.179,28,44,008/ - by including the following areas as a part of Built up are prescribed u/s 80IB(14)(a) of the Act:

a) "Flower Bed area" which are "Open to Sky" and not at "Floor Level";
b) "50% of Common Wall area even though the "Common area" is specifically excluded from the said definition.

4. On the facts and circumstances of the appellant case and under the Law, Ld. CIT (A) as well as Ld. AO erred in not appreciating the understated material facts:

a) The local authority is the appropriate Government Authority for development of housing project and area a roved by the local Authority Certificate issued by Municipal architect is reliable evidence;

b) "Built up area" was consistently same as per the "Approved Sanctioned Plan", "Occupation Certificate / Completion Plan", "Registered sale Agreement", "Allotment Letter" and it was within the prescribed limit as per the Section 80IB(10)(c) of the Income Tax Act, 1961.

c) The measurement taken by the Ld. DVO were not taken accurately were rough and approximate;

d) The possession of the flats were already handed over to the buyers before 5 to 6 years back and therefore the assessee is not responsible for any subsequent changes made by he individual flat owner;

e) The local authority (BMC)/MCGM also, even as on date charges property tax on the entire residential unit excluding elevetional features such as flower bed etc and common areas shared with the other residential units."

3. Issue raised by the assessee in the first ground of appeal is a legal issue. The order of the CIT(A) was challenged on the ground that the order passed by the AO under section 143(3) r.w.s.153A was an order passed on

the non-existing entity on the ground that the firm on which the order was passed was M/s Nahar Enterprises which stands closed with effect from 20.11.2011 and the business was taken over by "M/s Nahar Builders Limited" and therefore the assessment order passed on non-existing entiry is bad in law and void ab-initio.

4. Brief facts of the case are that the assessee- Nahar Enterprises a Partnership Firm was formed in the year 1978 and was engaged in the business of construction of buildings and development of the properties. On 9.9.2011 a new company was incorporated under the Companies Act, 1956 in the name and Style of "M/s Nahar Builders Limited". The assessee firm Nahar Enterpises was dissolved on 20.11.2011 and the business of the firm was taken over by the said company Nahar Builders Ltd. The Income Tax Department was informed qua the said change in status of the assessee vide letter dated 1.12.2011.

5. The dissolved firm M/s Nahar Enterprises was engaged in the business of developing residential complex with the name "Amrut Shakti" at Chandivali, Andheri (E), Mumbai wherein it had completed as many as 19 different residential blocks. The said firm claimed deduction u/s 80IB(10) of the Act in respect of residential buildings from the assessment years 2006-07 to 2011-12

6. A search action u/s 132(1) and also survey action u/s 133A were carried out on 2.2.2012 on Nahar Group of cases and its associate concerns. The search was concluded on 28.3.2012 being the last date on which authorization was executed. The assessee and its entire group of concerns were engaged in the business of development of commercial and residential projects. A search warrant was issued in the name of erstwhile firm "M/s Nahar Enterprises" a non existent entity and so was the search whereas as a matter of fact the business of M/S Nahar Enterprises was taken over by "M/s Nahar Builders Ltd" upon dissolution on the date of search and was non-existent. The assessee firm was dissolved on 20.11.2011 and not in existence when the warrant was served on 2.2.2012. Thus, the warrant was issued in the name of assessee firm which was dissolved with effect from 20.11.2011 even though the department was informed to this fact of dissolution of assessee firm by a letter dated 1.12.2011. Whereas in Punchanama No. 9303, dated 27.3.2012 and in the Punchanana dated 28.3.2012 the name was mentioned as "Nahar Enterprises" (now known as "M/s Nahar Builders Ltd). The assessee contended before the AO that since the search warrant was issued in the name of Nahar Enterprises and the assessment was completed in the name of Nahar Enterprises a firm which was not in existence when the warrant was issued the assessment could not be made on the dissolved assessee firm.

7. The AO did not agree with the legal and technical issue raised by the assessee that the search was conducted on non-existing entity and also consequent assessment being bad in law. The Assessing Officer concluded that the warrant issued in the name of "Nahar Enterprises (now known as Nahar Builders Ltd) is legally valid and the assessments were not bad in law. Aggrieved by the order of the AO, the assessee preferred appeals before the ld.CIT(A) who also dismissed the appeals of the assessee confirming the stand of the AO on this issue by observing and holding as under (para 13 and 14 of CIT(A)'s order) :

> *"13. I have considered the facts of the case and contentions of the assessee. From the discussion in foregoing paragraphs, it appears that the search warrant was issued in the name of M/ s. Nahar Enterprises (now known as Nahar Builders Ltd.). It further appears that the names of both the entities, namely the old entity, which was claimed to have been dissolved on 20/11/2011, and the new entity M/s. Nahar Builders Ltd., which took over the business of M/s. Nahar Enterprises, as going concern, have been clearly mentioned in the Panchnama prepared after search. Further, both the search warrants dated 1/2/2012 and 9/3/2012 were shown to Shri Sukhraj Nahar, partner in M/s. Nahar Enterprises and Managing Director of M/s. Nahar Builders Ltd., who happens to be the main person of the two entities who signed both the search warrants. It is further gathered that two Panchanamas were prepared - one at the project site at Chandivali and another one at the office premises at Mahalaxmi Chambers, Vallabhbhai Desai Road - and both the Panchnamas have been witnessed and signed by independent Panchas, namely Shri Mohan J. Chopda & Shri Satnam Singh and Shri Sagar B Padalkar and Shri Hanumantan Imalopankar, respectively. Moreover, both the Panchnamas have been signed by Shri Sukhraj Nahar, main person of the group, also. Besides, the Panchnama drawn at Mahalaxmi Chambers clearly shows that the warrant had been issued in the name of M/s. Nahar Enterprises (now known as M/s.*

Nahar Builders Ltd.), though the other Panchnama drawn at Chandivali carries the name of M/s.Nahar Enterprises only and the name of M/s. Nahar Builders Ltd. has not been' mentioned. But that may be because of some oversight.

14. From the assessment order, therefore, it appears that warrant of authorization for search was apparently issued in the name of M/s. Nahar Enterprises (now known as M/ s. Nahar Builders Ltd.) and the correct address of the office premises as also the project site were mentioned therein. On conclusion of the search proceedings, the Panchnama has been drawn in the name of M/s. Nahar Enterprises (now known as M/s. Nahar Builders Ltd.) and the entire proceedings were carried out in the presence of two independent Panchas, who have signed and verified the Panchnamas. Further, the Panchnamas have also been signed and verified by Shri Sukhraj Nahar, the main person of the group. Accordingly, the objections raised by the learned AR about the validity of the search proceedings are misplaced and untenable and the same are therefore rejected. Accordingly, the proceedings initiated u] s.153A of the Act and assessment completed u/s 143(3) read with section 153A are held valid. I further hold that the ratio of the judgment of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Rakesh Kumar and the decision of Hon'ble ITAT, Indore Bench, in the case of Late Smt. Laxmibai Karanpuria vs. ACIT (supra.) are distinguishable on facts of the present case, in as much as, in the Panchnama drawn subsequent to search, names of the old entity as well as the new entity had been very clearly mentioned, and, therefore, it is not the case as if the search warrant was executed on a dead person and Panchnarna was drawn in the name of a dead person. Since the Panchnama has been drawn in the name of M/s. Nahar Enterprises (now known as M/s.Nahar Builders Ltd.), it makes the entire proceedings quite clear and there is no ambiguity whatsoever. Accordingly, this ground of anneal of the assessee is rejected."

8. The ld. AR vehemently argued before us that as per the provisions of section 2(31) of the Income Tax Act, the company and firm were separate and distinct entities. He further submitted that it was clear from the Punchanama that the search warrant was authorized/issued against the old

non-existent entity "NAHAR Enterprises" but not in the name of "Nahar Builders Ltd". The ld. AR also pointed out that no separate search warrant /notices were issued in the name of formal partners of the assessee firm as required under the provisions of section 283(2) of the Act indicating their status as formal partners of the dissolved firm. The ld. AR submitted that authorization of the search party was illegal and so was the consequent search proceedings and assessment proceedings. In defence of his arguments, the ld.AR heavily relied on the decision of Punjab and Hariyana High Court in the case of CIT V/s Rakesh Kumar, Mukesh Kumar reported in 178 Taxman 224(P&H) and this decision was challenged before the Hon' ble Supreme Court which was dismissed. The decision in the case of Late Smt Laximibai Karanpuria V/s ACIT reported in 130 ITD 40 (Indore), the decision of the Hon'ble Delhi High Court in the case of CIT V/s Indu Surveyors and Loss Assessors Pvt Ltd in ITA No.365 of 2013, dated 15.10.2015.

9. The ld. AR further submitted that no valid assessment could be framed on the strength of invalid search warrant and the assessment proceedings framed on the basis of invalid search warrants were bad in law and void ab-initio. The ld. AR further submitted that the entity on which the search warrant was served was holding PAN AAAFN1599D which was disallowed on

20.11.2011 meaning thereby that the assessment proceedings were initiated against the non-existing person and ultimately the assessment order was passed on the very same entity which is not in existence and therefore the assessments made on such entity u/s 143(3) r.w.s.153A were bad in law and prayed that the same should be quashed as being invalid and void-abinitio.

10. The ld. DR , on the other hand, strongly opposed the arguments of the ld. AR and submitted that there is only one Punchanama bearing No.9303 dated 27.3.2012 which was executed in the name of several parties out of which one name appearing was "NAHAR ENTERPRISES" whereas other Punchanama bearing No.9302 dated 28.3.2012 was issued in the name of M/s Nahar Enterprises (now known as M/s Nahar Builders Ltd) and thus correctly issued. The ld. DR argued that Punchanama was drawn in the name of M/s Nahar Enterprises (now known as M/s Nahar Builders Ltd) and thus cannot be said to be it was issued invalidly. The ld. DR also argued that since both the entities were at the same premises, the Punchanama was drawn in the name of both entities and hence cannot be held to be invalid. The ld. DR further argued that the assessee never objected at the time of search proceedings to the same and duly acknowledged receipt of warrant which proved beyond doubt that search warrant was correctly issued and arguments raised by the ld.AR that the search warrant and Punchanama

were in the name of dissolved entity was an after thought and should not be considered. The ld. DR also expressed his inability rather declined to furnish the search warrant issued against the assessee on the ground that search warrant cannot be produced before the Tribunal. Lastly, the ld. DR submitted that the mistake in the Punchanama was purely clerical in nature and deserves to be overlooked and the legal and technical objection taken by the assessee should be rejected.

11. We have carefully considered the rival submissions and perused the material placed before us including the orders of authorities below and decisions relied upon by the parties. Undisputed facts are that the firm M/s Nahar Enterprises was dissolved on 20.11.2011 and the business of the said firm was taken over by a Limited Company which was incorporated on 9.9.2011 registered under the name and style of M/s Nahar Builders Ltd, which tookover the business of erstwhile firm. The fact of dissolution of the erstwhile firm and taking over the business by the newly incorporated firm M/s Nahara Builders Ltd was intimated to the department vide letter dated 30.11.2011 which was acknowledged on 1.12.2011 by the Office of the Dy.Commissioner of Income Tax. A search was conducted on 2.2.2012 and concluded on 28.3.2012 in the premises of assessee Nahar Group and the assessments were completed under section 143(3) r.w.s. 153A in the name of

Nahar Enterprises, the firm which was dissolved on 20.11.2011 prior the issue of search warrant. The observations of the AO was that assessments were framed by believing that search warrant was issued to "M/s Nahar Enterprises (now known as M/s Nahar Builders Ltd)" which was clerical mistake while preparing Punchanama. The First Appellate Authority confirmed the action of the AO on the ground that old company was merged into new company and both the names appear in the Panchanama.

12. Now, the issue before us for adjudication is as to whether the search warrant was issued in the name of dissolved entity or the existing company and whether the consequent assessments were void abinitio and non-est. It is an admitted fact and also apparent from the AO in the assessment order that the search warrant was issued in the name of the erstwhile firm i.e.Nahar Enterprises and the same is evident from the Punchanama itself. The AO observed that while drawing up the Punchanama some clerical mistake or by one sight the full name was not mentioned but just it was mentioned as Nahar Enterprises. It is the observation of the AO that it is a procedural mistake and no way affects the legality of the search as the warrant is correctly issued according to law. The relevant observations are as under :

> " *The above allegation is absolutely unfounded, baseless and arbitrary and it seems has been made with a motive to divert attention from the*

main issue and/ or to dilute the sanctity of search action conducted u/s 132(1) of the Income Tax Act, 1961.

In support of your allegation you have taken support of the copy of Panchnama enclosed by you. A per this in Col A it is written as- Warrant in the case of Nahar Enterprises. This Panchnama relates to warrant no.9303 and was drawn at Nahar Amrit Shakti (sales office), Chandivali Farm Road, Near Chandivali Studio, Andheri(E), Mumbai-72.

While enclosing the said Panchnama, you have conveniently ignored what is written on the Warrant of Authorisatiori No. 7303 which is the most important document. It states that it is issued to- Nahar Enterprises (now known as Nahar Builders Ltd). Thus the search warrant has been correctly issued and is not in the name of a person or an entity which is not in existence as wrongly alleged by you. While drawing up the Panchnama, there appears to be some clerical mistake or oversight in writing the full name and just Nahar Enterprises has been mentioned. It is a procedural mistake and no way affects the legality of the search as the warrant is correctly issued.

The other warrant in your case i.e warrant no. 9302 has also been issued to - Nahar Enterprises (now known as Nahar Builders Ltd) and was drawn on -B-1, Mahalaxmi Chambers, 32, Bhulabhai Desai road, Mahalaxmi, Mumbai-26. There were two Panchnamas drawn here i.e dated 4.2.12 and 23.2.12. In both these Panchnama's the name has correctly been written as - Nahar Enterprises (now known as Nahar Builders Ltd). Thus there is no mistake either in the warrant or in both the Panchnamas. Copies of both these Panachnamas and the copy of warrant no 9302 and 9303 are enclosed for your reference and record.

Thus there is no basis to your allegation and the same is therefore not acceptable and is rejected."

13. The ld. CIT(A) confirmed the stand of the AO for the reason that both the names of the entities are mentioned on Punchanama, and therefore, the proceedings are valid. We further find that the Panchanama prepared on 27.3.2012 with reference to warrant No.9302, the warrant was issued in the

name of Nahar Enterprises and we do not see any mention of Nahar Builders Ltd. However, in the Panchanama prepared on 28.3.2012 with reference to warrant No.9302, there is a mention of assessee firm name "Nahar Enterprises" (Now Known as Nahar Builders Ltd). We further find that the PAN of Nahar Enterprises is AAAFN1599D and the PAN of Nahar Builders Ltd is AADCN8065A. The assessments were completed on Nahar Enterprises with PAN AAAFN1599D.

14. In our opinion, the search action is a strict action taken against the privacy of any person by the investigating and searching the premises of any person with extreme powers bestowed on the department. Search action u/s 132(1) of the Act cannot be allowed to be taken place without proper evidence and information in the hands of the department. The revenue is expected to exercise utmost precaution while exercising these powers as search action is normally conducted after detailed enquiry and investigation by investigating authority after analyzing the background of group companies, partners, and directors, their PAN, residential status, address etc. We are therefore not in agreement with the conclusion of the authorities below that mistake is simply a clerical and procedural mistake of either side in mentioning the full name of the existing entity. Moreover, the appellant has duly informed the department vide its letter dated 1.12.2011 which was

acknowledged by the office of the Dy.CIT on 1.12.2011 with reference to the dissolution of the firm. For the sake of convenience, we reproduce the letter dated 30.11.2011 intimating the AO about the dissolution as under :

"Udani Mehta and Co,
Chartered Accountants
Tushar D Udani
B.Com(Hon)LLB(Gen),FCA,

Ref :No:---------- *Date November 30th, 2011*
ACIT/NE/2011-12

To,
The Asstt.CIT,
Circle 16(2),
Mumbai.

Re : M/s Nahar Enterprises, PAN AAAFN1599D,
Intimation of dissolution of firm.

With reference to the above and under instructions from our clients and as required u/s 176(3) we have to inform you that consequent to conversion of the firm, M/s Nahar Enterprises, into a company by the name of M/s Nahar Builders Ltd' under part IX of the companies Act, 1956, the above referred firm has been dissolved w.e.f. end of 20.11.2011. Copy of the Deed of dissolution is enclosed herewith.

Thanking you

Yours faithfully,
(Udani Mehta)
CA

Under these circumstances, when the department has been fully informed about the dissolution of the firm, new company has taken over the business of the old firm before initiation of search proceedings, than the issue of

Punchanama in the name of dissolved firm cannot be valid. In our opinion, when the search under section 132 was conducted and to be valid, the warrant and notice should be issued in the name of successor only and the assessment has to be made on the successor but in the present case Punchanchama was drawn in the name of M/s Nahar Enterprises on a non-existing entity and so was the case and is not a clerical mistake.

15. On a query from the Bench to ld.DR to satisfy regarding the service of search warrant on Nahar Builders Ltd and to place before the Bench the said satisfaction respectively, the ld. DR declined to reply the question by submitting that the Bench has no jurisdiction to call for such record and expressed his inability to place before the Bench. Therefore, in this case since the department could not establish that the search warrant was issued in the name of the successor entity Nahar Builders Ltd, we therefore inclined to hold that the assessment proceedings initiated and completed on the dissolved entity Nahar Enterprises are nullity in the eyes of law as has been laid down in the various decisions discussed hereunder:

16. In the case of *Spice Infotainment Ltd.* v. *CIT* [2012] 247 CTR 500 (Delhi), the Hon'ble High Court of Delhi has held as under:

> *"3. In this backdrop, the question that arises for consideration is as to whether the assessment in the name of a company which had been amalgamated and had been dissolved with the said amalgamating*

company will be null and void or whether framing of assessment in the name of such a company is a mere procedural defect which can be cured. The appeals were, thus, finally admitted and heard on the following questions of law : "(i) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the action of the AO in framing assessment in the name of 'Spice Corp. Ltd.', after the said entity stood dissolved consequent upon its amalgamation with MCorp (P) Ltd. w.e.f 1st July, 2003, was a mere procedural defect ? (ii) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that in view of the provisions of s. 292B of the Act, the assessment, having in substance and effect, been framed on the amalgamated company which could not be regarded as null and void ?"

4. The rationale given by the Tribunal, giving it to be a mere procedural defect is summed up as under :

> *(i) Spice Corporation Ltd. (the amalgamating company) was an income-tax assessee in the status of a company incorporated under the provisions of Companies Act, 1956.*
>
> *(ii) The amalgamating company was in existence during the relevant asst. yrs. 2002-03 and 200304.*
>
> *(iii) The returns of income for these assessment years were filed on 30th Nov., 2002 and on 30th Oct., 2003 respectively by M/s Spice.*
>
> *(iv) The scheme of amalgamating was sanctioned much subsequently on 11th Feb., 2004 by the High Court.*
>
> *(v) The return filed by M/s Spice was selected for scrutiny and notices were issued. Pursuant thereto, the amalgamated company i.e. the appellant appeared and participated in the proceedings. Even the assessment orders were challenged by the appellant/amalgamated company. Thus, the appellant accepted that the assessment proceedings in respect of the assessment of Spice for the period prior to its amalgamation are being taken up against the appellant and it is the appellant which felt aggrieved of the assessment order and preferred appeal. The order was thus in substance and in effect, against the*

appellant/amalgamated company. The mere omission on the part of the AO to mention the name of the appellant/amalgamated company in place of M/s Spice was, therefore a procedural defect covered by the provisions of s. 292B of the Act

5. According to the Tribunal, if the Spice was non-existent, there was no reason for the amalgamated company to represent the same or to feel aggrieved against the said order and prefer appeal and get the same decided on merits. In other words, any appeal preferred by a nonexistence person must also be treated as non est. All these acts of the appellants/amalgamated company clearly show that it had been constantly treated the assessment made against the appellant in respect of the assessment of amalgamated company. Further, no prejudice is caused to the assessee merely because in the body of the assessment order name of the amalgamated company is not shown.

6. On the aforesaid reasoning and analysis, the Tribunal summed up the position in para 14 of its order which reads as under : "In the light of the discussions made above, we, therefore, hold that the assessment made by the AO, in substance and effect, is not against the non-existent amalgamating company. However, we do agree with the proposition or ratio decided in the various cases relied upon by the learned counsel for the assessee that the assessment made against non-existent person would be invalid and liable to be struck down. But, in the present case, we find that the assessment, in substance and effect, has been made against amalgamated company in respect of assessment of income of amalgamating company for the period prior to amalgamation and mere omission to mention the name of amalgamated company along with the name of amalgamating company in the body of assessment against the item 'name of the assessee' is not fatal to the validity of assessment but is a procedural defect covered by s. 292B of the Act. We hold accordingly."

7. The aforesaid line of reasoning adopted by the Tribunal is clearly blemished with legal loopholes and is contrary to law. No doubt, M/s Spice was an assessee and as an incorporated company and was in existence when it filed the returns in respect of two assessment years in question, however, before the case could be selected for scrutiny and assessment proceedings could be initiated, M/s Spice got amalgamated with MCorp (P) Ltd. It was the result of the scheme of the amalgamation filed before the Company Judge of this Court which

was duly sanctioned vide orders dt. 11th Feb., 2004. With this amalgamation made effective from 1st July, 2003, M/s Spice ceased to exist. That is the plain and simple effect in law. The scheme of amalgamation itself provided for this consequence, inasmuch as simultaneous with the sanctioning of the scheme, M/s Spice was also stood dissolved by specific order of this Court. With the dissolution of this company, its name was struck off from the rolls of companies maintained by the RoC.

8. A company incorporated under the Indian Companies Act is a juristic person. It takes its birth and gets life with the incorporation. It dies with the dissolution as per the provisions of the Companies Act. It is trite law that on amalgamation, the amalgamating company ceases to exist in the eyes of law. This position is even accepted by the Tribunal in para 14 of its order extracted above. Having regard to this consequence provided in law, in number of cases, the Supreme Court held that assessment upon a dissolved company is impermissible as there is no provision in income-tax can to make an assessment thereupon. In the case of Saraswati Industrial Syndicate Ltd. vs. CIT (1990) 88 CTR (SC) 61 : (1990) 186 ITR 278 (SC) the legal position is explained in the following terms : "The question is whether on the amalgamation of the Indian Sugar Company with the appellant company, the Indian Sugar Company continued to have its entity and was alive for the purposes of s. 41(1) of the Act ? The amalgamation of the two companies was effected under the order of the High Court in proceedings under s. 391 r/w s. 394 of the Companies Act. The Saraswati Industrial Syndicate, the transferee company was a subsidiary of the Indian Sugar Company, namely, the transferor company. Under the scheme of amalgamation the Indian Sugar Company stood dissolved on 29th Oct., 1962 and it ceased to be in existence thereafter. Though the scheme provided that the transferee company the Saraswati Industrial Syndicate Ltd. undertook to meet any liability of the Indian Sugar Company which that company incurred or it could incur, any liaiblity, before the dissolution or not thereafter. Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each

blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly amalgamation does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See Halsburys Laws of England 4th Edition Vol. 7 para 1539. Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."

9. The Court referred to its earlier judgment in General Radio & Appliances Co. Ltd. vs. M.A. Khader (1986) 60 Comp Cas 1013 (SC). In view of the aforesaid clinching position in law, it is difficult to digest the circuitous route adopted by the Tribunal holding that the assessment was in fact in the name of amalgamated company and there was only a procedural defect.

10. Sec. 481 of the Companies Act provides for dissolution of the company. The Company Judge in the High Court can order dissolution of a company on the grounds stated therein. The effect of the dissolution is that the company no more survives. The dissolution puts an end to the existence of the company. It is held in M.H. Smith (Plant Hire) Ltd. vs. D.L. Mainwaring (T/A Inshore) (1986) BCLC 342 (CA) that "once a company is dissolved it becomes a non-existent party and therefore no action can be brought in its name. Thus an insurance company which was subrogated to the rights of another insured company was held not to be entitled to maintain an action in the name of the company after the latter had been dissolved".

11. After the sanction of the scheme on 11th Feb., 2004, the Spice ceased to exist w.e.f. 1st July, 2003. Even if Spice had filed the returns, it became incumbent upon the IT authorities to substitute the successor in place of the said 'dead person'. When notice under s. 143(2) was sent, the appellant/amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the appellant on record. Instead, the AO made

the assessment in the name of M/s Spice which was non-existing entity on that day. In such proceedings an assessment order passed in the name of M/s Spice would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the appellant would be of no effect as there is no estoppel against law.

12. Once it is found that assessment is framed in the name of non-existing entity, it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of s. 292B of the Act. Sec. 292B of the Act reads as under : "292B. No return of income assessment, notice, summons or other proceedings furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reasons of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceedings is in substance and effect in conformity with or according to the intent and purpose of this Act.

13. The Punjab & Haryana High Court stated the effect of this provision in CIT vs. Norton Motors (2006) 200 CTR (P&H) 604 : (2005) 275 ITR 595 (P&H) in the following manner : "A reading of the above reproduced provision makes it clear that a mistake, defect or omission in the return of income, assessment, notice, summons or other proceeding is not sufficient to invalidate an action taken by the competent authority, provided that such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the provisions of the Act. To put it differently, s. 292B can be relied upon for resisting a challenge to the notice, etc., only if there is a technical defect or omission in it. However, there is nothing in the plain language of that section from which it can be inferred that the same can be relied upon for curing a jurisdictional defect in the assessment notice, summons or other proceeding. In other words, if the notice, summons or other proceeding taken by an authority suffers from an inherent lacuna affecting his/its jurisdiction, the same cannot be cured by having resort to s. 292B."

17. In the case of CIT V/s Intel Technology India (P.) Ltd. [2016] 380 ITR 272 (Karnataka), the Hon'ble High Court of Karnataka held as under :

> **"5.** The tribunal had rejected the claim of the department on the ground that the assessment proceedings against SSS Limited (which was non-existent on the date of passing of the assessment order) cannot be held to be valid proceedings, learned counsel for the appellant has submitted that the return of income had been filed by the assessee-SSS Limited much prior to the amalgamation order dated 1.4.2004 and as such, the proceedings would continue against the said company even after the amalgamation, especially when the successor company - M/s Intel Technology India Pvt. Ltd. had participated in the proceedings. Learned counsel for the appellant further submits that the department would be entitled to the benefit of Section 292(B) of the Income Tax Act.
>
> **6.** On the other hand, learned counsel for the respondent has submitted that any proceeding against a non-existing company would be null and void, especially after the respondent/company (which had succeeded M/s SSS Limited) had given notice of amalgamation to the department on 29.6.2004. It is thus submitted that after the issuance of the demand notice, it was for the department to substitute the respondent company in the proceedings for assessment and by not having done so, the entire assessment proceedings would be null and void. In support of his submission, learned counsel for the respondent has placed reliance on a Division Bench decision of the Delhi High Court rendered in *Spice Infotainment Ltd.* v. *CIT* [IT Appeal Nos. 475 & 476 of 2011, dated 3-8-2011]. It is contended that the facts of the present case are similar, if not identical, to the facts in the case of *Spice Infotainment Ltd.* (*supra*) wherein the Delhi High Court has, after considering the various provisions of the Income Tax Act as well as certain decisions of the Apex Court and other High Courts, clearly held that the framing of assessment against the non-existing entity/person goes to the root of the matter which is not a procedural irregularity, but, a jurisdictional defect and as there cannot be any assessment against the dead person.
>
> **7.** In the present case also, the proceedings had been initiated against a non-existing company/SSS Limited even after the amalgamation of the said company with M/s Intel Technology India Pvt. Ltd.. We do not

see any good ground to differ with the said judgment of the Delhi High Court.

8. Accordingly, for the reasons given in the judgment of the Delhi High Court in the case of *Spice Infotainment Ltd.* (*supra*), these appeals are dismissed and we decide the substantial questions of law in favour of the assessee and against the revenue."

18. In the case of CIT V/s Micron Steels (P.) Ltd. [2015] 372 ITR 386 (Delhi), the Hon'ble High Court of Delhi has held as under :

"The Revenue in these appeals claims to be aggrieved by the order of the Income-tax Appellate Tribunal ("the ITAT"), dated February 19, 2013. The Income-tax Appellate Tribunal had affirmed the order of the Commissioner of Income-tax (Appeals) who had set aside the block assessment of M/s. Micron Steels Pvt. Ltd. (the original assessee which subsequently amalgamated with M/s. Lakhanpal Infrastructure Pvt. Ltd. with effect from February 1, 2008, by virtue of an order dated February 19, 2010). The assessment years in question are 2003-04 to 2008-09.

2. *The grounds on which the Commissioner of Income-tax (Appeals) and later the Income-tax Appellate Tribunal set aside the assessment was that the assessee had amalgamated with M/s. Lakhanpal Infrastructure Pvt. Ltd. and neither was it assessed in the relative periods and that the amalgamation of the original assessee corporate had rendered the assessment framed against it as void.*

3. *The facts relevant for deciding this appeal are that on October 20, 2008, a search and seizure action was conducted in the cases of B.K. Dhingra, Smt. Poonam Dhingra, M/s. Madhusudan Buildcon Pvt. Ltd. and others connected. Based upon the said search, and the materials secured during that proceedings, block assessments were finalised in respect of those assessees. The Assessing Officer ("the AO") was of the opinion that during the course of the search, materials were seized which belonged to the respondents-assessees and, accordingly, issued notice to M/s. Micron Steels Pvt. Ltd. on July 6, 2010. By that time, M/s. Micron Steels Pvt. Ltd. as noticed at the outset in this judgment had been amalgamated with M/s. Lakhanpal Infrastructure Pvt. Ltd. The assessment was finalised on December 31, 2010, by the Assessing Officer. In the course of assessment, various additions were made.*

This was the subject-matter of appeal to the Commissioner of Income-tax (Appeals). It was urged in the appeal that on account of amalgamation and by operation of section 170 of the Income-tax Act the income-tax authorities were under a duty, upon receipt of information, to initiate complete proceedings against the transferee company which they had not done. This plea was accepted by the Commissioner of Income-tax (Appeals), who, inter alia, noted that on October 19, 2010, since the Assessing Officer changed, on account of an administrative order, an intimation was received by the Assessing Officer on November 18, 2010, stating that M/s. Micron Steels Pvt. Ltd. no longer existed on account of the amalgamation order, dated February 19, 2010. The Commissioner of Income-tax (Appeals) guided by various previous decisions of this court, formed the opinion that the contentions of the respondent-assessee was substantial and that the assessment orders as framed, were unsustainable. He, accordingly, set aside the assessment order.

4. *The Revenue's appeal was rejected. The Income-tax Appellate Tribunal relied upon several judgments including one of the Division Bench of this court in Spice Entertainment Ltd. v. CST [I.T. Appeal No. 475 of 2011, dated August 3, 2011] the Income-tax Appellate Tribunal held as follows :*

> *"8. We have carefully considered the submission in this regard and perused the records. We fully concur with the finding of the learned Commissioner of Income-tax (Appeals) that a company incorporated under the Indian Companies Act is a juristic person. It takes its birth and gets life with incorporation and it dies with the dissolution as per the provisions of the Companies Act. On amalgamation, the company ceases to exist in the eye of the law. Thus, assessment upon a dissolved company is impermissible as there is no provision in the Income-tax Act to make an assessment thereupon. The learned Commissioner of Income-tax (Appeals), in our view, has, therefore, rightly held that the assessment on a company which has been dissolved by amalgamation under sections 391 and 394 of the Companies Act, 1956, is invalid. Admittedly, the assessee-company in the present case stood dissolved on September 19, 2010, on amalgamation with M/s. Lakhanpal Infrastructure Pvt. Ltd. and the assessment order in the present case was framed on December 31, 2010. Hence, we uphold the order of the learned Commissioner of Income-tax (Appeals).*

9. In view of the above finding on the maintainability of the assessment order itself, which has been held to be a nullity, the issue raised in the other grounds of appeals preferred by the Revenue and cross-objections raised by the assessee have become infructuous and they don't need adjudication."

5. *It is urged on behalf of the Revenue that the assessment as framed could not have been set aside. To say so, the learned counsel, firstly, contended that the Assessing Officer took note of the fact that the M/s. Micron Steels Pvt. Ltd. had been amalgamated as is evident from the fact that the assessment was framed in respect of "Micron Steels", and, consequently, the assessee effectively participated and made its view on its own and filed its return. Learned counsel contended that the operation of section 292B, therefore, precluded the assessee's contention with regard to nullity of the entire proceedings.*

6. *This court notices, at the outset, that the issue urged is no longer res integra. As stated earlier, Spice Entertainment Ltd. (supra) is an authority for the proposition that completion of assessment in respect of a non-existent company, due to the amalgamation order, would render assessment in the name and in respect of the original assessee-company, a nullity. In Spice Entertainment Ltd. (supra), after referring to Saraswati Industrial Syndicate Ltd. v. CIT [1990] 186 ITR 278/53 Taxman 92 (SC), this court held as follows :*

"9. The court referred to its earlier judgment in General Radio and Appliances Co. Ltd. v. M.A. Khader [1986] 60 Comp Cas 1013 (SC). In view of the aforesaid clinching position in law, it is difficult to digest the circuitous route adopted by the Tribunal holding that the assessment was in fact in the name of amalgamated company and there was only a procedural defect.

10. Section 481 of the Companies Act provides for dissolution of the company. The company judge in the High Court can order dissolution of a company on the grounds stated therein. The effect of the dissolution is that the company no more survives. The dissolution puts an end to the existence of the company. It is held in M.H. Smith (Plant Hire) Ltd. v. D.L. Mainwaring (T/A Inshore) [1986] BCLC 342 (CA) that 'once a company is dissolved it becomes a non-existent party and, therefore, no action can be brought in its name. Thus, an insurance company which was subrogated to the rights of another insured company was held not

to be entitled to maintain an action in the name of the company after the latter had been dissolved."

19. In the case of CIT V/s Micra India (P) Ltd (2015) 231 Taxman 809 (Delhi), the Hon'ble Delhi High Court has held as under:

> ***"10.*** *In the present case, no doubt there was participation during the course of assessment; however, the AO, despite being told that the original company was no longer in existence, did not take remedial measures and did not transpose the transferee as the company which had to be assessed. Instead, he resorted to a peculiar procedure of describing the original assessee as the one in existence; the order also mentioned the transferee's name below that of M/s Micra India Pvt. Ltd. Now, that did not lead to the assessment being completed in the name of the transferee company. According to the AO, M/s Micra India Pvt. Ltd. was still in existence. Clearly, this was a case where the assessment was contrary to law, as having being completed against a non-existent company. The ITAT's decision is, in the circumstances, justified and warranted.*
>
> ***11.*** *For the above reasons it is held that these appeals do not involve any substantial question of law and of liability. The appeals are accordingly dismissed."*

Therefore, following the above decisions, we hold that the assessment made u/s 143(3) r.w.s.153A are bad in law being nullity in the eyes of law as the search warrant was issued in the name of non-existing entity.The ground no 1 is accordingly allowed.

20. The issue raised by the assessee in the second ground of appeal is with respect to appointment of DVO being bad in law and therefore, the Valuation

Report prepared by the DVO which was relied upon by the lower authorities was also bad in law.

21. The facts of the case are that after search proceedings the matter was referred to the DVO for valuation, which was duly submitted by the DVO and relied upon by the AO and also in the First Appellate Proceedings. The assessee objected to the appointment of the DVO on the ground that the DVO was not a member of search party and therefore the report prepared by the DVO could not be relied upon.

22. We have carefully considered the rival contentions and perused the material placed before us. We find that the valuation office was engaged by the Department from Central Public Works Department, Government of India, who was technical expert. After perusing the provisions of section 132 (2) of the Act, we find in the search cases it is usually to take opinion of technical experts from the qualified engineers working in CPDW. In the case before us, the services of DVO was taken for the measurements of flats which in our opinion, no other person could have done better way as the matter being highly technical. We also find that due opportunity was given to the assessee by the department to controvert the finding of the AO by giving copy of the valuation report, so, in view of these facts we are of the considered view that the ground raised by the assessee has no substance and therefore, the ground raised by the assessee is dismissed.

23. On merits the assessee challenged the order of the ld.CIT(A) in denying the claim for deduction u/s 80IB(10) for including the flower bed area which is open to sky and not on floor level and 50% of common wall area as part of built up area prescribed under section 80IB(14) of the Act. The AO while completing the assessment included the service area, window projection, cupboard projection, sunken area (flower bed) and common wall area in arriving at the eligible limit of 1000 sq.ft. of built up area of each flat. The AO observed that after inclusion of these areas in built up area, the total built up area is exceeding 1000 sq.ft and therefore he denied the assessee the benefit of deduction 80IB(10) of the Act on various flats.

24. However, the ld. CIT(A) sustained the action of the AO in including sunken area (flower bed) and 50% of common wall area for the purpose of computing eligible area of 1000 sq. ft of built up area for the purpose of computing deduction u/s 80IB(10) of the Act.

25. The assessee before us filed detailed written submissions and argued extensively and submitted that the flower bed area should not be included in the definition of built up area as the flower bed area is below the floor level open to sky and outside the scope of definition of built up area. It was submitted that the flower bed area is open to sky and area open to sky including terrace shall not be included in the built up area. The ld. Counsel

also contended that when the survey was carried out on 2.2.2012 the allowability for claiming deduction u/s 80IB(10) was duly verified by the survey party. They have visited project site. They have conducted exercise during the course of survey with regard to measurement of flats by the CPWD, Departmental Valuation Officers. They have satisfied with the construction area of each flat i.e. built up area of each flat is within eligible limit of 1000 sq. ft. Therefore, it was contended that the report of the District Valuation Officer of the department cannot be brushed aside and the AO cannot rely on the subsequent DVO's report which was not based on the any scientific measurement but was taken on rough sketch taken by the DVO. It was contented that wide variation between the two valuation reports is practically not possible and therefore the subsequent valuation report prepared by the DVO without proper measurement cannot be the basis for denying the benefit u/s 80IB(10) of the Act. During the course of hearing before us, the assessee filed detailed submissions as under:

"**Assessee submission**:-

Core issue before. your honour related to calculation of Built-up area. As per working of assessee all flats are below 1000 sq. ft., however, as per revenue working some flats are more than 1000 sq. ft. This variation was arises due to misinterpretation of definition of Built-up area by revenue. Revenue had included area of flower-bed in calculation of built-up area by treating it as balcony even though flower bed is below the floor level and different from the Balcony due to following features:-

Feature	Balcony	Flower Bed
Covered By	3 Sides	Not Covered
Level	At floor	Below the Floor level
FSI Calculation as per DRC	Included	Excluded
Reflected in approved plan combined or separately	Separately	Separately
Starting Point	When Room ends	When Balcony ends

Thus, balcony and flower bed are completely different. Therefore, definition of "Built-up" area" given u/s 80IB(14)(a) is most relevant to determine the built-up area, which spell as under:-

a) "built-up area" means the inner measurements of the residential unit at the floor level including the projections and balconies, as increased by the thickness of the walls but does no include the common areas shared with other residential units

The deduction was provided for a housing project which is habitable in nature. If we read the definition word by word it is get clear that only habitable area is covered under the definition.

***First word "inner measurements of the residential unit at the floor level**":*

These words covers the carpet area which is actual habitable area used by the resident of the flat. Such areas are enclosed and surrounded by four walls and are at floor level.

Second Word ", including the projections and balconies, "

*The word start from "," and end with "," and rest of the word are in continuity and independently. Thus, the second word is attached with first word. Means i.e. area inside & outside but at floor level. Because when inner area is considered only when at floor level. therefore, the outer area will also be consider at floor level. The whole weight age is given in section is to word **"at the floor level**".*

After calculation of area as per first and second word, the area was further extended by third word independently which is as under:

Third word "as increased by the thickness of the walls"

As without wall residential unit will be open and under open area person cannot live. Therefore the WALL area will also be included. It is important to point that WALLS are always at floor level and without WALL unit cannot be completed.

After calculating inner, outer and wall at floor level, habitable area is arrived. In housing project, common area are also shared by the unit holder. But common area is not habitable independently and are shared with other residential units. Therefore, legislature specifically excluded the common area.

Thus, the crux of definition and intention behind definition is to ***"Include only habitable area which is exclusively built for a particular residential unit at floor level"***

In case of ***Poddar Ashish Developers ITA 3408/M/2010 ITAT*** *Mumbai also put their remark as under for the project which was approved on 16/12/2004 :*

> *Areas of a unit at the floor level used in the Act and the exception of areas with the level difference of 0.3Mts under the DCR had a greater significance, that same had not been used in the relevant provisions without any meaning or reason, that the areas stipulated under the DRC were to be with the level difference to the floor level are chajjas, flower beds, dry balcony etc. which difference of 0.3Mts under the DCR had a greater significance, that same had not been used in the were to be provided for proper ventilation, light and protection from weather to the actual useable area of the flat, that same were not on the same floor level as the useable flat area for the occupant and therefore under the definition of built up area those areas were not includable, that inner built up area and projection and balconies - and thickness of wall was to be included as per Act, that the certificate issued by the architect, gave typical floor plan, floor wise various accommodation in each flat and carpet area thereof, built up area of all the flats in each floor which tallied with the aggregate area of the flats shown in*

the agreements of sale, that assessee had taken the aggregate of the balcony area as the built up area of the flat, which prima facie appeared to be correct, considered under the definition of the built up area under the Act and DCR provisions. Thus, the Area below the floor even in inner side of outer side will not be consider while calculating built up area for section 80IB(14).

- *In this connection, relevant extracts of opinion given by **Shri. M.L.Bhakta, Senior Partner of Kanga and Co**, a leading firm of Solicitors, are reproduced herewith:*

*"17. It is well settled principle that a subject is **not be taxed unless he is taxable** within the strict meaning of the taxing statute. **The principle has been applied** is a plethora of cases, some of **which are cited below.***

*18. A **frequently-cited dictum of Rowlatt** J. in his judgment in case of Cape Brandy Syndicate v. IRC [1921) 1KB 64 at 71 is:*

" ... in a taxing statute one has to look merely at what is clearly said There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used"

19. Further, His Lordship the Hori'ble Bhagwati J. of the Supreme Court of India, in his judgment in the case of A. V. Femandez v. State of Kerala [AIR 1957 SC 657] stated the aforesaid principle as follows:

"In construing fiscal statues and in determining the liability of a subject to tax one must have regard to the strict letter of the law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed If on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the Legislature and by considering what was the substance of the matter"

20. The Hon'ble Supreme Court in the case of Mathuram Agarwal v. State of Madhya Pradesh [AIR 2000 SC 109J quoted with approval the judgment in the case of IRC V. Duke of Westminster (1936)AC 1 pp 19

and 24 (HL) wherein their Lordships held in respect of taxing statutes, that :

"The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case"

21. The above principle has been followed by the Hon'ble Supreme Court in the case of Union of India v. Azadi Bachao Andolan [AIR 2004 SC 1 107J wherein their Lordships accepted the following contention of the appellants:

" ... there is nothing like equity in a fiscal statute. Either the statute applies proprio vigore or it does not. There is no question of applying a fiscal statute by intendment, if the expressed words do not apply. "

22. Notwithstanding the aforesaid. the courts have also held that incentive provisions contained in a taxing statute are given a more liberal construction. In case of CIT v. Strawboard Manufacturing Company Limited [1989) 177 ITR 431 (SC) the Hon'ble Supreme Court has held that the law providing for concession for tax purposes to encourage industrial activity should be liberally construed. So also in the case of Bajaj Tempo Limited V. CIT [AIR 1992 SC 1622J the Hon'ble Supreme Court has accepted the principle laid down in the case of Straw board Manufacturing (supra).

23. As stated above Section 80-IB(14)(a) of the Act defines 'built up area' as under.

> *"Built up area means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units.*
> *(Emphasis supplied)*

24. In his Treatise entitled "Principles of Statutory Interpretation' 12al edition at page 180. Justice G. P. Singh (Recd.) states that:

"A definition which defines a word to mean A and to include Band C cannot. in its application. be construed to exclude A and to include only B and C.

25, In view of the above cited case law and principles of interpretation of statues, the provisions of Section 80-IB(14)(a) of the Act must be interpreted strictly . Therefore, for the purposes of Section 80-IB(10) of the Act, the areas of the . projections and balconies can be included, if and only if, the same are at the same floor level as the residential unit.

26. Another well settled principle of interpretation of statutes is that the Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the Legislature will not be accepted except for compelling reasons. This principle has been applied by the Hon'ble Supreme Court in case Aswini Kumar Ghose Arabinda Bose [AIR 1952 SC 369J wherein it was held that:

> *"it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage. if they' can have appropriate application in circumstances conceivably within the contemplation of the statute"*

27. The aforesaid judgment was cited with approval by the Hon 'ble Supreme Court in the case of State of Orissa & Ors. v. Joginder Patjoshi & Anr. [AIR 2004 SC 1039J. In view of the aforesaid. in the present case, as the projections and balconies are at a level lower than the floor level of the residential unit. in our opinion, the same cannot be included while calculating the built up area of the unit for the purposes of Section 80-IB(lO) Act as such inclusion would render the phrase 'at the floor level' used in the definition of 'built up area' in Section 80-IB(14)(a) of the Act, redundant"

- *Scope of Built up area as defined under the* ***Development Control Regulations of Greater Mumbai, 1991 and its harmonious construction*** *with the definition prescribed under the Income Tax Law is very must in this connection, relevant extracts of* ***opinion given by Shri. S.H.Kapadia, Former Chief Justice of India****, are reproduced herewith:*

> *"As per the DC Regulations of Greater Mumbai 1991, Built up area means the area covered by a building on all floors including cantilevered portion if any but expecting the areas excluded specifically under these regulations.*

Further as per Sec 80IB(14)(a) of the Income Tax Act, 1961, Built up area has been defined ***to mean*** *"the* ***inner*** *measurements of the residential unit* ***at the floor level, including*** *projections and balconies, as increased by the thickness of the walls but does* ***not include*** *the common areas shared with the other residential units"*

In the instant case, the Ld.AO has failed to give due weightage to the expression ***"at the floor level"****. The Corporation has given Occupation Certificate on the basis that any area which is not at a floor level is not to be counted in the BUA after excluding areas specified in the regulations. Thus, balcony area is included in the BUA as approved by the Corporation, whereas flower bed area, dry balcony area and ornamental projections, which are not at the floor level, are not I ncluded in the BUA as defined as per the DC Regulations of Greater Mumbai, 1991. This has also been* ***the practice*** *followed by experts who have deposed in favour of the appellant, copies of which have already been placed on record during assessment proceedings.*

The Ld. AO has wrongly included Flower Bed Area, etc in the BUA. These areas have not been defined in the DC Regulations nor in the IT Act. Hence, the decision of the Corporation under DC Regulations could not have been brushed aside by the Ld. AO on extraneous reasons. The Ld. AO has observed that since BUA has been defined in section 80 IB[14](a) which contains the words "means" and "includes", the said definition should be read broadly and not narrowly.

According to ***GP Singh on Interpretation of Statutes****, the definition which defines a word or a term [****like BUA in this case****} to mean A and to include Band C, cannot in its application be construed to exclude A and to include only Band C. [see :* ***Page 130****, 13th* ***edition****). The word "includes" enlarges the meaning of the words in the the first part, but the word "includes" cannot exclude the words "****at the floor level****", which expression finds place in the "means" part of the definition of BUA u/s.80IB [14j(a}. If the ornamental projections are not* ***at the floor level****, they cannot be included in the BUA.*

The AO has erred in not giving weightage to the words "at the floor level" in the "means" .part of the definition. Accordingly on the basis of the above, ***there is no conflict between definition of BUA in section 80 IB[14[(a} and DC Regulations"***

- *Even department appointed valuer in case of M/s Sonam Builders while calculating the area as per section 80IB (14)(a) excluded the area of flower bed which are below the floor level from the calculation of Built-up area.*

In support of our contention we rely on following judicial pronouncement:-

Poddar Ashish Developers ITA 3408/M/2010 ITAT

Facts:-

As regards 3 BHK units, AO held that flower bed, drybalcony, window projections should be taken as part of the built up area of the flat, that such total area being in excess of the prescribed limit of 1000 Sq.ft.

Finding*:-*

"1O. 7 What all areas are taken into accounts to make up the built up area of a Flat needs to be understood at this stage before concluding whether the built up area of any flat violated the norms prescribed under the provisions of section 80IB(10) of the Act.

10.8 It is relevant to mention that the floor plans as sanctioned by the MCGM and attached to the occupation certificate issued, include the calculation of flat and floor area, in the said sanctioned plan. The concept of built-up area under the IT Act and under the development control Regulations are as under:

(i) Under and for the purpose of section 80IB(1 O} provisions, the Built up area has been defined to mean "the inner measurements of the Residential unit at the floor level, including the projections and

balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units"

(ii) Under the development control regulations of Maharashtra, the Built up area has been defined to means "Built-up area means the area Covered by a building on all floor including cantilevered portion , if any, but excepting the area excluded specifically under these Regulations"

The areas excluded specifically under these Regulations, among other things, are - a chajja, cornice, weather shade, sun -breaker over a balcony or gallery, its projection not exceeding from the balcony or gallery face with level difference of 0.3 m. in relation to the floor level. However ornamental projection over a balcony or gallery may be allowed to project up to 0.75m. "Balcony means a horizontal projections, including a parapet, hand-rail balustrade, to serve as a passage or sitting out place .

10.9. By a combined reading of the provisions of the Income tax Act and the Development control regulations, it transpires that the areas of a unit at the floor level used in the I T Act and the exception of area with the level difference of 0.3 Mts under the DCR have a greater significance. They have not been used in the relevant provision without any meaning or reason. The areas stipulated under the DCR to be with the level difference to the floor level are chajjas , flower beds, dry balcony etc. which are to be provided for proper ventilations, light and protection from weather to the actual useable flat area of the flat. They are not on the same floor level as the useable area for the occupant and therefore under the definition of built up area, these areas are not includable. However, inner built-up area and projection and balconies and thickness of wall is to be included as per IT Act, 1961. The counsel referring to the sanctioned plans filled before me which was also filed before the AO, submits that the DCR allows a part of the balcony not exceeding 10% of the carpet area of the flat to be on the same floor level and the same could be enclosed with the wall. He submits that the DCR however does not take such balcony area as consumption of FSI available in relation to the plot area. It is free of FSI under the DCR. But, the same being on the floor level as that of the flat, the appellant has included the balcony area in The calculation of the built up area. To the same effect is the certificate issued by the architect, which is on records of the AO. The sheet shown as CHE/ 8711/ BP(WS}AP 11/11 is the relevant plan referred. It gives typical

floor plan, floor-wise various accommodation in each flat and carpet area thereof, built up area of all the flats in each floor which tallies with the aggregate area of the flats shown in the agreements of sale, permissible balcony area, actual balcony area which in case of the flat appears to be slightly in excess of what is allowable and the total built up area of the flats in each floor. The appellant has taken the aggregate of the flat area and the balcony area as the built up area of the flat, which prima facie appear to be correct, consider under the definition of the built up area under both IT and DCR provisions"

Naresh Wadhwani ITA No. 18/PN/2013

All projections and elevations at the floor level are liable to be included in the definition of 'built-up area' *for the purposes of examining the condition prescribed in clause (c) of section 80IB(10) of the Act. The learned CIT-DR also raised an issue that the built-up area for the purposes of clause (c) of section 80IB(10} of the Act has to be understood in the light of what has been sold by the assessee builder to the respective customers. According to the learned CIT-DR, though the said aspect is not emerging from the orders of the authorities below, so however, the built-up area as understood for the purposes of sale-purchase between builder and the ultimate buyer can also be relevant factor to consider as to what all areas are to be considered as a part of the expression 'built-up area' contained in clause (c) of section 80IB(10) of the Act.*

(i) The intention of legislature in inserting the provisions of Sec 80lB 14(a) w.e.f. 01.04.2005 has to be read in consonance with the provisions of Local Plan Approving Authority governi.ng and regulating the construction, regularization and development of housing projects. The Carpet areas, Wall areas, Built-up area, ornamental projections, sunken area, balcony, service slabs,· dry balcony, cupboard area are all defined under various sections and provisions of Development Control Regulations of Greater Mumbai, which is the Supreme body and the most appropriate authority in case of development of housing projects.

(ii) It is a settled history that no two Acts work in the opposite manner. They need to be harmonious and in consonance with each other. In case of development of housing projects also, the local Authority has to work in consonance with Environment Act Regulations to maintain the

Natural Environment. Likewise the intention of Income Tax Act and the legislation also works in consonance with DC Rules& Regulations provided by the Local Authority. The definition of Built up areas as per IT Act providing the floor level concept has greater significance and importance attached to it. The DC Rules have provisions of floor level difference in case of ornamental projections to claim areas of free FSI and accordingly, the definition of Built -up area was amended w.e.f. 01..04.2005 specifying the floor level concept with regards to projections and balconies so that any areas including projections and balconies, if at floor level shall form a part of Built -up area. This proves beyond doubt that intention of legislature was to have harmony with local development laws. Even the section was designed on the basis of DRC Rules. The concept of at floor level and area open to Sky was based on the Section 30 DRC Rules, for ready ref. Sec. 30 were produced below:-

Section 30, features permitted in open spaces (DCR 1991)
(e) *a chajja, cornice, weather shade, sun-breaker and other ornamental projection projecting not more than 1.2 m from the face of the building No chajja, cornice, whether shade, sun-breaker or other ornamental projection, etc shall be permissible, which will reduce the width of he required open space to less than 2.5 m;*

f) A chajja, cornice, weather shade, and sun-breaker over a balcony or gallery, its projection not exceeding from the balcony or gallery face with level difference of 0.3 m in relation to the floor level. However, an ornamental projection over a balcony or gallery may be allowed to project upto 0.75m"

As per DRC also chajja below the floor level treated as "AREA OPEN TO SKY". That's, why in the section 80IB(14)(a) at floor level area was counted and area below the floor level was not counted in built-up-area calculation.

ONE MORE IMPORTANT POINT:- *As per the Principal of In pari material (Upon the same matter or subject) of statutory interpretation that when word used in statute was not define in the act, then meaning of that word has to be determined in light of other statutes on the same subject matter. The meaning of area open to Sky was not given in income tax act. Therefore, the word open to sky has to be*

determined as per the DRC rules which are the most appropriate statute on measurement of area for development of housing project. As the Flower Bed below the floor level is termed as area open to sky and area open to sky are clearly excluded from the definition of built up area, therefore flower bed required to be reduced from calculation of built-up area.

iii) And further, Intention of any incentive provision/ amendment is not to override the local law which is governing authority for development of housing projects in the city of Mumbai. The underlying eligibility of Sec 80lB (10) is the approval of Housing Project by a local authority. However if the plan is not approved by the local authority, no claim of deduction u/s 80lB(10) is allowed. Accordingly if once the plan is sanctioned and approved how can the built up area sanctioned and certified by the local Authority clearly excluding the projections such as flower bed, be completely ignored.

iv) The plans are approved by the Municipal Corporation under the provisions of Sec. 37 of the Bombay Municipal Corporation Act and Sec. 43, 44 & 45 of the MR&TP Act, 1966. These approved plans provide detailed calculations of various areas included for working out the FSI consumed on the plot and the detailed plans of each Plot consisting of various Flats. The calculations are of Carpet areas, Balcony areas, "Built up area" of each floor and various elevation features are also shown on the Plan in terms of Plan· and cross sections through the Building. These Plans clearly show the Floor Levels as also Levels of various projections permitted in the sanctioned Building Plans. It is clear from scrutiny of the Plans that Balconies are permitted in level with the Floor of the entire Flat whereas there is definitely a level difference between the floor of the flat and the various elevation features such as Flower Beds, Service Slabs, Ducts, Voids: and various such elevation features incorporated thereat.

v] After completion of the Building, the Building Completion Certificate /occupation Certificate is granted by Municipal Corporation and these Plans show the work actually carried out at side. Accordingly it couyld be said beyond doubt that the local authority is the sole authority to govern and decide whether the area is below /above 1000 sq. ft.

(vi) ***Provisions of section 80IB(10) itself empowers local authority on various stages for eligibility to claim deduction u/s 80IB(10).***

The underlying eligibility of section 80IB(10 is highlighted and is solely dependent on the various provisions and approval of local planning and approving authority i.e. in the case of the assessee, MCGM;

i) The housing project has ***to be approved by the local authority***

(ii) The housing project has to be ***completed within the period of four/five years*** *from the end of financial year in which the housing project* ***is approved by the local authority.***

(iii) Where in respect of the housing project, approval has been obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is ***first approved by the local authority****.*

(iv) The date of completion of housing project shall be taken to be the date on which the ***completion certificate in respect of such housing project is issued by the local authority****.*

(vii) The appellant would again like to elaborate and emphasize that in respect of the housing projects, the built up area constructed and sold by the appellant is less than 1000 sq. ft (Built up area) which is clearly verifiable from the following deeds and documents:

(a) Sanctioned and Approved plan of Local Authority
(b) Commencement Certificate issued by Local Authority.
(c) Occupation Certificate issued by the Local Authority.
(d) Completion Plans issued and certified by the Local Authority
(e) Licensed BMC Architect Certificate & Expert Opinions on interpretation of Built up area
(f) Letter of Allotment dearly reflecting Built up area below 1000 sq.ft.
(g) Copy of Registered Agreement for Sale reflecting the Built up area below 1000 sq.ft.
(h) Municipal Rateable Value Assessment Bill which collects property tax on area less than 1000 sq.ft.
(i) Auditors Certificate in Form 1OCCB duly certifying Built up area less than 1000 sq.ft.

Accordingly, on the plain reading of the provisions of Sec 801B(10) it is crystal clear that the intention of the legislature is not to override or ignore the approvals or sanctions in respect of areas (Carpet and Built up area) given the local authority governing the entire development of housing projects. Moreover to substantiate further the purpose of projections such as Flower bed, and their interpretation as per the definition of Built up area, an expert opinion of Licensed Engineer and Surveyor Mr. Rajesh Shah has been: enclosed herewith for your· reference (Paper Book Page No. 175-180)

(viii) However it is pertinent to note that department has grossly erred in not appreciating the working mechanism and the role of the governing authority in respect of Development of Housing Projects and its approval mechanisms which is the heart of the provisions of sec 801B(10). The relevant extract from the Ld. A.O. assessment order u/s 143(3) r.w.s 153. is reproduced as under:

> *"17.2.1 The assessee is under firm intention that BMC (Brihmumbai Municipal Corporation (hereinafter it will be referred as the MMC) is the ultimate authority in deciding the area as the Income Tax Act, 1 961. In this regard it is vital and irrefutable to note in view of the following points that the BMC is not the ultimate authority to rely, to decide, to certify and prove that the construction of the each unit! block/flat is less that 1000 sq ft and as per the wording and definition given in the Act itself-*

a. *The BMC just processes, takes into account and uerifes the documents, building plans and other written submission given/ submitted by the assessee. It is just mechanical procedural aspect on the part of the BMC to verify and thereby process the application received by it and consequently issue requisite certificates for building the housing projects.*

b. *The commencement certificate is being issued as a rule only before the actual commencement of the construction activities initiated.*

c. *They have no mechanism to monitor whether construction is being done as the approved plans. No BMC mechanism to watch, monitor the construction activity by the Builder and Developer.*

That's why many disputes arose from construction activities by the Builder and Developers if there is any deviation from the approved plans.

d. *They do not know and may be in dark about the requisite conditions enumerated and laid down in the Act in the provision of section BOIB (10) . To prejudge and believe that BMC is knowledgeable and well versed with the provisions of the Income Tax Act, 1961 and specifically the provision of section BOIB (10). will be simple mistake.*

e. *The physical visit, personal verification and actual measurement by the departmental valuer (duly authorized as the Income Tax Act, 1961) and sacred powers given by the Act as per the provisions of section 132(1) of the Act cannot be disputed, disregarded and disagreed upon.*

f. *Mere obtaining commencement certificate and approved building plans from the BMC does not conclusively prove that BUA could be less than 1000 sq ft. The question is therefore that whether completed, existing bloc/ unit is as per the definition of BUA as given in the Act.*

g. *Most of us are well aware how BMC works and it works under extreme adverse conditions. It is not expected it to monitor each unit! block whether construction is as per the BUA as defined and written in the Act.*

h. *BMC is the local authority responsible for local construction activities in the jurisdictional area, planning of the city, to stop and control illegal, unplanned and uncontrolled construction. So it merely issues commence certificate, approves building plans"*

The appellant also submits that the Ld.AO has commented on the system of working and plan approval mechanism, monitoring of day to day working of construction work and issue of completion certificate. The above comments on the working of MCGM by the Ld. AO is not correct, baseless and without any reasoning. It is further submitted that MCGM is the highest and ultimate Government authority entrusted with the task of regulating housing construction, approval of

plan till issue of completion certificate, stopping unauthorized constructions etc. The local authority also takes a serious view on any lapses and imposes a heavy monetary penalty and other penal measures. Further the appellant had complied with all the terms and conditions of building plans and approvals and accordingly the MCGM has approved and certified that Buildings are duly constructed as per sanctioned plans and the appellant has been issued the Occupation certificate including water connections etc. Hence it is submitted that no cognizance of the comments of the Ld.AO on MCGM and its working mechanism should be taken into consideration.

Reliance is placed on the following:

"The Tribunal pointed out that as far as the construction of the building is concerned, the Local Authority, the Chennai Corporation, is the appropriate authority to regulate construction as per the building bye-laws and sanction plans. The Tribunal observed that when it is not disputed that the Corporation is the local authority, the certificate issued by it could not be disregarded. The building was inspected on 23.11.2007 by the Corporation local authorities and was found to be m accordance with the permit conditions. Looking from the angle of the role of the Chennai Corporation as well as Chennai Metropolitan Development Authority, the Tribunal pointed out that the certificate issued on 13.6.200B by the Chennai Metropolitan Development Authority cannot, in any manner, negate the relevance of the Corporation's certificate and the factual completion before 31.3.200B. Thus, the Tribunal held that when the completion of the project was well before 31.3.200B, the local authority had also certified the same, the assessee was entitled to succeed"	*CIT V/s M/s Sanghvi and Doshi Enterprises ITA No.581 and 582 of 2011 and 314 -315 of 2012 (Madras-HC)*
There is no evidence on record to suggest that the builder has constructed the residential unit with a built-up area of more than 1 000 Sq. ft. in violation of the master plan and sold to the purchasers. There is no dispute infact that as per the approved plans built up area of each residential unit is less than 1000 Sq. ft, and the residential units were sold by executing separate sale deeds. In such circumstances, merely because the purchaser has joined the flats and the built-up area of the flat is exceeded more than 1000 Sq. ft., the assessee cannot be denied benefit u/ s. 80IB(10) of the Act. More or less an identical issue has been considered by the Mumbai Bench in the case of Hawae Constructions (P) Ltd. V/S. ITO. *The appellant had furnished evidence to the Addl CIT of the following to show that the area of each flat is less than 1000 sq. ft.* *a) Approved building plans* *b) Area stated in the title deed registered with the Subregistrar*	*ACIT V/s M/s Samartha Development Corporation –ITA No.5477 to 5482/Mum/2012*

c) Area for which the sale amount was obtained *d) Area which was stated in the occupation certificate issued by the local authority .* *No physical verification of any of the building was carried out during the course of survey of the built up area of any of the residential unit. The only evidence that the wing had was the statement of Shri Abhiram Bhattacharjee who stated that he had purchased 3 flats 1407, 1408 and 1409 in Building no 24 and the same was purchased as a single flat.* *The Inspector sent by the AO has not found any single instance wherein in the sale deed the fiat is of more than 1000 sq. ft. Neither the Addl CIT nor the AO has found any discrepancy in the following evidence filed by the appellant.* *a) Approved building plans* *b) Area stated in the title deed registered with the Sub registrar* *c) Area for which the sale amount was obtained* *d) Area which was stated in the occupation certificate issued by the local authority.*	
We have heard both the sides, perused the record and gone through the orders of the authorities below. The CIT(A) after considering the paper book filed by the assessee gave a specific finding that as per the agreement, the carpet area of the three flats 780 sq.ft. only. He further gave a finding that built up area and super built up area worked out separately by the assessee. On perusal of the details of sale of flats with agreement value, the built up area comes to 1092 sq.ft. Thereefore, the assessee fulfilled the conditions of the built up area as required by section 80IB(10) and allowed the claim of the assessee. The learned DR simply supported the order of the AO and nothing was brought on record to contradict the above findings given by the CIT(A). We, therefore) find no infirmity in the order of the CIT(A) and uphold the same, dismissing the ground raised by the revenue.	*Addl.Comm. of IT, Financial Services ITA No.5498/M/2010*

"***Built up area" is to be considered as on the day when the assessee had sold, and handed over the possession of the residential unit to the buyer;***

The assessee humbly submits that the residential flats after having sold, registered and even physical possession been handed over to the buyers and later on, if such purchaser had extended his/her flat and had encroached the area below the floor level and the area outside the residential unit, then the assessee cannot be blamed of such unauthorized extension. <u>In short, the "built up area" is to be considered as on the day when the local authority issues the</u>

<u>Occupation Certificate</u>. However in the instant case the Ld. Assessing Officer has considered all the areas whether carpet area, wall areas or for that matter even the projections as on the date of search, which is almost 5 to 6 years from the date the appellant has sold all alleged residential units. Accordingly the appellant makes a humble prayer to consider the Built up area as on date of Occupation Certificate issued by the local authority.

"The local authority, after construction of the building, inspected the building and granted the occupancy certificate. Therefore the construction put up by the assessee prima facie could be said in accordance with the sanctioned plan. If after the issue of the occupancy Certificate and sale of these residential flats, the owners of the flats decided to put up a head room and engaged the very same contractor and the engineer may have put identical structures, it could not be said that the assessee had put up the construction and thus contravened the requirement of section 80IB(10)"	*CIT v/s G R Developers* *(2013) (353 ITR 1) (Karnataka HC)*
It has been held that If, at the later stage, the allottees/ occupants of the flats makes any addition, the assessee cannot be held liable for their omissions/ acts, the claimed deduction u/s 8OIB(10) of the Act cannot be disallowed. *a. Harware Construction Pvt. Ltd vs ITO (2011) 64 DTR 251 (Mum)* *b. Sanghavi & Doshi Enterprises vs ITO (2011) 60 DTR 406 (Chennai)(TM)(Trib.)* *c. ITO vs AIR Developers (ITA No.447/Nag/2007)* *d. M/s Global Reality vs ITO (2012) 134ITD 407 (Indore)* *e. ITO VS M S VARDHAN BUILDERS ITA NO. 4635 MUM 2013*	

There is no evidence on record to suggest that the builder has constructed the residential unit with a built-up area of more than 1000 Sq. ft. in violation of the master plan and sold to the purchasers. There is no dispute in fact that as per the approved plans built up area of each residential unit is less than 1000 Sq. ft, and the residential units were sold by executing separate sale deeds. In such circumstances, merely because the purchaser has joined the flats and the built-up area of the flat is exceeded more than 1000 Sq. ft., the assessee cannot be denied benefit u/s. 80IB(10) of the Act. More or less an identical issue has been considered by the Mumbai Bench in the case of Haware Constructions (P) Ltd. VS.ITO.	ACIT vs M/S SAMARTHA DEVELOPMENT CORPORATION ITA NO. 5477 TO 5482/MUM/201

"*In such a situation, it is not possible to draw the inference that the appellant builder built the residential flats of more than 1500 sq.ft. of built-up area and the impugned units were combined by the appellant before handing over possession of flats to the purchasers in violation of the condition in clause (c) of sec.80IB(10). If each residential*	Kasturi Housing Pvt. Ltd. vs. Addl CIT [ITA No. 1231/PN/2008 & 1382/PN/2010)

unit does not exceed the built-up area of 1500 sq.ft. as per approved plan, the fact that they were joined together by the flat holders for better living or for more space or for any other reason does not disentitle the appellant to the claim for deduction u/s 80IB, particularly when these changes in the flats were made after handing over possession of flats to the flat holders.	

"It was not also the case of the Commissioner that each flat in the sing projects undertaken by the assessee could not have been used an independent or self-contained residential unit not exceeding 1,000 square feet of built-up area and that there would be a complete, habitable residential unit only if two or more flats were jointed with each other, which would ultimately exceed 1,000 square feet of built-up area. In such a situation, merely because 9 out of 140 purchases desired to join the flats purchased by them into one single unit, which exceeded 1,000 square feet of built-up area, could not disentitle the assessee to the deduction. If each residential unit did not exceed the built-up area of 1,000 square feet, the fact that they were joined together by the purchasers for better living or for more space or for any other reason did not disentitle the assessee to the claim for deduction under section 80-IB."	G. V. Corporation [133 TTJ 178]

Deduction cannot be disallowed on conversion of residential area into commercial use by the purchaser.	ACIT Vis Shree Ostwal Builders Ltd (ITA No. 2144/Mum/ 2010 & ITA No. 2153/Mum/ 2010)

There is no dispute that each of the 32 flats has been constructed as per the building plan as duly approved by Municipal authorities having 225 Sq. ft. area each, which is much less than the prescribed limit. There is also no dispute that each of the flat is an independent and separate residential unit. If after the sale of these flats, the end-user of the flats using these flats for non-residential purposes would not render the construction of these flats as non-residential units. *It is pertinent to note that what is required under section 80-IB(10) is residential unit and in the absence of anything to the contrary in the IT Act, the expression 'residential units' must have the same connotation as assigned to it by the local authorities granting approval to the project. When there is no dispute about the facts that these flats were constructed as standalone residential unit as per the approved plan and also as per the completion certificate, then any use of non-residential purpose of these flats by the end-user being transferred by the assessee would not change the nature of the residential unit in the housing*	Smt Manju Gupta V/s ACIT (2011) 15 taxmann.com 287 (Mum)

project. Therefore, subsequent use of the flats for non-residential purpose would not be considered as construction of commercial establishment by the' assessee in the housing project and therefore, deduction under section 80-IB(10) cannot be declined because of these reasons.	

The measurement taken by the ;d.DVO were not taken accurately and were rough and approximate. The wall thickness adopted by the Ld. DVO for calculation purpose wee on he higher side as compared to those approved as per the plan sanctioned by the MCGM.

The appellant totally disagrees with the measurement undertaken by the Income tax valuer. The measurements of various flats taken by the department's valuer are not taken accurately. From the sketches drawn by the Ld. DVO during the course of search, it can be seen that the measurements and calculations are rough and approximate (Copy enclosed in PB 53-57) Even the calculation of Carpet areas are not taken accurately. Further, the measurements taken by department valuer are not taken exactly to the scale and the calculations are not made in precise manner, rather have been roughly worked out. The appellant measurement sheets submitted and approved at all sages of approvals are made using a scientific and most appropriate method i.e. AutoCAD Software.

What is AutoCad Software and its usefulness?

Computer-aided design and drafting (CADD) is the process of using a computer with CADD software to design and produce drawings and models according to specific industry and company standards. AutoCAD is a universal CADD software program that applies to any drafting, design or engineering discipline. For example, use AutoCAD to design, architectural buildings, civil and structural engineering projects. AutoCAD provides commands and options to accurately create 2D drawings for buildings design and constructions and architectural floor plan of a flat. Architectural Design is an important part to generate various buildings designs that satisfy all the purposes and plays a critical role in making of digitized format for rough and handmade sketches. It was done traditionally on paper in past time. In the present era, manual architectural designs are become old technique and due to that architects have developed various software like AutoCAD. ***Accordingly, the carpet areas and the wall areas as***

calculated and depicted as per the AutoCAD are accurate and precise as compared to the rough sketches of the Ld. DVO.

The Ld. DVO was not justified in brushing aside the built up area certified by the recognized architect and approved engineers appointed by the appellant which had been approved by the BMC and other authorities on the basis of which the commencement and Occupation certificate are issued to the appellant. The department's valuer in hasty manner erroneously included the wall areas of the sunken areas also as a part of wall area and no separate working of the wall of sunken areas were given by Ld DVO Report. ***Accordingly during the appellate proceedings before Ld CIT (A), the appellant was directed by Ld. CIT(A) to bifurcate the total wall area as calculated by the DVO into wall area and wall of sunken areas such as service slabs, flower bed and window projection****. The exercise was undertaken and a detailed bifurcation of the same was provided during the appellate proceedings which was duly accepted by Ld. CIT -(A) and on that basis, the relief was adjudicated by Ld. CIT (A) in respect of flats whose Built up area did not exceed 1000 sq.ft.* ***The relevant finding of the same is reflected on Pg. 58 (Para 29) of the Ld. CIT-(A) order dated 02/03/2015****. Hence taking the base of areas of Ld. DVO and duly accepted and adjudicated by Ld. CIT (A) during the appellate proceedings, we hereby attach the detailed working of the residential units measured by the Ld. DVO as per "****Annexure A" t****o this submission.*

- ***Common area and area open to sky is not part of the built-up area.***

Common area defined in section 80IB(10) is clearly stated that a area which is shared with any other unit i.e. shared' with even a single unit is consider as common area. Hence, common area will be excluded from the built-up area calculation.

The Above issue is also elaborated by hon'ble HIGH COURT OF KARNATAKA in case of CIT V/s Raghavendra Constructions IT Appeal No. 177 of 2011 and held as under:-

> *"14(a) "built- up area means the inner measurement of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units. "* ***8.*** *Therefore the intention m clear. In calculating the built-up area it is only the inner measurements of the residential unit on the floor level, which has to be taken into consideration.. If there are any projections and balconies and if it exclusively belongs to the residential units, then, that also has to be taken into consideration for deciding the built-up*

area. However, if the residential unit is provided the facility of common area shared with other residential units such common area have to be excluded while computing the built-up area. The language employed in defining built-up area as the common area shared with other residential unit, it does not mean that every common area should be shared with other residential units. If that area does not exclusively belong to the owner of residential unit and if he has to share that common area with the owner of another residential unit, then that common area has to be excluded from the built-up area.. If this principle is kept in mind and applied to the facts of this case, in respect of 16 flats, the common area is shared by these 16 owners of residential units. In respect of A-1 and A-2 the common area is shared by the owners of flats A-1 and A-2. This common area is not the subject matter of sale as is clear from the recitals in the sale deed. In other words, the owners of the residential units do not have exclusive right to use these balconies as they have to share it with others. It is immaterial whether they have to share it with other 159 owners of the residential units or they have to share it with the adjoining owner of the residential unit, that area cannot be taken into consideration to decide the built-up area. From the facts, it is clear that if this balcony space is excluded all the160 units are less than 1500 sq.ft and therefore the assessee was entitled to 100% tax exemption on this project However; the Appellate Authority as well as the Tribunal have not extended the said benefit to 16 residential units. As the assessee has not preferred any appeal against the said order, it will not be appropriate for this Court to extend the said benefit in these proceedings. However, as the law stands today, in view of the interpretations placed by them on the aforesaid provisions, the assessee has not violated the provisions of Section 80- IB (10) of the Act and in fact was entitled to 100% tax exemption on the profits derived from the project. Therefore the substantial question of law framed is answered in favour of the assessee and against the revenue.

In present case also service areas are common areas whereas flower bed are areas open to s not surrounded by four walls and hence shall not form a part of Built up area.

Further bed area is open to sky hence, cannot be considered while calculating built-up a as decided by various judicial authority as under:-

Finding	Judgment
We are unable to uphold the stand of the Assessing Officer to include area of terrace as a part of the 'built up in a case where	*a}Naresh Wadhwani ITA No. 18/ PN/2013*

such terrace is a projection attached to the residential unit and there being no room. under such terrace, even if the same is available exclusively for use of the respective unit holders. -	
To claim deduction under section 80-IB(10), open terrace area cannot form part of built up area .	*b) Ceebros Hotels (P.) Ltd. v. Dy. CIT TC No.581,1186 of 2008 and 136 of 2009 (Mad HC)* *c) CIT v/s Mahalakshmi Housing [2014J 41 taxmann. com 146 (Mad HC)* *d) CIT v/s Sanghvi and Doshi Enterprise TAX CASE (APPEAL) No.581 & 582 OF 2011 and 314 & 315 of 2012 M.P. No.1 of 2011 (Mad HC)*
Whether definition of built-up-area as provided in Act is inclusive of balcony which is not open terrace - Held, yes - whether since open terrace being -not part of balcony/ verandah lower authorities were not justified in denying deduction to assessee by considering same as part of built-up area - Held, yes	*e) Amaltas Associates v. ITO [2011] 11 taxmann.com 420 (Ahd.)*
Area of courtyard which is open to sky and appurtenant to residential unit is not to be included to compute built-up area in terms of section 80IB(10)	*f) Commonwealth Developers V/s ACIT (2014) 44 taxmann.com 303(BHC),*

Quick Point of non-inclusion of below area in built-up area.

Flower Bed

Department Ground:-*Can be used as Balcony. Hence, it is a Balcony and covered under the*

definition of the built-up area. There is no signification of level difference.

Our Reply:

The Ld. AO confirmed by Ld. CIT(A) had included area of flower-bed in calculation of built-up area by treating it as balcony even though flower bed is below the floor level and different from the Balcony due to following features:-

Feature	*Balcony*	*Flower Bed*

Covered By	*3 Sides*	*Not Covered*
Level	*At floor*	*Below the Floor level*
FSI Calculation as per DRC	*Included*	*Excluded*
Reflected in approved plan combined or separately	*Separately*	*Separately*
Starting Point	*When Room ends*	*When Balcony ends*

Thus, balcony and flower bed are completely different. Further Regulation 3 of D.C.R specifies for various ornamental features etc to be created at O.3m below the floor level. This arrangement is made so that the water accumulated from flower pots or from rains shall be drained and shall enter the main living area as this ornamental feature (flower bed) are open to outside without any enclosure permissible. The ornamental feature per se is not the "Residential" area as the same is purely for increasing greenery and beauty/aesthetic of the building."

26. We find considerable force in the submissions of the assessee that the flower bed area and common wall area are not includible in the definition of built up area while calculating the eligible limit of 1000 sq. ft for the purpose of allowing deduction u/s 80IB(10) of the Act. The flower bed area is open to sky and not covered by any sides whereas balcony is covered with three sides. The flower bed area is few inches below floor level. It is the submission of the assessee that the flower bed area is outside the balcony area and the starting point for the flower bed area is a point where the balcony area ends.

27. In the case of ITO V/s Poddar Ashish Developers in ITA No.3408/M/2010 dated 12-03–2014, the co-ordinate Bench of the Tribunal has considered the situation as to whether the areas of a unit which is not

on floor level whether should be includible in the definition of built area or not and the co-ordinate Bench held:

> *"10.9 By a combined reading of the provisions of the IT Act and the Development control regulations, it transpires that the area of a unit the floor level used in the IT Act and the exception of area with the level difference of 0.3 Mts under the DCR have a greater significance. They have not been used in the relevant provisions without any meaning or reason. The areas stipulated under the DCR to be with the level difference to the floor lever are chajjas, flower beds, dry balcony etc which are to be provided for proper ventilations, light and protection from weather to the actual useable flat area of the flat. They are not on the same floor level as the useable area for the occupant and therefore under the definition of built up area, these areas are not includable.*

In the case of Commonwealth Developers V/s ACIT (2014) 44 taxmann.com 303, the Hon'ble Jurisdictional High Court held that *"Area of courtyard which is open to sky and appurtenant to residential unit is not to be included to compute built-up area in terms of section 80-IB(10)"*

28. Therefore as could be seen from the above, the co-ordinate Bench held that chajjas, floor bed, dry balcony etc which are below floor level shall not be included in the definition of built up area.

29. It was further contended before us that the flower bed area is ornamental and elevative feature provided on the outer side of the residential unit, these are not habitable area, provided mainly for the elevation or designing part of the building, such area are not covered by wall of either sides and hence did not constitute the inner part of the residential unit which

makes it a non habitable area. Therefore, it was contented that since the flower bed area are open to sky and not covered by the wall it cannot be counted in built up area. For the proposition that an area open to sky cannot be included in built up area, the assessee relied upon the following cases:

i) Naresh Wadhwani –ITA No.18/PN/2013;
ii) Ceebros Hotel (P) Ltd V/s DCIT TC NO.581,1186 of 2008 and 136 of 2009 judgment dated 19.10.2012 (Madras High Court);
iii) CIT v/s Mahalakshmi Housing (2014) 41 taxmann.com 146 (Madras High Court);
iv) CIT V/s Sanghvi and Doshi Enterprise Tax Case (Appeal) Nos. 581 and 582 of 2011 and 314 and 315 of 2012 MP No.1 of 2011(Madras High Court)
v) Amaltax Associates V/s ITO (2011) 11 taxmann.com 420 (Ahd);
vi) Commonwealth Developers V/s ACIT (2014) 44 taxmann.com 303 (Bom)

30. After considering the rival submissions and materials placed before us including the decisions of the rival parties we find that the flower beds which are below the floor level can not form part of constructed area of flat for the purpose of determining the eligibility of the assessee to deduction u/s 80(IB)(10) of the Act.

31. Coming to the Revenue's appeals, the department has challenged the orders of the ld.CIT(A) in directing the AO to exclude the service area, window area, window projection, cupboard projection from the definition of built up area for calculating the deduction u/s 80IB(10) of the Act and the eligible area of 1000 sq. ft. The ld. CIT(A) excluded the said services area, cupboard projection and window projection by observing as under :

c. **Cupboard projections**:

The next objection is about inclusion of cupboard area. It is gathered that cupboards are normally carved out of wall area only. In some cases, cupboards may be projected a few inches outside the walls. Considering the facts of the case, I am of the view that as cupboard area is already included in the wall area itself, so separate addition on this account may not be warranted in built-up area. In some cases, when it is projected in other room, it would have already included in the area of other room. Therefore, separate addition in this regard may not be warranted. I, therefore, hold that cupboard area. is not liable to be added separately in the built-up area and wall area will take care of it.

d) ***Service area:*** *Next issue is relating to inclusion of service areas. The service area is in the nature of service pipe duct, which continues from top floor to ground floor and carries service pipes, namely soil pipe, waste water pipe, water mains, etc. During the course of physical inspection of various apartments on 5/6/2014, it was noticed that this area is quite small and carries as many as 12 - 14 pipes - about 4 pipes having 4" diameter, about 3 pipes having 2" diameter, and some pipes having about one inch diameter. No doubt, a slab has been constructed at every floor and a door is provided in the bathroom to enter into the service area, But this area is primarily meant for repair of service pipes and it cannot be used for any other purposes. Further, this service duct is some kind of common area like stair case, flowing from top to bottom, and in case of any blockage of pipes or repair or leakage, etc, the mechanic has to enter this area for repairing the same. Generally speaking, this area, being small, cannot be used for any other purposes. This area has also not been sold by the assessee to the flat owners, as is evident from sale agreements. Further, it is also not part of the carpet area or BUA calculated by the BMC authorities. This is not also considered for FSI computation of the building, as per bye laws. In fact, on physical inspection, it was noticed that some of these pipes were leaking, giving a foul smell, and, therefore, I am of the view that it cannot be used for any other purposes. The photographs submitted by the assessee clearly show that these ducts are open and dangerous, and a child may in fact fall through it. These photos were forwarded to the AO for her comments. Also, for the sake of clarity, the same are enclosed as annexure to this order.Though the AO has enclosed some photos of such areas in*

respect of some flats, where such areas are being used towards storage, etc. by a few flat owners, but it is on their own peril and builder cannot be blamed for it. As per the bye laws, this area cannot be used for any purpose and flat owners are prohibited from doing so. But still, if some people, because of any reasons, are using the same for storage or putting a washing machine or a LPG cylinder, they are doing it on their own accord. Moreover, there is no evidence to suggest that the assessee has sold these areas to respective buyers, or otherwise, buyers own such areas. Therefore, the observation of the AO that such area was under exclusive possession of flat owners, remains unsubstantiated, as in my opinion, the flat owners may be using the area, but largely the area is meant for common facilities for all the flats and acts as duct for various kinds of facilities for all the floors. In any case, it does not alter the material position. Considering the overall facts of the case, I am of the opinion that this area. should not form part of the BUA, as it is in the nature of common area meant for all the flat owners from top floor to ground floor, and purpose of this area is to provide a platform for repair, and replacement of the service pipes, including soil pipe, waste water pipes, water mains, etc. Similar opinion' has been given by the other experts. Accordingly, considering overall facts of the case, I direct the AO to exclude this area from the BUA.

e) ***Window projections****:*

It is gathered that the Valuation Officer, in respect of some of the flats, has added certain area in the nature of window projections. During the course of physical inspection, it was noticed that these window projections are areas in the nature of ornamental projections done with a view to beautify the building. These areas are situated at window-sill level, about three feet above the floor level, and some kind of projections / extension of the building. In my opinion, these projections cannot be used for any purposes, because the area is highly unsafe and anybody can fall from such area. However, it was noticed that some people are using the area to put Air Conditioner, flower pots, etc. Considering the facts of the case, I am of the view that this is essentially an elevational feature and has nothing to do with carpet area of the flat. Therefore, it cannot form part of BUA. It is like a sill of a window, which is slightly extended and in some cases may be used for protection from sunlight and rain. It is also not the case that the builder has sold this area to various flat owners. Accordingly, this area

is also directed to be excluded. while calculating BUA. I would like to further clarify that this area is very small and still have very insignificant bearing upon overall BUA."

32. On going through the above findings of the ld. CIT(A), we do not find any valid reason to include service area, window area, window projections and cupboard projection in the built up area for calculating eligible built up area of 1000 sq.ft for the purpose of computation of deduction u/s 80IB(10) of the Act.

33. For the assessment year 2011-12 in ITA No.2854/Mum/2014 apart from the above common ground the following new ground has been raised:

" On the facts and circumstances of the case and in law the ld CIT(A) erred in upholding the action of the AO in treating two housing projects namely Jonquille-Jamaica and Laurel-Lilac as incomeplete by ignoring the part occupation certificate issued by the local authority on 31.03.2011 thereby disallowing the claim of deduction u/s 80IB(10) of Rs. 61,56,52,158/- without considering the vital facts that the occupation certificate is issued only after the building is deemed to be fit for occupation and all the possible sanctions and permissions with regards to fire, water, drainage, lift are received and for the purpose of 80(IB)(10) certificate from the local authority is proof for allowing the deductions u/s 80IB(10). "

34. The facts in brief are that the assessee part completed the the buildings namely Janquille, Jamaica, Laurel and Lilac upto 10th floor during the year and profits accruing therefrom of Rs. 61,56,52,158/- were claimed as deduction u/s 80(IB)(10) of the Act after obtaining a completion certificate from the municipal corporation qua the 10 floors on 31.3.2011.However the

AO disallowed the said deduction by holding that the for the purpose of claim of deduction , the completion has to be of entire project and in parts. The appeal of the assessee was also dismissed by the ld CIT(A) upholding the action of the AO that the entire project has to be completed and not in part as has been done in the instant case.

35. As regards profits derived of Rs.6156.52 lacs from housing projects comprising of the buildings, Jonquille, Jamaica, Laurel and Lilac, the ld AR submitted that the 10 floors in the said housing projects had been completed during impugned year and the completion certificate (OC) had been duly obtained on 30/3/2011 and according to the audited balance sheet as on 31.3.2011, the profits of the said project (10 floors) worked out to be Rs. 61,56,52,158/- and accordingly claimed the deduction u/s 80IB(10).The ld AR took us through the provisions of section 80(IB)(10) and submitted that according to the said provisions the assessee was fully entitled to the deduction u/s 80(IB)(10) which are as under:-

> Sec.80lB (10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008 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 1 st day of October, 1998 and completes such construction, -

(i) in a case where a housing project has been approved by the local authority before the 1st day of April, 2004, on or before the 31st day of March, 2008;

(ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1 st day of April, 2004 but not later than the 31 st day of March,2005, within four years from the end of he financial year in which the housing project is approved by the local authority:

(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five years from the end of the financial year in which the housing project is approved by the local authority.

Explanation -For the purposes of this clause,-

(i) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority;

(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority"

The ld. Counsel argued that a vital requirement of the incentive provision u/s 80IB(10)(a)(iii) is that the construction of the housing project should be completed within the time frame prescribed in the Section. In instant case, the plans of the above housing projects is approved after 01/04/2005, thus the construction is required to be completed before 31/03/201l. In impugned case, the construction of 4 buildings namely, Jonquille-Jamaica and Laurel-Lilac in the housing project had been completed ,in all respects of 10 floors before 31/3/2011 and even the completion certificate (also known as Occupation certificate {O.C}) from the local competent authority {BMC} had been obtained on 30/3/2011. In defense of his arguments the ld AR relied and referred to a numbers of decisions. In the case of CIT Vs Vandana Properties [2012J 76 DTR 363 (Bom), Bombay High Court has interpreted the meaning of the expression 'housing project'. It was held in this context that the expression 'housing project" is neither defined under section 2, nor under section 80-IB(10) of the Act. Even under the Mumbai Municipal Corporation Act, 1988, and also under the Development Control Regulations for Greater Mumbai, 1991, the expression 'housing project' is not defined.

Therefore, the expression 'housing project' in section 80-IB(10) would have to be construed as understood in common parlance. The expression 'housing project' in common parlance would mean constructing a building or group of buildings consisting of several residential units. In effect, the Explanation in section 80-IB(10) supports the contention of the assessee that the approval granted to a building plan constitutes approval granted to a housing project. Therefore, it is clear that construction of even one building with several residential units of the size not exceeding 1000 sq.ft. would constitute a 'housing project' under section 80-IB(10) of the Act.

32.3. In present case also appellant completed upto 10th floor which contains several residential units. Therefore, the building upto 10th floor itself is an housing project eligible for claiming deduction u/s 80IB(10). The appellant further submits that as per Explanation(ii) to Sec 801B(10), it is stated that "the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority." In impugned case, the local authority being BMC had issued the completion certificate on 30/3/2011 which would proved, beyond doubt, that the construction of the said housing project had been completed before 31/3/2011. The appellant further submits that obtaining of the completion certificate (O.C) from the local authority

(BMC) is the final proof to prove the completion of the construction of the housing projects and there is no further certification required to justify the completion of the project. It is also vital to note that words used in the Explanation is 'Shall" which means that the housing project is mandatorily required to be treated as completed on the date when the completion certificate is issued by the local authority (BMC). The appellant further submits that competent authority (BMC) on taking the physical inspection and on verification of various plan documents and certifications had issued the occupation certificate on 30.3.2011. The appellant further submits that once the competent authority had issued the completion certificate (O.C), then Income tax department have no authority to disbelieve the completion of the housing project. Your honour is requested to obtain the confirmation of the completion certificate (O.C) issued by BMC on 30/3/2011 and may also seek any clarification/basis of issuance of O.C from their department

36. The ld counsel for the assessee also submitted that the appellant during course of search on 02/02/2012 in statement recorded u/s 132(4) agreed to withdraw the claim of deduction u/s 801B(10) of Rs. 61,56,52,158/- and relevant extract of the recorded statement is reproduced as under ;-

> *"i) Sir, M/ s. Nahar Enterprises has claimed a deduction of Rs. 28,31,72,619/- on Jonquille and Jamaica and Rs. 33,24,79,539/- on*

Laurel and Lilac for AY 2011-12. The Part OC up to 10th Floor was obtained from BMC on 30.03.2011 for the purposes of shifting the furniture and not for actual occupation. Since as I understand, in this case, the firm will not be eligible for the deduction, since the project has actually not been fully completed till 31.3.2011, I as the chairperson of the group admit this fallacy and the same shall be withdrawn immediately"

The above statement clearly shows that the appellant, in recorded statement. had merely agreed to withdraw the claim of the deduction u/s 80IB(10) and had not actually withdrawn its claim otherwise eligible under the law. In fact, the said director had also stated that as Occupation certificate of 10 floors is obtained, thus the appellant had even allowed the flat buyers to shift their furniture with a general advice to reside after some time since internal construction work of balance 12 floors was in progress. The retraction cum clarification of the managing partner Mr. Sukhraj B.Nahar provided in his affidavit which is already placed on assessment record vide letter submission dated 29/01/2014 before Ld. AO.

37. The appellant humbly submits that any adverse inference on the basis of the statement of the managing partner may kindly not be drawn as such statement was given under stress, in confused state of mind and under serious confusion that the appellant would not be adversely effected since is not required to pay any tax and that the sales disclosed in audited P&L account would be treated as an advance(since Ld. DDIT(Inv) alleged that the

project is not complete and appellant consistently followed the project completion method) and that the appellant would be eligible to claim the deduction u/s 80IB in subsequent years.

On the issue that the completion of construction of the housing project, in part, is also entitled for deduction u/s 80IB(10), the appellant relied on understated direct judicial decisions

i) ITO vis. Saket Corporation 62 Taxman 38 (HC- Gujarat);
ii) CIT Vs. Tarnetar Corporation 26 Taxman 180 (HC- Gujarat);
iii) Ramsukh Properties V Is DCIT [2012] 25 taxmann.com 558;
iv) . Joharl-Iasan'Zojwalla vis DCIT ITA No. 581/Mum/2012;
v) Satish Bora & Associates Vs. ACIT ITA No. 713 & 7141 2010 (ITAT- Pune);
vi) Runwal Multihousing Pvt Ltd. vis. ACIT ITA No. 1015-1017/2011 (ITAT- Pune)
vii) *The City Development Corporation v] », DCIT ITA No. 1489/2009 & 1100/2010 (Pune- Trib)*
viii) Hindustan Samuha Awas Ltd V/s ITO ITA No. 945 to 950/2010 (ITAT-Pune)
ix) Surendra Developers V/s. DCIT ITA no.2743 to 2745/ 2010 (ITAT-Delhi)

Further it is pertinent to note that the appellant has received Full Occupation Certificate on 28 02/2014 in respect of the above two housing projects which has already been placed on assessment record filed at Page 62-65 of Paper book. Finally the ld AR argued that on the above proposition the housing projects were complete in all sense abd respect as being evidenced through possession of Part Occupation Certificate dated 30/03/2011 (now in possession of Full Occupation Certificate) and prayed before the bench to

kindly allow the claim of deduction in respect of these four towers amounting to Rs. 61,56,52,158/-.On the other hand the ld DR relied heavily on the order of authorities below and submitted that the concept of completion has to be considered with the reference to the completion of the entire project and no the part completion.

38. Having considered the arguments of the rival parties , perusing the records and impugned order including the case laws cited before us, we find that the BMC has issued completion certificate qua the 10 floors on which the assessee calculated the profits of Rs. 61,56,52,158/-.In our opinion based on the ratio laid down in the above decisions , the provisions of Act provides for the deduction of profits accruing from housing projects fulfilling the conditions as envisaged in section 80(IB)(10) irrespective of the fact whether the project is completed partly or wholly. In the instant case before us the BMC issued part completion certificate for 10 floors which testified that the 10 floors were complete. So far as the statement recorded during the search is concerned that has no significance in view of the part completion issued by the BMC. In view of our observations above and ratio in the decisions relied by the ld AR , we hold that the assessee was entitled to deduction of profits u/s 80(IB)(10) in respect of 10 floor completed.

39.. In view of the above discussion and observations, we are of the considered view that even on merits the assessee succeeds. In any case, we hold that the assessments in these cases are bad in law for the reason that the assessments were made on non-existing entity. In the circumstances, we quash the assessment orders passed under section 143(3) r.w.s.153A of the Act for the assessment years 2010-11 to 2012-13.

40. In the results, all the appeals of the assessee are partly allowed and that of revenue stand dismissed.

Order pronounced in the open court on 7th April, 2017.

Sd	**sd**
(Rajesh Kumar)	**(C.N. Prasad)**
लेखा सदस्य / Accountant Member	**न्यायिक सदस्य / Judicial Member**

मुंबई Mumbai; दिनांक Dated :7. 4.2017
SRL,Sr.PS
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

True copy

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai