



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

**BEFORE SHRI P. K. BANSAL, VICE PRESIDENT
AND SHRI PAWAN SINGH, JUDICIAL MEMBER**

I.T.A. No.92/NAG/2017
Assessment year:2008-09

Shri Pushendra Kumar K. Sharma Prop. Of Kawach Builders & Developers, Tapadia Nagar, Akola. PAN:AETPS 4753 H (Appellant)	Vs.	Income Tax Officer, Ward-3, Akola. (Respondent)
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Appellant by	Shri C. J. Thakar, Advocate Shri S. C. Thakar, Advocate
Respondent by	Shri Geetesh Kumar, D.R.
Date of hearing	22/11/2017
Date of pronouncement	24/11/2017



ORDER

PER P. K. BANSAL, V.P.

This appeal has been filed by the assessee against the order of the CIT(A)-1, Nagpur dated 21/11/2016 relating to assessment year 2008-09. The only issue involved in this appeal taken by the assessee relates to the denial of claim of deduction to the assessee u/s 80IB(10) of the I.T. Act.

2. The facts of the case, in brief, are that the assessee has claimed deduction u/s 80IB(10) of the I.T. Act amounting to Rs.1,07,65,311/-. The Assessing Officer disallowed the same to the following reasons:

"(i) Commencement certificate is in the name of Shri Sunilkumar Kailashchandra Bajoria and does not having any seal on it. The AO held that as assessee has purchased land from Shri Sunilkumar K. Bajoria & Others in F.Y. 2001-02 & F.Y. 2003-04, the assessee should have obtained fresh commencement certificate for housing project in his name.



Therefore this certificate cannot be treated as bonafide commencement certificate.

(ii) In the case of assessee the housing project shall be completed on or before the 31st day of March, 2008. In this regard the completion certificate submitted by the assessee dated 22.02.2008 which does not bear any seal or other mark of Akola Municipal Corporation or signature of Commissioner of Municipal Corporation but it signed by Dy. Engineer PWD, Akola. Municipal Corporation, Akola vide letter dated 28.12.2010 stated that this office has not issue such completion certificate. Only the Commissioner of Municipal Corporation, Akola is the competent authority to issue completion certificate. The assessee was thus failed to submit bonafide completion certificate issued by Competent Authority of Municipal Corporation, Akola.



(iii) Sanctioned Map of projects submitted by the assessee shows that total built up area of shops/commercial unit is 438.75 SQM. i.e ground floor - 146.25 SQM, 1st floor - 146.25 SQM, 2nd floor - 146.25 SQM, total 438.75 SQM. As per section 80IB(10) of I. T. Act, 1961 the build-up area of the shops and other commercial establishment included in the housing project should not exceed five per cent of the aggregate built up area of the housing project or two thousand square feet whichever is less. In assessee's case housing project is much more than the build up area as mentioned in section u/s 80IB(10)."

3. Against the said order, the assessee went in appeal before the CIT(A). During the appellate proceedings the assessee got the following papers from Akola Mahanagar Palika on 08/08/2011:

- (i) Commencement certificate in the name of Kawach Builders and Developers through Shri Pushpendrakumar Keshrilal Sharma in respect of above project.
- (ii) Revised sanctioned plan (case no. 14/39/07-08)
- (iii) Occupancy certificate (Imaratit rahanya sathi praman patra)

The assessee submitted the following papers as an additional evidence before the CIT(A):


- (i) Order-sheet of Akola Mahanagar Palika in case No. 14/39/07-08 in the case of Kawach Builders and Developers through Pushpendrakumar Keshrilal Sharma.
- (ii) Copy of application dated 06/12/2007 to the Municipal Commissioner, Akola by the assessee.
- (iii) Copy of letter reminder by assessee to Town Planning Nazul Dept, Akola Mahanagar Palika dtd. 20/05/2008.
- (iv) Letter of Akola Mahanagar Palika dtd. 10/09/2008 in reply to above letter dated 20/05/2008.
- (v) Letter by assessee to Akola Mahanagar Palika dtd. 20/12/2010
- (vi) Letter of Akola Mahanagar Palika dtd. 28/07/2011 in reply to assessee's letters dated 20/05/2008 & 20/12/2010.
- (vii) Commencement certificate in the name of Kawach Builders and developers through Shri Pushpendrakumar Keshrilalji Sharma dtd. 02/08/2007 in respect of above project in case no. 14/39/07-08.
- (viii) Building occupancy certificate in favour of "Kawach builders and developers" through Shri Pushpendrakumar Keshrilal Sharma, Shastri Nagar, Akola in respect of building completion on 27/03/2008.
- (ix) Revised sanctioned plan in respect of above project in case No.14/39/07-08 dated 02/08/2007.



The CIT(A) asked for the remand report from the Assessing Officer. The Assessing Officer took the view that the additional evidence was not in existence at the time of assessment proceedings and were created with a view to mislead the department. The CIT(A) on this basis dismissed the appeal of the assessee. When the matter went before the Tribunal in I.T.A.No.311/NAG/2013, the Tribunal vide order dated 05/09/2014 set aside the order of the CIT(A) and restored the same to the file of the Assessing Officer in respect of the claim made by the assessee u/s 80IB. Accordingly, in the fresh assessment proceedings the Assessing Officer rejected the claim of the assessee with regard to deduction u/s 80IB. the assessee again went before the CIT(A) who confirmed the order of the Assessing Officer.



4. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. We noted that in this case the assessee has got approved the low income housing project on 29/03/2001 by the Akola Municipal Corporation and accordingly claimed the deduction from assessment year 2002-03 to assessment year 2008-09 u/s 80IB(10) of the Act. During the assessment year 2004-05 when the scrutiny of conducted, the assessee was allowed deduction u/s 80IB(10) vide assessment order passed u/s 143(3) on 10/07/2006. The only question before us is whether the conditions stipulated u/s 80IB(10) are applicable prior to its amendment made with effect from 01/04/2005. It is not denied that the project of the assessee was approved prior to 01/04/2005. As on that date the provision of section u/s 80IB(10) read as under:



"(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year form such housing project if, -

- (a) Such undertaking has commence or commences development and construction of the housing project on or after the 1st day of October, 1998;*
- (b) The Project is on the size of a plot of land -which has a minimum area of one acre; and*
- (c) The residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty five kilometers from the municipal limits of these cities and one thousand and five hundred square feet at any other place."*

Subsequently we noted that the provision of u/s 80IB(10) has been amended by the Finance Act, 2004 with effect from 01/04/2005 and sub clause (d) has been inserted by which condition regarding the restriction on the built up area and other establishment was incorporated. Similarly, condition regarding the completion of the construction was incorporated u/s



condition mentioned in clause (d). This condition/restriction was not on the statute book earlier when all these projects were sanctioned. Another important amendment was made by this Act to sub-section (14) of Section 80IB with effect from 1.4.2005 and for the first time under clause (a) thereof the words 'built-up area' were defined.(para 17)

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Clause (a) was inserted in Section 80IB(14) defining the words "built-up area" 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 did not include the common areas shared with other residential units.(para 18)



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Now Clause (d) was to be treated as inextricably linked with the approval and construction of the housing project but an assessee cannot be called upon to comply with the said condition when it was not in contemplation either of the assessee or even the Legislature, when the housing project was accorded approval by the local authorities.(para 19)

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Bombay High Court in ITA Nos. 201 and 308 of 2012, had held that when the Assessee claims a deduction under section 80-IB(10), the Assessee is required to comply with such a condition only if it is on the statute-book on the date of the approval of the housing project and it has nothing to do with the year in which the profits are brought to tax by the Assessee. Clause (d) of section 80-18(10) is inextricably linked to the date of the approval of the housing project and the subsequent development/construction of the same, and has nothing to do with the profits derived therefrom. If a particular condition is not inseparably linked to the date of approval of the housing project, different considerations would arise.

Clause (d) of section 80-18(10), being a condition linked to the date of the approval of the housing project, would not apply to any housing project that was approved prior to 31st March, 2005 irrespective of the fact that the profits of the said housing project are brought to tax after the said provision was brought into force.(para 21)



80IB(10)(a)(i)(ii)(iii). The section has also subsequently been amended by Finance Act, 2009 and Finance Act, 2010. We noted when the project of the assessee was approved as per the provisions of u/s 80IB(10), as it exists on that date, under sub clause (a) the only condition was that such undertaking has commenced or commences development or construction of housing project on or after 01/10/98. There was no condition regarding the completion of such construction. The condition regarding the completion of the construction has been inserted u/s 80IB(10) by Finance Act, 2004 with effect from 01/04/2005. Even there was no condition regarding the restriction on the built up area of the shops and commercial establishment included in the housing project. The Assessing Officer has denied the deduction to the assessee u/s 80IB in the impugned assessment year on the basis of the amended provision of section 80(1B) which were inserted from 01/04/2005. In our view, the assessee is required to comply with the conditions as stipulated u/s 80(1B) as on the date when its project was approved and he commenced the construction not the conditions which have been brought into the statute subsequently. Our aforesaid view is duly supported by the decision of Hon'ble Supreme Court in the case of CIT vs. Sarkar Builders [2015] 375 ITR 392 (SC) in which Hon'ble Supreme Court has held as under:

"Only changes that were brought about were that with effect from 1.4.2002: (i) the housing project had to be approved before 31.03.2005; and (ii) there was no time limit prescribed for completion of the said project. Though these changes were brought about by the Finance Act, 2003, the Legislature thought it fit that these changes be deemed to have been brought into effect from 1.4.2002. All the remaining provisions of Section 80IB(10) remained unchanged. (para 16)

Thereafter, significant amendment was carried out by Finance (No.2) Act, 2004 with effect from 1.4.2005. The Legislature made substantial changes in sub-section (10). Several new conditions were incorporated for the first time, including the





Thus judgments of the High Courts, which are impugned in these appeals, take correct view that the assessee were entitled to the benefit of Section 8018(10). (para 23)

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Clause (d) of Set/on 80-76 is to be treated as inextricably linked with the approval and construction of the housing project but an assessee cannot be called upon to comply with the said condition when it was not in contemplation either of the assessee or even the Legislature, when the housing project was accorded approval by the local authorities.*

Clause (d) of section 80-18(10), being a condition linked to the date of the approval of the housing project, would not apply to any housing project that was approved prior to 31st March, 2005 irrespective of the fact that the profits of the said housing project are brought to tax after the said provision was brought into force."

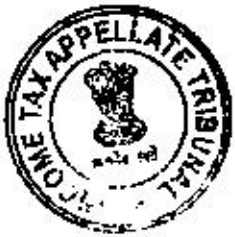
4.1 Similar view has been taken by the undersigned in the case of Raj Reality vs. DCIT [2015] 53 Taxmann.com 439 (Indore-Trib.) in which this Tribunal under para 9 has held as under:



"From the perusal of the provision of section 80-IB(10) as was in existence, when the assessee's project was approved i.e. on 24/4/2003, the condition as stipulated under Explanation (ii) to section 80-IB about the completion of the project and issue of the certificate by the local authority was not there. There was only three conditions which have to be complied with by the Project, the first condition was that project should have been approved before 31-3-2005, and the undertaking should have commenced the development of construction of housing project on or after 1-10-1998. The size of the project should have a minimum area of 1 acre and in case the residential units has a minimum built up area of 1000 sq.ft., if it is situated within the cities of Delhi or Mumbai or within 25 kms. from Municipal limit of these cities and 1500 sq.ft. if it is situated in any other place. The condition that completion of the project before 31-3-2008, or within 4 years or within 5 years has been brought into section 80-IB. Only by the Finance Act, 2004, not prior to that. This is settled position of law that the law existing at the particular point of time will be applicable unless and until it is specifically made retrospective by the legislator. Therefore, the assessee is expected to complete the project as per the approved plan at a particular point of time and the assessee is



not expected to do or fulfill the conditions which are not in existence at the relevant point of time or made compulsory after making such amendment in the Act from the future date. When the project approved, the competent authority has given specified date that project should have completed by that date. The section 80-18(10), which was in existence in relevant year relevant year there nowhere required the assessee to complete the project within a particular period. Therefore, the restriction, which has been imposed subsequently by amending the provisions of the law will not apply to the assessee that the project should have been completed within four years from the end of the financial year in which housing is approved by the local authorities. [Para 9]"



4.2 In view of this fact, we are of the view that the Assessing Officer cannot reject the claim of the assessee made u/s 80IB(10) on the basis of the non compliance of the condition regarding the completion of the project as well as non complying with the condition stipulated u/s 80IB(10)(d) of the Act as those conditions were not in existence when the assessee's project was approved i.e. on 29/03/2001. In view of decision of Hon'ble Supreme Court , we set aside the order of CIT(A) and allow the deduction to the assessee u/s 80IB of the Act.

5. In the result, the appeal of the assessee stands allowed.

(Order was pronounced in the open court on 24/11/2017)

Sd/.
(PAWAN SINGH)
Judicial Member

Dated:24/11/2017

*Singh

Sd/.
(P. K. BANSAL)
Vice President

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R.,
- ✓ 6. Guard

[Signature]
सहायक पंजीकार
Assistant Registrar
आयकर अपील अदालत,
Income Tax Appellate Tribunal
नागपुर न्यायपीठ / Nagpur Bench