

**IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT**

**BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

**आ.अ.सं./I.T.A No.2396/AHD/2016
निर्धारणवर्ष/Assessment Year: 2013-14**

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| M/s. K.G. Developers, Final Plot No.104, Althan Canal Road, Nr. Gujarat Vitran Mathak, Althan, Surat-395 017. | V. | Dy. Commissioner of Income Tax, Circle-2(3), Surat. |
| [PAN: AAIFK 9749 C] | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी/Respondent |

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| निर्धारितकीओरसे /Assessee by | None |
| राजस्वकीओरसे /Revenue by | Ms. Anupama Singla, Sr. DR |

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| सुनवाईकीतारीख/ Date of hearing: | 11-02-2020 |
| उद्घोषणाकीतारीख/Pronouncement on: | 13-02-2020 |

आदेश /O R D E R

PER O.P.MEENA, AM:

1. This appeal filed by the Assessee is directed against the order of Commissioner of Income-Tax (Appeals)-I, Surat [in short “the CIT(A)”] dated 20-07-2016, for the assessment year 2013-14.
2. Ground No.1 & 2 relates to rejecting the claim for deduction u/s.80IB of the Act to the tune of Rs.9522022/- in respect an eligible housing project.
3. Brief facts of the cases are that the assessee was engaged in the business of builder and developer in the name and style of M/s. K.G. Developers. It has constructed a high rise residential building, namely “Sai KG Flats” at FP No.104, Block No.206, Althan Canal Road, Althan, Taluka Choryasi, Surat. The return of income was filed on 27-09-2013 showing total

income of Rs.433950/- after claiming deduction u/s.80IB(10) of the Act of Rs.9522022/-. The AO asked to justify the claim of deduction, the assessee has furnished a reply which has examined by the AO. The AO was of the opinion that the housing project in respect of which the assessee's claim of deduction u/s.80IB(10) of the Act was approved on 16-03-2009 that it was not approved before 31-03-2008, so the assessee was not eligible for deduction u/s.80IB(10) of the Act, amounting to Rs.9522022/-.

4. Being aggrieved, the assessee carried the matter before the Id. CIT(A). the CIT(A) noted that the original plan was approved by SMC in the name of one Shri Kalpesh Kumar Kantilal giving permission dated 19-07-2006 which was for construction and development of Row Houses having 22 units to be constructed. This permission was valid upto 18-07-2007. However, after this the assessee applied for development permission on the same land for construction of residential flats (High Rise Buildings) on 26-11-2008 and received development approval from SMC, Surat on 16-03-2009 in the name of Shri Shailesh P. Gonawala. Therefore, the CIT(A) held that housing project was held on 16-03-2009 which was obviously after 31-03-2008. Therefore, the assessee is not eligible for deduction u/s.80IB(10) of the Act. The CIT(A) further observed that in appellant's own case the similar issue on identical facts has been decided against the assessee by him vide his order dated 28-09-2015 for the assessment year 2011-12 & 2012-13, by dismissing the appeal of the appellant. In view of this, the appeal of the assessee is dismissed.

5. Being aggrieved, the assessee filed an appeal before this Tribunal. However, none was attended on behalf of the assessee but a written submissions were filed from Shri Hiren M. Diwan, wherein it was submitted that in appellant's own case on identical facts, the appeal for the assessment year 2010-11, 2011-12 & 2012-13 were dismissed by the ITAT, Ahmedabad Bench, Ahmedabad vide its consolidated order dated 13-06-2017 (copy filed). Therefore, the above grounds of appeal were placed reliance in written submissions.

6. *Per contra*, the ld. Sr. DR submitted the issue covered against the assessee by the order of the Tribunal.

7. We have heard the rival submissions and perused the relevant material available on record. We find that the similar issue was arose in the case appeal for the AY.2010-11, 2011-12 in the ITAT, Ahmedabad Bench vide its order dated 13-06-2017 in consolidated order in ITA No.2414/AHD/2014 & ITA Nos. 3288, 3289 & 3290/AHD/2015 are decided the appeal against the assessee. We find that the ITAT vide Para 11 to 13 are reproduced as under:-

"11. We have carefully considered the rival submissions and gone through the orders of the authorities below as well as the case-laws cited. The solitary issue for determination is maintainability of claim deduction under s.80IB(10) of the Act in the facts of the case or otherwise.

1.1. In order to examine the issue, it will be desirable to reproduced the relevant portion of section **80IB(10)** for ready reference:-

Section 80IB (10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the [31st 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 1st 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 1st day of April, 2004 but not later than the 31st day of March, 2005], within four years from the end of the 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)

(b)

(c)

(d)

(e)

[underline is ours]

11.2. Thus, as per legal framework, deduction available under s.80IB(I) to an undertaking developing and building housing projects should be approved by the local authority before 31/03/2008 and construction should be completed within four years from the end of the financial year in which the housing project is approved by the local authority. The major controversy revolves around the aspect as to whether the assessee in the instant case is deemed to have taken requisite approval prior to the cut off date of 31/03/2008 or not. While the assessee claims that the project (for construction of row-houses) was first approved by local authority on 19/07/2006 which is much prior to the time limit specified under the provisions of the Act, the second approval was taken back in modification of the first approval subsequent to the cut off date is deemed approval in time owing to 'doctrine of relation back' as well as Explanation-I(i) of the incentive section. It is the case of the assessee that, notwithstanding the second approval taken subsequent to cut off date, it is merely continuation of the first approval. In terms of Explanation-I(i) to section 80IB(10), the date on which the housing project is deemed to have been approved is the date on which the building plan of such housing project is 'first approved' by the local authority. It is the contention on behalf of the assessee that since the first approval is prior to the cut off date, the second approval in modification of the first approval should be reckoned in conjunction with first approval and date of first approval is relevant to the compliance of s.80IB(10) of the Act. The Revenue, on the other hand, contends that the housing project first approved was in respect of altogether different building plan/housing project i.e. for construction of row-houses. Also, the first approval of the housing project was (towards construction of row-houses) obtained by another developer. The assessee at a later stage took over the land on which the housing project was proposed and the building plan for row houses was replaced by the building plan for high rise building.

It is thus the contention of the revenue that the building plan is not merely altered by some minor modifications but has undergone a sea-change. The project proposed to be developed by the present assessee is an altogether new and different project and *de hors* the earlier project for construction of row-houses.

11.3. We thus notice that the objections of the Revenue for eligibility of deduction under s.80IB(10) are three fold:

(i) The building plan for the housing project in question is completely alien to the earlier building plan and therefore cannot be seen in continuation of the previous building plan as claimed by assessee. Thus, the housing project seeking to claim deduction under s.80IB(10) of the Act is required to be tested on anvil of section 80IB(10) afresh. The fresh application for approval from the local authority for the new housing project for construction of high rise building has been made subsequent to the cut off date and the approval naturally has flowed subsequent to the cut off date. Thus, the primary condition for eligibility of claim under 80IB(10) is ostensibly unfulfilled.

(ii) The housing project which is subject matter of deduction under s.80IB(10) should be broadly be in conformity with the housing project approved prior to the cut off date to avail the relaxation under Explanation-1 to section 80IB(10). It is the case of the Revenue that a structural alteration in the building plan giving rise to an altogether different output does not characterize any continuity as claimed.

(iii) The first building plan expired on 18/07/2007 at the end of one year from its approval as the undertaking failed to follow the construction plan and the validity of development permission expired in the absence of any renewal. The second approval cannot be construed as renewal of earlier plan in the absence of continuity.

11.4. As reiterated on behalf of the assessee, the first approval for the concerned housing project (for construction of row-houses) was obtained by the assessee on 19/07/2006 which is prior to the cut off date prescribed by the provision of section 80IB(10). After the application for approval from the local authority, the developer of the housing project stood changed from DMJ to the assessee. The assessee herein resubmitted a building plan for approval as styled 'revised plan' for construction of residential flats as high rise building rather than row-houses originally approved. Thus, ostensibly, the revised development plan is altogether different and no intimacy with the earlier plan. The complexion of the housing project has changed altogether. Therefore, we do not find any semblance of merit in the plea of the assessee about the continuity of the second approval *qua* the first approval for construction of the housing project.

11.5. We are alive to the fact that Explanation-I(i) tones down the rigor of law in favour of the assessee where the approval in respect of housing project is obtained more than once. Explanation- I(i) provides that in such a case, the date of approval of the building plan will be the date on which the housing project was first approved by the local authority. The doctrine of relation back is thus implicit here. However, in the same vain, we find ourselves in agreement with the plea raised on behalf of the Revenue that the housing project for availing the benefit of Explanation-I(i) must be broadly the same housing project to seek continuity. The instant case is not case involving some alterations in the building plan at a later stage but is rather a case

where the first building plan approved within the cut off limit has been totally obliterated and stands replaced by building plan. The development permission towards the impugned building plan was applied and taken subsequent to the cut off date. In the absence of any continuity or integrity between the initial approval and subsequent approval, as noted above, the date of first approval within cut off limit cannot be reckoned for the purposes of second approval. The basic condition of obtaining the approval from the local authority for housing project in specified time limit thus remains unfulfilled for the housing project in question.

11.6. The housing project in Explanation-I(i) is qualified and punctuated by implicit condition. The use of word 'the' preceding the; expression 'Housing project' is suggestive and indicative of the fact that: the 'Housing project' should be broadly the same. Approval for a given housing project at the first instance will not grant an indefeasible or vested right under Explanation-I(i) for a altogether new project. There should be some demonstrable and intense relationship between earlier approval obtained in respect of 'housing project' vis-a-vis subsequent approval. The law cannot be surpassed to grant relief.

12. We take note of the plea propounded on behalf of the assessee that second development permission is merely 'revised' permission as per approval of the local authority dated 16/03/2009. We are however r. impressed by the mere use of the work 'revised' by the local authority. The local authority appears to have simply adopted the word 'revised*' from the layout plan submitted by the assessee for residential high rise building. Nothing turns out on the use of the expression 'revised permission' by local authority. As noted, the approval for revises housing project has no rational connection with the first housing project for which the approval was initially taken.

12.1. We also take note of the various decisions cited on behalf of the assessee to seek liberal interpretation of section 80IB(10) in favour of the assessee. We are not persuaded. This issue for determination is 'essentially factual which is quite peculiar in this case. A statutory fetter in the form of time limit for approval of Housing project is enjoined which cannot be rescinded. As per the express language of section 80JB(10) of the Act, the prodigious benefit offered therein stands forfeited unless a housing project is approved by the local authority before 31/03/2008. In the instant case, the second approval taken for the housing project concerning high-rise building betrays the aforesaid condition outlined. This being so, the ratio of the decisions cited do not govern the issue even on most liberal and utmost considerations. Thus, the action of revenue is found to be in accord with mandate of law. The CIT(A) was thus right in endorsing the opinion of the AO. Hence, in the totality of facts and circumstances, we do not find any force in the grievance of the assessee.

13. In the result, the appeal of the Assessee in ITA No. 24 14/ Ahd/ 14 for AY 20 10- 11 is dismissed."

8. Therefore, in the light of above decision of Tribunal, respectfully following the same, as facts are being identical, the appeal of the assessee is accordingly treated as dismissed.

9. In the result, the appeal of the assessee is dismissed.
10. The order pronounced in the open Court on 13-02-2020

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(O.P.MEENA)
ACCOUNTANT MEMBER

Surat: Dated: 13th Feb, 2020/Samanta, PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/ Guard file of ITAT.

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By order

Assistant Registrar, Surat