

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"H" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, HON'BLE JUDICIAL MEMBER**

ITA NO. 7943/MUM/2019 (A.Y: 2008-09)

Income Tax Officer – 28(2)(1) 3 rd Floor, Room No. 326 Tower No.6 Vashi Railway Station Building Complex Vashi, Navi Mumbai-400703	v.	M/s. Kamdhenu Builders & Developers 20, 2 nd Floor, Shanti Centre, Sector-17 Vashi, Navi Mumbai- 400705 PAN: AAHFK0461E
(Appellant)		(Respondent)

Assessee by	:	Shri Subodh Ratnaparkhi
Department by	:	Shri K. Shiddaramappa
Date of Hearing	:	12.10.2021
Date of Pronouncement	:	30.11.2021

ORDER

PER S. RIFAUR RAHMAN, AM

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)–26, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 11.10.2019 for the A.Y. 2008-09.

2. Revenue has raised following grounds in its appeal: -

"(1) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the A.O. to allow deduction u/s 80IB(10) of the Act without appreciating the fact that

the assessee in order to avail deduction u/s 80IB(10), segregated part of the plot ad-measuring 745.129 sq.meter meant exclusively for commercial purposes even though the CIDCO had allotted the entire plot of built up area admeasuring 7420.752 sq.meter for residence cum commercial project”?

(2) “Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred directing the A.O. to allow deduction u/s 80IB(10) of the Act without appreciating the fact that the residential cum commercial project was approved by CIDCO as a whole. There is only one plot involved in this case i.e Plot No.37. Thus, the commercial portion cannot be viewed separately from the residential portion”?

(3) “Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred directing the A.O. to allow deduction u/s 80IB(10) of the Act without appreciating the fact that there are no provisions in the Act that enable an assessee to avail proportionate deduction u/s 80IB(10). On satisfying the conditions, the assessee is either eligible for 100% deduction or ineligible for 100% deduction of profits as held by Bombay High Court in the case of M/s Brahma Associates vs CIT (2011) 333 ITR 289”?

(4) “Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred directing the A.O. to allow deduction u/s 80IB(10) of the Act without appreciating the fact that the transfer of commercial portion of project to M/s Pyramid Developers was an illegal transfer as consent of the CIDCO was not taken by the assessee and there was no tripartite agreement with CIDCO at the time of transfer between assessee, M/s Pyramid Developers and CIDCO”?

(5) The appellant prays that the order of Ld. CIT (A) on the above grounds be reversed and that of the Assessing officer be restored.”

3. Brief facts of the case are that, assessee is a partnership firm engaged in the business of builder and real estate developers. During the year under consideration, the Assessing Officer made assessment for the A.Y. 2008-09 u/s. 143(3) of the Income-tax Act, 1961 (in short “Act”) on 28.12.2010 accepting Nil Return of income. The Assessing Officer allowed

the claim of deduction u/s. 80IB(10) of the Act. During the course of the assessment proceedings for the A.Y. 2009-10, it was noticed by the Assessing Officer that assessee's claim of deduction u/s. 80IB(10) of the Act is not allowable. Since the Assessing Officer had reason to believe that income has escaped assessment, accordingly, the assessment was reopened. The assessment was completed by disallowing the claim made by the assessee and the matter travelled to ITAT and it is brought to our notice that ITAT has allowed claim of the assessee u/s. 80IB(10) of the Act with the following observations: -

"Considering the principles laid down above, and in host of other cases, the issue becomes clear that there is no definition of housing project in the provisions and there can be more than one approval for the project and even if there is common approval, assessee is entitled for deduction on the project undertaken by it, provided the project satisfies the other conditions. As stated earlier, assessee constructed only residential block 'Eden Garden' which was commenced on 30.2.2006 and completed on 16.10.2008 as per the date of commencement certificate and occupation certificate granted by the authority. The commercial project developed by M/s. Pyramid Developers, sanctioned by CIDCO has commenced on 18.10.2006 but completed after completion of this project, much later on 04.08.2010. Even as seen from the plans the project is separate and not contiguous to the part of the building developed by assessee. The same is entirely separate block and in no way connected to the assessee project, except approved on the same plot of land. Moreover, the development rights were sold in March, 2009 and other party developed much later. Nothing was brought on record to indicate that assessee developed commercial project as well. Therefore, as assessee has completed the residential project which satisfies the conditions, it is eligible for deduction u/s 80IB(10). In fact, the AO after satisfying the conditions has in fact allowed deduction in A.Y. 2007-08 and AY 2008-09 on the same project. Thus, we are of the opinion that the AO and Id.CIT(A) erred in disallowing the claim this year on the reason that commercial project is part of the same housing project and that portion exceeded the

5% or 2000 sq ft whichever is less. We hold that the commercial building is a separate project and assessee project satisfies the conditions prescribed. We direct the AO to allow the deduction. The grounds are allowed."

4. We observe from the records that Ld.CIT(A) has followed the order passed by Coordinate Bench in assessee's own case for the A.Y. 2009-10 and the case of the assessee was reopened heavily relying on the A.Y.2009-10. Since there is no change in the business module and also the project is same on which the Coordinate Bench has held that the assessee is eligible to claim deduction u/s. 80IB(10) of the Act. Therefore, we do not see any reason to interfere with the findings of the Ld.CIT(A) and Ld.CIT(A) has given relief to the assessee by relying on the decision of the Coordinate Bench. Since there is no change in the facts of this case, we are inclined to dismiss the appeal filed by the Revenue.

5. In the net result, appeal of the Revenue is dismissed.

In Order pronounced on 30.11.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Mumbai / Dated 30.11.2021
Giridhar, Sr.PS

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

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

(Asstt. Registrar)
ITAT, Mum