

आयकर अपील अाधिकरण, अहमदाबाद ँयायपीठ  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
"B" BENCH, AHMEDABAD

BEFORE, SHRI WASEEM AHMED, ACCOUNTANT MEMBER

And

Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 1597/AHD/2012

आयकर अपील सं./ITA No. 548/AHD/2010

&

आयकर अपील सं./ITA No. 2692/AHD/2012

जधाण वष/Asstt. Years: (2005- 06 & 2006-07)

M/s. Vaibhav Construction, Vaibhav Towers, Anand-Vidhyanagar Road, Anand-388001.  PAN: AABFV4757C	Vs.	Income Tax Officer, Ward-1, Anand.
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(Applicant)		(Respondent)
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Assessee by :	Shri Aseem L. Thakkar, A.R
Revenue by :	Shri O.P. Sharma, CIT.DR & Shri L.P. Jain, SR. D.R

सुनवाई क तारख/Date of Hearing : 11/09/2019

घोषणा क तारख /Date of Pronouncement: 25/10/2019

**आदेश/O R D E R**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned appeals have been filed at the instance of the Assessee against the separate orders of the Learned Commissioner of Income Tax (Appeals)-IV, Baroda [Ld. CIT(A) in short], arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-

in-after referred to as "the Act") relevant to Assessment Years (A.Y)s 2005-06 & 2006-07).

***First we take up ITA No. 1597/Ahd/2013 an appeal by the assessee for A.Y. 2005-06***

The assessee has raised the following grounds of appeal:

- 1. The Learned Commissioner of Income Appeals-IV, Baroda, erred in law and on facts in passing order u/s.154 of the IT Act 1961.*
- 2. The learned Commissioner of Income Tax (Appeals)-IV, Baroda, erred in law and on facts in confirming the action of AO to deny deduction u/s.80IB(10) of Rs.1974718/- to the appellant vide Order u/s.143(3) r.w.s 254 of the I.T Act, 1961, u/s.271(1)(c) of the Act/12/2010.*
- 3. The learned Commissioner of Income Tax (Appeals)-IV, Baroda, erred in law and on facts in holding that deduction u/s.80IB(10) is not allowable to the appellant.*

*The appellant craves liberty to add, alter, delete, amend or modify any of the ground mentioned herein above.*

2. The 1<sup>st</sup> issue raised by the assessee in ground No. 1 is that the Ld. CIT (A) erred in rectifying the order passed under section 143(3)/254 of the Act under section 154 of the Act.

3. Before dealing with the issues raised by the assessee in the grounds of appeal, it is pertinent to note the brief history of the case which goes as under.

3.1 The facts in brief are that the assessee in the present case is a partnership firm and engaged in the business of civil construction. It is the 2<sup>nd</sup> round of appeal before us. The ITAT on the earlier occasion has restored the

issue to the file of the AO in ITA No. 1729/AHD/2009 vide order dated 25<sup>th</sup>September, 2009 with the direction as detailed under:

16. *The facts involved in the case of the assessee are similar to the facts in the case of Radhe Developers (supra) and accordingly we are of the view that the assessee has acquired the dominant over the land and has developed the -/ housing project by incurring all the expenses and taking all the risks involved therein. We may mention here that, in our opinion, the decision in the case of Radhe Developers (supra) will not apply in a case where the assessee has entered into the agreement for a fixed remuneration merely as a contractor to construct or develop th housing project on behalf of the landowner. The agreement entered into in that case will not entitle the Developer to have the dominant control over the project and all the risks involved therein will vest with the landowner only. The interest of the Developer will be restricted only for the fixed remuneration for which he would be rendering the services. The decision in the case of Radhe Developers (supra) has not dealt with such situation. The proposition of law laid down in the case of Radhe Developers cannot be applied universally without looking into the development agreement entered into by the Developer along with the landowner. In the case of Shakti Corporation since the assessee has filed copy of the evelopment agreement and crux of the agreement is that assessee has purchased the land and has developed the rising project at its own, therefore, we are of the view t the assessee will be entitled for the deduction u/s B(10). The decision of the Hon'ble Supreme Court in the se of Faqir Chand Gulati (supra) will not assist the Revenue, as the agreement is not sharing of the constructed area. In other cases the copy of agreement since has not been submitted before us, if submitted , the terms and conditions of the agreement were not specifically argued before and placed before us, we therefore, in the interest of justice and fair play to both the parties set aside the order of the CIT(A) and restore all other appeals to the file of the AO with the direction that the AO shall, look into the agreement entered into by each of the assesseees with the landowner and decide whether the assessee has in fact purchased the land for a fixed consideration from the landowner and has developed the housing project at its own cost and risks involved in the project. In case the AO finds that practically the land has been bought by the Developer and Developer has all dominant control over the project and has developed the land at his own cost and risks, the AO should allow the deduction to the asses see u/s 801B(10). In case the AO finds that the Developer has acted on behalf of. the landowner and has got the fixed consideration from the landowner for the development of the housing projects, the asses see should not be allowed deduction u/s 801BHO) to the assessee.*

17. *In the result, all these appeals are allowed for statistical purposes."*

3. *Respectfully following the aforesaid order of the Tribunal, we set aside the order of the CIT(A) and restore the issue to the file of the AO with the direction to decide the issue*

*in the light of aforesaid decision of the Tribunal in the case of M/s Shakti Corporation (supra).*

From the above, it is clear that the ITAT directed the AO to look into the following facts:

- i. Whether the assessee has in fact purchased the land for consideration from the landowners AND
- ii. The assessee has developed the housing project at its own cost and risks involved in the project.

4. The AO in consequence to the direction of the ITAT issued the notice to the assessee for adjudicating the issue afresh under section 143(2)/ 142(1) of the Act. The assessee in response to such notice appeared before the AO and filed the necessary details.

4.1 However, the AO dismissed the claim of the assessee for the deduction under section 80IB(10) of the Act amounting to Rs. 19,74,720/- by observing that the area of the plot on which the development activity carried out was less than 1 acre. As per the AO, the condition specified under section 80IB(10) of the Act for requisite area of land approved by the local authority was not satisfied by the assessee. Accordingly, the AO disallowed the claim of the assessee in the order framed under section 143(3) read with section 254 of the Act vide dated 27-12-2010.

5. Aggrieved assessee preferred an appeal to the Ld. CIT (A) who has allowed the appeal of the assessee by observing that the issue for the area of plot of land has been considered by the ITAT in favour of the assessee. The Ld. CIT (A) also observed that the project has been developed by the assessee at its own cost and risks in its order dated 20-10-2011.

5.1 However, subsequently the ITO ward-1 Anand has filed rectification application under section 154 of the Act bearing No. wd-1/And/154/VC/2011-12 dated 7<sup>th</sup> of March 2012. It was submitted in the rectification application that the Ld. CIT (A) has decided the issue considering the area of plot of land exceeding 1 acre though the area of the land is less than 1 acre. The opinion of the Ld. CIT-A was based on the fact relating to the case of M/s Shakti Corporation which was not before him. As such the area of land in the case of the assessee is less than 1 acre. Accordingly, the ITO submitted in the rectification application under section 154 of the Act that the condition of section 80IB(10) of the Act has not been satisfied. As per the AO, the impugned mistake is apparent from record.

6. The Ld. CIT (A) after considering the application filed under section 154 of the Act observed that he had inadvertently held in his order that the area of the plot of land has already been considered by the ITAT in the order bearing ITA no. 1729/Ahd/2009 dated 25-09-2009. Accordingly the Ld. CIT (A) held that there is a mistake in his order dated 20<sup>th</sup>October, 2011 apparent from record which needs to be rectified.

6.1 Thus, the Ld. CIT (A) further held that the assessee does not hold 1 acre of plot of land approved by the local authority. Hence, the Ld. CIT (A) upheld the order of the AO dated 27<sup>th</sup>December, 2010 in his order framed under section 154 of the Act vide dated 9<sup>th</sup>May, 2012.

7. Being aggrieved by the order of the Ld. CIT (A), the assessee is in appeal before us.

8. The Ld. AR before us submitted as follows:

1. The assessee firm had filed the return of income for A.Y.2005-06 on 31.010.2005 declaring total income of Rs. Nil after claiming deduction u/s. 80IB(10) of the Act amounting to Rs.19,74,718/-. The assessee firm has developed and constructed a scheme by the name of "Vaividhya Bunglows". The assessment came to be completed u/s. 143(3) of the Act vide order dated 31.12,2007, The copy of the assessment order passed u/s. 143(3) is placed on page 56 to 61 of the PB.

2. The assessee firm has organized and developed a scheme by the name of "Vaividhya Bungalows". The housing scheme in question has been constructed on plot at FP No. 363 admeasuring 3700 Sq. Mtrs and in FP No. 364 admeasuring 733 Sq. Mtrs. As per the AO the "Rajachitthi" had been given for construction at F.P.No. 363 only during the year under consideration. Since the plot area of land in FP no. 363 was less than 1 acre, the assessee company was denied the benefit of the deduction u/s. 80IB(10) of the Act.

3. An appeal had been filed against the aforesaid order and. the Ld. CIT(A) vide his order dated 27,03.2009 confirmed the disallowance. The copy of the **appellate order has been** placed on **page 52 to 55 of the PB**. It was contended during the appellate proceedings before CIT(A) that during the assessment proceedings it was informed vide letter dated 31.12.2007, that in the year under appeal the assessee firm was the owner of two plots namely FP No.363 & 364 was 4433 sq. intrs (3700+733) and if both of them were taken into consideration the area of land was exceeding 1 acre, which fact was not taken into cognizance by the AO resulting in rejecting the claim of deduction u/s 80IB(10) of the Act. After calling for the remand report, the Ld. CIT(A) decided that the local Authorities approval in respect of FP No. 364 was on 18.08.2005 and therefore, during the relevant assessment year the approval was only in respect of FP No. 363 and the area of such FP No. 363 being less than 1 acre, the benefit of section 80IB(10) of the Act could not be granted.

4. The assessee firm had filed an appeal before the Hon. ITAT against the aforesaid disallowance. The Hon. ITAT vide order dated 25.02.2009 had set aside the matter back to the file of the AO. **The copy of the order passed by the Hon. ITAT is placed on page 1 to 48 of the PB**. Particular attention is drawn to Para 16 (refer page 47) wherein the conclusion in the case of M/s. Shakti Corporation on which reliance had been placed has been reproduced. On page 48, it has been directed as under. "3. Respectfully following the aforesaid order of the Tribunal, we set aside the order of the CIT(A) and restore the issue to the file of the AO with the direction to decide the issue in light of aforesaid decision of the Tribunal in the case of M/s. Shakti Corporation (Supra). 4. In the result, the appeal is allowed for statistical purpose. "

5. Therefore, there was a clear cut direction issued by the Hon. ITAT that the matter in question had to be decided in light of the decision of M/s. Shakti Corporation. In M/s. Shakti Corporation, the issue which had to be been decided was whether the assessee had acquired the dominance over the land and had developed the housing project by incurring all the expenses and taking all the risks involved. The issue of area of land was not adversely commented upon. This only goes to show that the Hon. Tribunal had accepted the fact that all other conditions with regards the claim of section 80IB(10) of the Act including the size of the plot were duly fulfilled and complied with. **It may also be pointed out the Revenue has neither filed any miscellaneous application nor approached the Hon. High Court against the order passed by the Hon. ITAT and therefore the same stands final and conclusive.**

6. In pursuance of the matter being set aside, fresh assessment proceedings were undertaken by the AO and assessment u/s. 143(3) r.w.s. 254 of the Act dated 27.12.2010 was passed by the AO. The AO once again disallowed the claim of deduction u/s. 80IB(10) of the Act. The reason assigned was that the perusal of the land purchase deed for Survey no. 364 revealed that the land in question was in the name of Smt. Pratikshaben Patel, Partner of Vaibhav Construction. However, there was failure to prove that the land at Survey no. 364 was transferred in the name of the assessee firm or the land was shown in the books of the assessee firm as "land brought in business capital" from the partner. In view of the same an inference was drawn that land has not been bought by the assessee developer. Apart from the above the AO has once again referred to the objections raised in the original assessment proceedings with regards the area of the plot being less than 1 acre and therefore, the condition of section 80IB(10) of the Act not having been complied with.

7. The assessee firm filed a further appeal against the aforesaid order and the Ld. CIT(A)-4, Baroda vide order dated 20.10.2011 allowed the appeal. The operative portion of the Ld. CIT(A) is appearing on page 5 and Para 7 of the order. The Ld. CIT(A) has categorically indicated that the issue regarding the area of plot land has been considered by the Hon. ITAT in favour of the assessee firm. The Ld. CIT(A) has also decided the issue that the land in question has been purchased for fixed consideration and the project has been developed by the assessee firm on this land on its own cost and risk involved and therefore, the claim of section 80IB(10) of the Act would be available to the assessee firm.

8. Thereafter, the Assessing Officer moved a rectification application u/s. 154 of the Act before the Ld. CIT(A)-4, Baroda. In pursuance of the rectification application, an order u/s. 154 of the Act with reference to the appellate order dated 20.10.2011 came to be passed which is subject matter of the present appeal. Therefore, the entire chronology of events is as under:

<i>Date</i>	<i>Event</i>	<i>Reference in PB</i>
31.12.2007	<i>Order passed u/s. 143(3) of the Act</i>	<i>Page 56 to 61</i>
27.03.2009	<i>Order passed by Ld. CIT(A)-4, Baroda</i>	<i>Page 52 to 55</i>
25.09.2009	<i>Order passed by Hon. ITAT, Bench - B</i>	<i>Page 1 to 48</i>
27.12.2010	<i>Order passed by the AO u/s. 143(3) r.w.s. 254 of the Act</i>	
20.10.2011	<i>Order passed by Ld. CIT(A) - 4, Baroda</i>	<i>Page 65 to 69</i>
22.08.2012	<i>Order passed by the Hon. ITAT against the Departmental appeal</i>	<i>Page 49 to 51</i>
07.03.2012	<i>Rectification application by ITO Ward (1), Anand before CIT(A)-4, Baroda</i>	
09.05.2012	<i>Order passed u/s. 154 of the Act by Ld. CIT(A)-4, Baroda</i>	

9. The assessee firm had filed an appeal against the order passed u/s. 154 of the Act by the Ld. CIT(A)-4, Baroda bearing ITA No. 1597/A/2012 . The appeal has challenged the rectification order passed u/s. 154 of the Act on the ground that the same is erroneous on facts and law and has wrongly denied the benefit of the deduction u/s. 80IB(10)oftheAct.

10. At the outset it is submitted that the rectification made by the Ld. CIT(A) is in gross violation of the specific direction issued by the Hon. ITAT wherein there was a specific direction to decide the issue in light of the decision in the case of M/s. Shakti Corporation which is reproduced in para 4 of the submissions.

11. In the set aside proceedings, the AO has questioned the claim of deduction u/s. 80IB(10) of the Act on the ground that land not having been introduced as business asset or purchased by the firm and therefore, the assessee firm would not be eligible for deduction u/s. 80IB(10) of the Act. It has been held that even if the land is not owned by the developer he would still be entitled to deduction u/s 80IB(10) of

the Act. Ownership of land is not the criterion for deciding the issue of claim of deduction u/s 80IB(10). Reliance is placed on the following decisions in support of the contention: **CIT-IV v. Swastik Associates (2015) 231 Taxman 893 (Gujarat)** Section 80-IB of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing project) - **Assessee-developer's claim of deduction under section 80-IB(10) met disallowance on ground that assessee was not owner of land and development permission was also not granted to assessee but to a co-operative housing society who was owner of said land - High Court in CIT v. Radhe Developers 120121 341 ITR 403/204 Taxman 543/17 tajcmann.com 156 (Gup held that assessee are entitled to benefit under section 80-IB(10) even where title of lands had not passed on to assessee and in some cases, development permissions may also have been obtained in name of original land owners - Whether facts being identical, disallowance was to be deleted - Held, yes [Para 3] [In favour of assessee] Vishal Developers (2014) 52 taxman.com 514 (Gujarat)** Section 80-IB, of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing project) - Assessment year 2007-08 - Assessee entered into a development agreement with co-operative Housing Societies and was given possession of land for construction of Housing units - Assessee claimed deduction at 100 per cent of its profits under section 80-IB(10) - Assessing Officer found that assessee was not owner of land but land was in name of said society, accordingly, he concluded that assessee was not both, a developer and builder, as required by said section and did not fulfil condition of said section - Whether where assessee had taken full responsibility for execution of development project and assessee had borne entire cost of construction and it was developer and builder of housing project and there was nothing under section 80-IB(10) requiring that ownership of land must vest in developer to be able for such deduction, assessee was entitled for deduction - Held, yes [Para 9] [In favour of assessee]

Therefore, the objection raised that the ownership of land is a paramount consideration for deciding and allowing the grant of deduction u/s 80IB(10) of the Act is already a settled issue as held by the Hon. Jurisdictional High Court.

12. **The second reason which has been assigned by the AO and with which the Ld. CIT(A) has concurred for withdrawing the claim of deduction granted earlier in the appellate proceedings is the area of the land being less than 1 acre. However, as pointed out this issue is not for consideration in the set aside proceedings as per the specific direction of the Hon. Tribunal which is final and conclusive since the same has not been challenged by the Revenue.** The order passed u/s 154 by the

Ld. CIT(A) deserves to be quashed as the same is in gross defiance of the specific direction issued by the Hon. ITAT wherein the matter was set aside only to be examined the claim of deduction in light of the decision of M/s. Shakti Corporation. Any order passed in gross defiance of the specific direction of the Hon. ITAT deserves to be quashed and set aside. Reliance is placed in the case of **Sandhya Educational Trust v. CIT(A) (2012) 150 TTJ 557 (Chd.)** wherein it was held as under:

*Section 12A Income-tax Act, 1961, read with section 12AA, of the Income-tax Act, 1961 - Charitable or religious trust - Registration of [Illustrations] - Assessee-trust was created with objects to run any school and to purchase land for running educational institution - Assessee's application for registration under section 12A was rejected by Commissioner - Tribunal held that activities of purchasing land and constructing building for setting up school was application for charitable purpose and, therefore, assessee was entitled for registration under section 12A - Accordingly, Tribunal set aside matter to file of Commissioner to consider case of assessee in accordance with decision of High Court in Pinegrove International Charitable Trust v. Union of India [2010] 327ITR 73/188 Taxman 402 (Punj. & Ear.) - Commissioner however once again refused to grant registration observing that assessee was only engaged in leasing out building to third party, and no educational activities were provided by assessee - **Whether in view of above said finding of Tribunal, Commissioner was not right in relooking at issue i.e., activities of assessee trust, objects of entering into collaboration with a third party and, thereafter, holding that educational activities were not provided by trust - Held, yes - Whether assessee having fulfilled conditions for grant of registration under section 12A, Commissioner was to be directed to pass consequential order granting registration under section 12AA to assessee - Held, yes [Paras 16 & 20]** Further in para 13 of the order it was observed as under:*

*13. The Tribunal in IT A No.693/Chandi/20Q8 in the case of Punjab State Forest Corpn. Ltd. v. Addl. CIT, Range, IV, Chandigarh relating to assessment year 2005-06 vide order dated 26.3.2009 had elaborately considered the order of the CIT (Appeals) in not giving due accord and regard to the order of the Tribunal which was brought to his knowledge and deciding the issue overlooking the said order of the Tribunal, which was brought to his notice by the assessee. The Tribunal held that the requirement of judicial discipline to follow the order of the Jurisdictional Tribunal as a binding precedent by the CIT (Appeals) is quite well settled and does not require any emphasis by us. The Tribunal further held as under:*

***"The said principles have been explained by various Courts, including the Hon'ble Supreme Court in the case of Kamalakshi Finance Corporation Ltd. (supra) wherein it is observed as under:***

*"The High Court has, in our view, rightly criticized this conduct of the Asstt. Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of the authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, Revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Asstt. Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Asstt. Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is 'not acceptable' to the Department in itself and objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court.*

*If this healthy rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws. " The Court further staled as under:*

*"It is clear that the observations of the High Court, seemingly vehement and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assessee public without any benefit to the Revenue. We would like to say that the department should lake these observations in the proper spirit. The observations of the High Court should be kept in mind in future and utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them. "*

*13. Reliance is placed in the case of **Ambani Meena Ramniklal v DCIT in ITA No.660/Ahd/2012 of the coordinate bench** in support of the proposition. In para 6 of the order it has been held that "the AO has to give effect to this direction. It is settled position that executing Court cannot travel beyond the decree. Because of subsequent development in the position of law, the decree cannot be termed as erroneous. The AO was bound by the directions of the higher appellate authority. He cannot sit in the judgment of the Tribunal while giving effect to it. Even if there is some error in the order of the Tribunal, because of subsequent decision of the Hon 'ble Bombay High Court, that would not automatically affect executability of the order in the case of the assessee, where specific finding has been record. Therefore, the Ld. Revenue authorities have rightly given effect to the order of the Tribunal. Remedy of the assessee lies, if any, against the original order and not in the order giving effect. Tribunal cannot review its earlier in the garb of finding out whether effect has been properly given or not. In view of the matter this appeal is devoid of merit, hence dismissed.*

*Therefore, judicial discipline requires that the order of the higher judicial authority has to be followed in letter and spirit and cannot be questioned while giving effect thereto as has been done in the case of the assessee firm. The order so passed being in gross violation of the directions granted by the Hon. Tribunal deserves to be quashed and set aside.*

*14. Coming to the merits of the case that since the approval for land which had been obtained in the year under appeal was with reference to FP 363 only and the same being less than 1 acre the benefit of deduction u/s 80IB(10) was not available it is submitted that there is no dispute that the scheme has been executed on FP 363 & 34 and if the area of both the plots are aggregated then the same exceeds 1 acre. Only since the approval for the subsequent plot i.e. FP364 has been received in the subsequent year (though application made in the year under appeal) has the assessee been denied the benefit of deduction u/s 80IB(10). It is submitted that the land has been purchased by the partner in the earlier years and not subsequently. At this stage attention is invited to the following judicial pronouncements in support of the contention that even if one subsequently makes good the deficiency of inadequate size of the plot of land the benefit of deduction cannot be denied:*

***Haware Engg. & Builders (P) Ltd. v ACIT (2011) 11 taxmann.com 286 (Bom.)***

*Section 8Q-IB of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings - Assessment year 2004-05 - Whether it is area of plot, and not built up area, which is relevant for purpose of deciding eligibility of a project under section 80-IB (10) - Held, yes - Whether in case an assessee finds that he is not eligible for deduction under section 80-IB (10) because size of plot, on which project is built, is less than minimum necessary size, and he makes good that deficiency; and ensures that all necessary preconditions are satisfied and approvals obtained, he is eligible for deduction under section 80-IB(10) - Held, yes*

**Baba Promoters and Developers v ITO (2012) 25 taxmann.com 84 (Pune)** *Section 80-IB of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings - Assessment years 2004-05 to 2006-07 - Deduction under section 80-IB -was denied on ground (i) that area of land was less than prescribed one acre, (ii) that one of dwelling units was more than prescribed limit of 1500 square feet and (Hi) that two of dwelling units were merged which resulted in exceeded prescribed limit of 1500 square feet - Whether if a developer is ineligible for deduction under section 80-IB(10) because of size of plot being less than prescribed size and makes good deficiency later on, he is eligible for deduction under section 80-IB(10) - Held, yes Even in the case of the appellant if both the FP's i.e. 363 & 364 are taken into consideration over which the scheme has been developed the same exceeds 1 acre and therefore the question of not fulfilling the condition does not arise.*

15. *It is also submitted that the deduction u/s 80IB(10) are beneficial provisions and should be interpreted liberally and not rigidly. There is no doubt that the ultimate size of the plot exceeds 1 acre. Under such circumstances to deny the benefit would not be justifiable proposition. Reliance is placed on the following judicial pronouncements in support of our contention: Bajaj Tempo Ltd. v CIT (1992) 196 ITR 188 (SC)*

*A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. Since a provision intended for promoting economic growth has to be interpreted liberally the restriction on it too has to be construed so as to advance the objective of the section and not to frustrate it. Under clause (i) of sub-section (2) of section 15C formation of the undertaking by splitting up or reconstruction of an existing business by transfer to the undertaking of building, raw material or plant used in any previous business results in denial of the benefit contemplated under sub-section (1).*

**CIT v Gujarat Aluminium Extrusions Pvt. Ltd. (2003) 263 ITR 453 (Guj.)** *The object behind the enactment of section 35 is to encourage research and development activities by the assessee. As an incentive, the Legislature has given this benefit by way of deduction in respect of the capital expenditure incurred by the assessee. This is a provision for the benefit of the assessee and if the assessee incurs capital expenditure for the purpose of research and development during the relevant previous year, the revenue should not deprive the assessee of the benefit of deduction under the provisions of section 35, even if the asset is not put to use for research and development. It is a settled legal position that the provisions for exemption or relief should be construed liberally and in favour of the assessee. If*

*the section is interpreted in the manner suggested by the revenue, it would be depriving the assessee of the benefit, which the Legislature desires to give to the assessee. [Para 16]*

*In light of the above facts and judicial pronouncements it is requested that the claim of deduction u/s 80IB(10) be granted to the assessee firm.*

9. On the other hand, the Ld. DR placed reliance on the order of authorities below by reiterating the contentions contained in their respective orders.

10. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates whether there is a mistake apparent from record in the order of the Ld. CIT (A) which needs to be rectified under section 154 of the Act.

10.1 It is the 2<sup>nd</sup> round of appeal before us which is emanating from the order of the ITAT bearing ITA no. 1729/ahd/2009 dated 25-09-2009 wherein it was directed the AO to verify:

- i. whether the assessee has in fact purchased the land for of consideration from the landowners AND
- ii. The assessee has developed the housing project at its own cost and risks involved in the project.

10.2 On perusal of the above direction, there is no ambiguity to the fact that there was no whisper about the area of the plot of land. The direction of the ITAT was very clear and unambiguous. Therefore, we are of the view that the authorities below have no jurisdiction to go beyond the direction issued by the ITAT. In this regard we find guidance and support from decision of Honøble

Supreme Court in case Union of India and others vs. Kamlakshi Finance Corporation Ltd reported in AIR 1992 SC 711 where it was held as under

*"The High Court has, in our view, rightly criticized this conduct of the Asstt. Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of the authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, Revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Asstt. Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Asstt. Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is 'not acceptable' to the Department in itself and objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws. "*

10.3 We also find support from Honøble Delhi High Court in case of Sub inspector Roop Lal vs. Lt. Governor Delhi where it was held as under

*"We are indeed sorry to note the attitude of the Tribunal in this case which,, after noticing the earlier judgment of a coordinate bench and, after noticing the judgment of this Court, has still thought, it fit to proceed to lake a view totally contrary to the view taken in the earlier judgment thereby creating a judicial uncertainty in regard to I ha (sic) declaration of law involved in this case. Because of this approach of the latter bench of the Tribunal in this case, a lot of valuable time of the Court is wasted and parties to this case have been put to consideration hardship."*

10.4 It is also pertinent to note that the Ld. AR and the DR appeared before the ITAT in the 1<sup>st</sup> round of litigation have fairly agreed that the issue is covered by the decision of the tribunal in the case of M/s Shakti Corporation and others in ITA No. 1503/AHD/2008 dated 7-11-2008. The relevant observation of the ITAT reads as under:

*"both the Ld. AR and the Ld. DR agreed that now the issue is covered by the decision of the tribunal in the case of M/s Shakti Corporation and others in ITA No. 1503/AHD/2008, vide order dated 07-11-2008 wherein it has been held as under:"*

10.5 From the above finding of the ITAT, it is obvious that the order was passed after taking the consent of both the Ld. DR and the AR. Thus we are of the view that the authorities below cannot travel beyond the direction of the ITAT in the given facts and circumstances.

10.6 Without prejudice to the above, it is also pertinent to note that in case there is a mistake apparent from record in the order of the ITAT, the same can be rectified by way of making an application to the ITAT under the provisions of section 254(2) of the Act. The relevant provision of section 254(2) of the Act reads as under:

*Section 254:-*

*(1)XX  
XXXXXXXXXXXXXXXXXXXX*

*(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the [Assessing] Officer :*

10.7 Thus, we note that the lawmakers have provided a provision under the statute for the rectification of the mistake apparent from record after following the due process of law. However in the case on hand, the Revenue instead of following the process of law as discussed above, has travelled beyond the direction of the ITAT which is uncalled for and undesirable.

10.8 It is the trite law that any mistake committed by the authority apparent from record can be rectified only by the same authority. As such, the authorities below have no power to rectify the same. If they do so it will be beyond their jurisdiction.

10.9 It is also pertinent to note that, if the revenue was not satisfied with the order of the ITAT, then it could have approached to the Honøble High Court as per the provisions of section 260A of the Act. But it appears that the revenue has not resorted to this option challenging the order of the ITAT before the higher forum.

In view of the above and after considering the facts in totality, we are not convinced with the findings of the Ld. CIT (A) given in the rectification order passed under section 154 of the Act. Hence the ground of appeal of the assessee is allowed.

10.10 As, we have held that the order passed by the Ld. CIT-A under section 154 of the Act is not sustainable, we refrain ourselves from adjudicating the issue on merit.

In the result the appeal of the assessee is partly allowed.

***Coming to the other appeal of the assessee bearing ITA No. 548/AHD/2010 for the AY 2006-07***

11. At the outset we note that the issue involved in the impugned appeal has already been decided by us in favour of the assessee in ITA No. 1597/AHD/2012 vide paragraph number 10 of this order. For the detailed discussion, please refer the relevant paragraph.

Besides the above, we also note that all the issues relating to the area of the plot of land and the approval from the prescribed authority have already been

reached to the finality by the order of this tribunal in the 1<sup>st</sup> round of litigation in ITA No. 1729/AHD/2009 vide order dated 25-09-2009. Hence, we allow the ground of appeal of the assessee.

In the result the appeal of the assessee is partly allowed.

***Coming to assessee's appeal bearing ITA No. 2692/AHD/2012 for the AY 2005-06***

12. As the impugned penalty appeal is arising out of the quantum appeal bearing ITA No. 1597/AHD/2012 for A.Y. 2005-06 which has been adjudicated in favor of the assessee as discussed above. Thus, in our considered view, the penalty levied by the authorities below is not sustainable. Thus the appeal filed by the assessee is allowed.

In the result, the appeal of the assessee is allowed.

13. In the combined result the appeal bearing ITA No. 1597/AHD/2012 and 548/AHD/2010 are partly allowed where the appeal bearing no. 2692/AHD/2012 is allowed.

**Order pronounced in the Court on 25 /10/2019 at Ahmedabad.**

**-Sd-  
(Ms MADHUMITA ROY)  
JUDICIAL MEMBER**

**(True Copy)**  
Ahmedabad; Dated 25/10/2019  
*Manish*

**-Sd-  
(WASEEM AHMED)  
ACCOUNTANT MEMBER**