

**IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM**

ITA No.962/Mum/2015

(A.Y:2003-04)

Income Tax Officer 3 rd Floor, C-10 R. No. 305 BKC Mumbai-400051	Vs.	R.J. Construction A-101 Krishant Bldg Opp Apollo Hospital M.G. RD, Kandivlai (W) Mumbai-400067 PAN No. AAAFR4765R
Appellant	..	Respondent
Assessee by	..	Keyuri Desai,AR
Revenue by	..	Aarsi Prasad, DR
Date of hearing	..	21-06-2017
Date of pronouncement	..	12-07-2017

ORDER

PER MAHAVIR SINGH, JM:

This appeal by revenue is arising out of the orders of CIT(A)-35, Mumbai, in appeal No. CIT(A)-35/ITO-25(3)(3)/ITA-546/2011-12 dated 07-11-2014. The Assessment was framed by ITO ward-25(3)(3), Mumbai for the A.Y. 2003-04 vide order dated 27-12-2011 u/s 143(3) read with section 254 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of Revenue is against the order of CIT(A) allowing the deduction under section 80IB of the Act. For this Revenue has raised following grounds: -

"(1) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 801B which was not claimed in the return of income."

(ii) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing on the basis of size of plot inclusive of plot of Bldg. A & B (while the Bldgs. A & B did not qualify for deduction under section 801B)"

(iii) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in treating the Projects D & G for the purpose of 801B to include size of plot of land of Bldg. A & B. The assessee filed to give details of area of land related to wing D & G."

(iv) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying upon Bombay High Court decision in the case Vandana Properties without appreciating the fact that the bldgs. A & B have already been completed and do not qualify for deduction and cannot be a part of plot for qualify for deduction u/s 801B in respect of project D & G."

3. Briefly stated facts are that the AO while completing original assessment, assessed the profit from D and G Wing at Rs. 14,26,800/- and Rs.14,55,000/- respectively as profit of the assessee and disallowed the claim of deduction under section 80IB of the Act. Finally, the matter went to Tribunal and Tribunal set aside the issue of claim of deduction under section 80IB of the Act pertaining to the profits of D and G Wing. During the second round, there was no compliance by the assessee before the AO and accordingly, the AO computed the profit of D and G Wing and disallowed the claim of deduction under section 80IB (10) of the Act. Aggrieved, assessee preferred the appeal before CIT(A). After considering the submissions of the assessee and noted the following facts: -

"The facts of the case are that the construction of the entire plot of 2.53 acres started in the year 1992 and building of Wing A & B was completed and possession was given to the members and tax was paid in 1996-97. Building No.2 was completed in 1995 which was considered of Wing 'A', 'B' & 'C' of

stilt + podium of 32+22+32 floors respectively and plinth C.C. was issued on 14.11.1995. The 2 BHK and 3 BHK luxurious flats Were proposed and completed, was commenced in the year 1996 and the work of 'C' wing was carried upto 9 slabs and Wing 'A' and 'B' was carried upto 1st slab only under approvals. However, subsequently due to adverse market conditions, work of Building No.2 in Wing 'A', 'B' & 'C' was stopped in 1999 and 'D' wing which was approved on 6.4.1999 and the commencement certificate upto the plinth level was granted on 27.10.99. Unapproved work of Wing 'A and 'B' was demolished upto the 1st slab. The work of '...' Wing was stopped at 9th slab only and the work is still not completed. The work of 'D' wing on ground, upper 7 floors commenced in 1999 and was completed in 2001. The floor area of Wing 'D' is 435 sq.ft. carpet area on each floor. In respect of Wing 'G' Building 3, IOD was obtained on 23.3.2010 and the construction was commenced in 2001 and completed in December, 2003 without obtaining commencement certificate. In Wing 'G', area of the flat 435 sq.ft each. In 2007, by an order of MCGM dated 25.4,2007, work of Wing 'c' 'D' and 'G' was regularized and Wing 'E' & 'F' were demolished.”

And finally, allowed the claim of the assessee by observing as under:-

“From the facts mentioned above, the picture that emerges is that while in entirety, the housing project commenced in 1992, however, with respect to Wing 'D' & 'C', commencement certificate and IOD is given only on 6.4.1999 and 2001 respectively thereby fulfilling the condition of Section 80IB(10). By 2007, both D' & 'C' had been regularized by MCGM. Therefore, the conditions as prescribed in

Explanation of sub-section (a) is also met with. The conditions at (c)(d)(e) & (f) are also found to be met, One issue of debate is that whether the condition. (b) of the project being on the size of plot of land which has a minimum area of 1 acre is met or not when the entire project was on 2.53 acres and if buildings 'P' & 'G' are to be treated as separate projects for the purpose of sub-section (a), then would not be condition (b) also required to be independently met for the project related to buildings 'D' & 'G'.

In this regard, reference is made to the decision in the case of Vandana Properties referred supra wherein the Hon'ble Bombay High Court have mulled over the issue and have decided that 801B(10)(b) specifies the size of the plot of land but not the size of the housing project. While the plot must have a minimum area of one acre, it need not be a vacant plot. The object of Section 801B(10)(b) is to boost the stock of houses. Though there can be multiple housing projects on a plot of land having minimum area of 1 acre. In the present case, therefore, it is see that the total plot of land being 2.53 acres, what is left to be seen is that whether the buildings D and C constituted independent housing project in terms of the commencement certificates and the completion certificates being issued by the concerned authorities. From the above facts, therefore, it emerges that the projects D and C are eligible for deduction under section 801B(10). Therefore, to summarize, it is seen that 3 main areas of concern raised by the AO are that - (i) what would be the date of commencement in the present case ? (ii) what would be the size of the plot

taken and (iii) whether the project D&G is to be taken as part of the entire project or independent?

As can be seen from the facts brought out above, the date of commencement of projects D & G are to be taken separately from the buildings A and B since the same have been initiated, approved and completed later. On the issue whether two buildings are to be taken as part of the housing project and therefore, whether acreages to be seen for D & G separately or for the entire project, the Humble Bombay High Court in the case of Vandana Properties referred supra holds; in favour of the appellant that it is for the revenue to see the entire project as one whole and it is not as if one acre needs to be fulfilled for each of the building. As clarified by the Hon'ble High Court, it is nowhere envisaged by the section that building must be made on a vacant plot and therefore, it is important that the entire plot should be above 1 acre and not that each of the building made on it, which are eligible for 80B(10) deduction, need to be one acre or more. Therefore, in light of all the above findings, it is decided that the appellant is eligible to claim 80B(10) deduction."

Aggrieved, now Revenue is in second appeal before the Tribunal.

We have heard the rival contentions and gone through the facts and circumstances of the case. We find that in second round, the CIT(A) asked for detailed remand report from the AO and AO vide remand dated 13-05-2013 discussed the entire facts and noted that the assessee has not claimed deduction under section 80B(10) of the Act in respect to profit on housing project Wing 'D' and 'G' during the course of first assessment proceedings and moreover, housing project Wing 'D' and 'G' cannot be taken as separate project and it is integral part of the whole

project which is commenced in the year 1993 and some part of the project is also offered for taxation by the assessee. The assessee contended that the project of building No.1 and Building No.2 has single plot and is single project whereas the approval was obtained at different part of time as the completion of project requires large span of time from a huge capital investment and liquidity. From the records, we noticed that the plan of building No.2 Wing 'D' was approved on 06-04-1999 and construction were started in 1999 and completed in 2001. Similarly, plan of building No.2 Wing 'G' was obtained on 23-03-2001 and construction work started in 'G'; and completed in December in 2003. It was stated that area of plot is 2.53 acres and the flat area in both the Wings i.e. Wing 'D' and 'G' is 435 sq. ft carpet area per flat. It was contended that the no commercial area is constructed in the project. Before us the learned Counsel for the assessee explained that this is a single project, the wing 'A' and 'B' buildings blocks specially when the second block kept separate by the assessee in which no deduction under section 80IB(1) of the Act was claimed initially, but it was claimed when the project was completed in the year under consideration. The AO in his remand report dated 31-05-2013 admitted that Wing 'D' and 'G' is also part of said project and hence deduction under section 80IB (10) of the Act is not eligible. But he also recorded that the Wing 'D' and 'G' cannot be taken complete project and it is an integral part of whole project which is commenced in the year 1999.

4. We find from the above facts that the work of Wing 'D' and 'G' was commenced on 1999 and 2001 and was completed in 2001 & 2003 respectively. This fact is very much noted by CIT(A) in his order that with respect to Wing 'D' and 'G' commencement certificate and IOD is given only on 06-04-1999 and 23-03-2001. This was regularized by **MCGM** in 2007, therefore, the conditions for claiming deduction under section 80IB of the Act has been fulfilled. As regards to the issue of size of complete of land which has a minimum area of 1 acre, when we find that the entire project was on a land of 2.53 acre this issue has been answered by the

Hon'ble Bombay High Court in the case of CIT vs. Vandana Properties (2013) 353 ITR 36 (Bom), wherein Bombay Hon'ble High Court held as under: -

“26. The object of Section 80IB (10) in granting deduction equal to one hundred per cent of the profits of an undertaking arising from developing and constructing a housing project is with a view to boost the stock of houses for lower and middle income groups subject to fulfilling the specified conditions. The fact that the maximum size of the residential unit in a housing project situated within the city of Mumbai and Delhi is restricted to 1000 square feet clearly shows that the intention of the legislature is to make available large number of medium size residential units for the benefit of the common man. However, in the absence of defining the expression 'housing project' and in the absence of specifying the size or the number of housing projects required to be constructed on a plot of land having minimum area of one acre, even one housing project containing multiple residential units of a size not exceeding 1000 square feet constructed on a plot of land having minimum area of one acre would be eligible for Section 80IB (10) deduction. If the construction of Section 80IB (10) put forth by the Revenue is accepted, it would mean that if on a vacant plot of land, one housing project fulfilling all conditions is undertaken, then deduction would be available to that housing project and if thereafter several other housing projects are undertaken on the very same plot of land, the deduction would not be available to those housing projects as the plot ceases to be a vacant plot after the construction of the first housing project. Such a

construction if accepted would defeat the object with which Section 80IB (10) was enacted.

27. *Moreover, plain reading of Section 80IB (10) does not even remotely suggest that the plot of land having minimum area of one acre must be vacant. The said Section allows deduction to a housing project (subject to fulfilling all other conditions) constructed on a plot of land having minimum area of one acre and it is immaterial as to whether any other housing projects are existing on the said plot of land or not. In these circumstances, construing the provisions of Section 80IB (10) by adding words to the statute is wholly unwarranted and such a construction which defeats the object with which the Section was enacted must be rejected.*

28. *Apart from the above, the Central Board of Direct Taxes (CBDT) by its letter dated 4th May 2001 addressed to the Maharashtra Chamber of Housing Industry has stated thus :*

"The undersigned is directed to refer to your letter No.MCHI:RSA:m:388/19799/3 dated 1st January 2001 and to state that the additional housing project on existing housing project site can qualify as infrastructure facility under Section 10(23G) and 80IB (10) provided it is taken up by a separate undertaking, having separate books of accounts, so as to ensure that correct profits can be ascertained for the purpose of Section 80IB and also to identify receipts and repayments of long term finances under the provisions of Section 10(23G), separately financing arrangements and also, if it separately fulfills all other statutory conditions listed in Sections 10(23G) and 80(B(10)). With regard to your query

regarding the definition of Housing Project, it is clarified that any project which has been approved by a local authority as a housing project should be considered adequate for the purpose of Section 10(23G) and 80IB (10)."

29. *From the aforesaid letter of CBDT, it is clear that for the purposes of Section 80IB (10) it is not the mandate of the Section that the housing project must be on a vacant plot of land having minimum area of one acre and that where a new housing project is constructed on a plot of land having minimum area of one acre but with existing housing projects would qualify for Section 80IB (10) deduction. Even otherwise, the argument of the Revenue does not stand to reason because, in the city of Mumbai where there is acute space crunch, it is difficult to find a vacant plot having minimum area of one acre and even if few such plots are existing it cannot be said that Section 80IB (10) deduction was intended to give benefit only to the undertakings who construct housing projects on those few plots. Therefore, it is clear that on a plot of land having minimum area of one acre, there can be any number of housing projects and so long as those housing projects are approved by the local authority and fulfill the conditions set out under Section 80IB (10), the deduction thereunder cannot be denied to all those housing projects. Section 80IB (10) while specifying the size of the plot of land, does not specify the size or the number of housing projects that are required to be undertaken on a plot having minimum area of one acre. As a result, significance of the size of the plot of land is lost and, therefore, the assessee subject to fulfilling other conditions becomes entitled to Section 80IB (10) deduction on*

construction of a housing project on a plot having area of one acre, irrespective of the fact that there exist other housing projects or not. In these circumstances, the decision of the Tribunal in rejecting the contention of the Revenue regarding the size of the plot cannot be faulted.”

5. In view of the above facts of the case and the judgment of Hon'ble Bombay High Court in the case of Vandana Properties (supra) we are of the view that CIT(A) has rightly allowed the claim of the assessee and we confirm the same.

6. **In the result, appeal of Revenue is dismissed.**

Order pronounced in the open court on 12-07-2017.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 12-07-2017
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//
BY ORDER,
Assistant Registrar
ITAT, MUMBAI