आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.271/Ind/2011
(Assessment Year: 2007-08)
&
ITANo.22/Ind/2012
(Assessment Year 2008-09)

Sahara States (AOP) Bhojpur Road, 11 Mills, Near Water Park, Bhopal	Vs.	ACIT -1(1) Bhopal
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AABAS9296C		

Assessee by	Shri, P.K. Bansal, AR
Revenue by	Shri Ram Kumar Yadav, CIT- DR
Date of Hearing	05.09.2024
Date of Pronouncement	27.09.2024

O R D E R

Per Vijay Pal Rao, JM :

These two appeals by assessee are directed against two separate orders of Commissioner of Income Tax (Appeal) dated 29.07.2011 & 28.10.2011 for A.Y. 2007-08 & 2008-09 respectively.

2. The assessee has raised common grounds in these appeals except the quantum of disallowance. The grounds raised for A.Y.2007-08 are reproduced as under:

> *"1. That the Id. CIT(A) has erred in law and on facts in confirming the denial of claim of Rs. 64,27,070/- made by the appellant under section 801B(10) of the Income Tax Act.*
>
> *2. That the Id. CIT(A) has erred in law and on facts in holding that the appellant is not entitled to deduction under section 801B(10) because the project completion certificate was not obtained from the local authority.*
>
> *3. That the Id. CIT(A) has erred in law and on facts in confirming the denial of deduction under section 801B(10) for the reason that the area of commercial complex built on the project was in excess of the limits in the amended section 801B(10).*
>
> *4. That the Id. CIT(A) has not correctly interpreted the provisions of section 80IB(10) which stood prior to 1.4.2005 and after their amendment from 1.4.2005 in the correct perspective and thereby confirming the denial of deduction to the appellant whose project was approved prior to 31.3.2004.*
>
> *5. That the order passed by ld. CIT(A) is without proper opportunity and bad in law.*
>
> *6. That the order passed by ld. CIT(A) is against the merits, circumstances and legal aspects of the case.*
>
> *7. That the appellant craves leave to add, alter, amend or withdraw any or all the grounds of appeal on or before the date of hearing."*

3. The assesse is joint venture (AOP) constituted vide agreement dated 17.01.2002 to carry out the business of development and construction of residential and commercial units. The assessee filed

its return of income for A.Y.2007-08 on 29.10.2007 and for A.Y.2008-09 on 25.09.2008 declaring the income of Rs.12,77,970/- and Rs.25,70,022/- respectively after claiming deduction u/s 80IB(10). The AO completed the assessment u/s 143(3) whereby the claim of deduction u/s 80IB(10) was denied on two grounds viz;- Non completion of project within the stipulated period provided u/s 80IB(10) i.e 31.03.2008 and commercial construction in the project exceeding the limit as provided in clause (d) of section 80IB (10). The assesse challenged the action of the AO before the CIT(A) but could not succeed.

3.1 Before the Tribunal Ld. AR of the assesse has submitted that the project of the assessee was initially approved by the Town and Country Planning (TAPC) on 14.09.2000 and subsequently revised on 23rd August 2004. The project was commenced w.e.f 31.01.2001. The AO has denied the claim of deduction u/s 80IB(10) for non-fulfillments of the conditions of section 80IB(10) post amendment vide Finance Act 2004 w.e.f. 01.04.2005. Thus, Ld. AR has submitted that when the project was approved and commenced prior to the amendment of section 80IB(10) w.e.f 01.04.2005 then the conditions as stipulated in the amended provisions with respect of the completion of the project as well as commercial area in the project are not applicable in the case of the assessee. The provisions of section 80IB(10) applicable in the case of the assesse are those which were in existence at the time of the assessee commenced development and construction and not the provisions which has subsequently been amended. Ld. Counsel has contended

that a right vested in the assessee cannot be taken away by amended provisions by imposing a fresh condition the rule of promissory estoppel will apply. The amended provision of section 80IB(10) will be applicable only to those projects which has been commenced and approved after the amendment of section 80IB(10) therefore, the same are not applicable in the case of the assessee when it has commended the project much prior to the said amendment and there was no limit on construction of commercial complex which was restricted by the amended provision at 5%. He has further contended that as per un-amended u/s 80IB (10) there was no requirement of completion certificate and therefore, the said condition cannot be imposed on the assesse and even the revenue cannot ask for completion of the project whether it is completed or not. Ld. Counsel has submitted that when the assessee had complied with the conditions as per un-amended provisions of section 80IB(10) then the subsequent amendment cannot imposed a fresh condition for claiming the deduction u/s 80IB(10) of the Act. He has clarified that initially the project was approved for 29.7 acre on 14th September 2000 and revised plan were approved on 23rd August 2004 for 57.35 acres. In support of his contention he has relied upon following decisions:

a. CIT vs Sarkar Builders 277 CTR 301 (SC)

b. P. CIT vs Sahara State, Gorakhpur dated 19th August 2019 in ITANo.13 of 2016 (Allahabad High Court)

c. CM/s ACE Multi Axes System Ltd vs The DCIT dated 28th July 2014 in ITA No.477/2013 (Karnataka High Court)

d. CIT vs Bramha Associates - 333 ITR 289 (Bombay)

3.2 Placing reliance on the above judgment the Ld. AR has submitted that the Hon'ble High Court as well as Hon'ble Supreme Court has held that the insertion of clause (d) in section 80IB(10) w.e.f 01.04.2005 is applicable prospectively and not retrospectively and therefore, cannot be applied to the projects commenced and sanctioned before 01.04.2005. Thus, Ld. AR has contended that when the project was approved there was no such condition for completion of project on or before 31.03.2008 as well as commercial areas not exceeding 5%. He has pointed out that assessee started selling units for F.Y.2004-05 & 2005-6 and also claimed deduction u/s 80IB(10) for A.Y.2006-7 which was allowed by the AO in the scrutiny assessment and therefore, when the deduction is alloweable for the assessment years prior to the completion of the project then the same cannot be disallowed in the subsequent years on the ground that project is not completed before time limit prescribed in the amended provisions of section 80IB(10) of the Act. Ld. AR has also relied upon following decisions:

(i) Sahara States vs. ACIT in ITANo.520/Hyd/2011 dated 17.10.2018 (ITAT, Hyderabad)

(ii) M/s Sahara States Hyderabad vs. DCIT in ITANo.1498/Hyd/2012 and others dated 17.06.2015

(iii) M/s Raj Reality vs. Dy CIT in ITANo.533 & 534/Ind/2012 dated 19.09.2014

3.3 He has also pointed out that the decision of Hon'ble jurisdictional High Court in case of *Global Reality vs. CIT 379 ITR 107 (M.P.) & Global Estates vs. CIT 114 taxmann.com 96* has been stayed by Hon'ble Supreme Court 270 taxmann 178 therefore, when the operation of the judgment of Hon'ble jurisdictional High Court in case of Global Reality and Global Estates has been stayed then the same cannot be considered as a binding precedent. In support of his contention he has relied upon the judgment of Hon'ble Supreme Court in case of *Indira Nehru Gandhi vs. Raj Narain & Anr. (1975) AIR 1590.*

4. On the other hand, Ld. DR has submitted that the assessment years under consideration are subsequent to the amendment w.e.f. 01.04.2005 and therefore, the amended provisions of section 80IB(10) are applicable in the case of the assesse. The time limit prescribed under the amended provisions of section 80IB(10) for completion of the project will be applicable as legislature has given sufficient room to the existing project approved prior to the amendment to complete within a period of more than three years or almost four years as the same time period is allowed to the projects which are approved after amendment brought into the provisions of section 80IB(10). Therefore, there is no discrimination or disparity or prejudice cause to the assessee by the amendment by Finance Act 2004 w.e.f. 01.04.2005. Even after the said amendment the

assesse got more than three years to complete project . Ld. DR has further submitted that when the intent of the legislature is clear from the language of the provisions the the same cannot be given different a meaning. He has relied upon the orders of the CIT(A) and submitted that the CIT(A) has dealt with all the contentions of the assessee while passing the impugned orders.

5. We have considered rival submissions as well as relevant material on record. There is no dispute regarding approval of the project in the case as on 14th September 2000 for total area 29.97 acres. The assesse has also claimed that development and construction activities of the housing project commenced w.e.f 31.01.2001. The thrust of the whole argument of the Ld. AR of the assesse is on the point that subsequent amendment vide Finance Act 2004 w.e.f 01.04.2005 in the provisions of section 80IB (10) cannot impose new condition for allowing deduction in respect of the project which was approved and commenced prior to 01.04.2005.

5.1 In support of his contention he has relied upon series of decisions including the judgment of Hon'ble Supreme Court in case of *CIT vs. Sarkar Builders 375 ITR 392* as well as judgment in case of *CIT vs. Veena Developers 277 CTR 297*. Ld. AR has also relied upon the decision of Hon'ble Bombay High Court in case of *CIT vs. Bramha Associates 333 ITR 289*. Thus he has asserted that the amendments in section 80IB(10) w.e.f 01.04.2005 are prospective and not retrospective and hence cannot be applied for prior period

to 01.04.2005. It is pertinent to note that all these judgments are on the point that a conditions as per clause (d) of section 80IB (10) inserted vide Finance Act 2004 w.e.f 01.04.2005 regarding restriction of commercial area in the housing project can not be applied in respect of the projects approved prior to the said amendment. The Hon'ble Supreme Court while dealing this issue in case of *CIT vs. Sarkar Builders, (supra)* has observed in para 20 to 23 as under:

> *"20) Having regard to the above, let us take note of the special features which appear in these cases:*
>
> *(a) In the present case, the approval of the housing project, its scope, definition and conditions, all are decided and dependent by the provisions of the relevant DC Rules. In contrast, the judgment in M/s. Reliance Jute and Industries Ltd. was concerned with income tax only.*
>
> *(b) The position of law and the rights accrued prior to enactment of Finance Act, 2004 have to be taken into account, particularly when the position becomes irreversible. (c) The provisions of Section 80IB(10) mention not only a particular date before which such a housing project is to be approved by the local authority, even a date by which the housing project is to be completed, is fixed. These dates have a specific purpose which gives time to the developers to arrange their affairs in such a manner that the housing project is started and finished within those stipulated dates. This planning, in the context of facts in these appeals, had to be much before 01.04.2005. (d) The basic objective behind Section 80IB(10) is to encourage developers to undertake housing projects for weaker section of the society, inasmuch as to qualify for deduction under this provision, it is an essential condition that the residential unit be constructed on a maximum built up area of 1000 sq.ft. where such residential unit is situated within the cities of Delhi and Mumbai*

or within 25 kms. from the municipal limits of these cities and 1500 sq.ft. at any other place.

(e) It is the cardinal principle of interpretation that a construction resulting in unreasonably harsh and absurd results must be avoided. (f) Clause (d) makes it clear that a housing project includes shops and commercial establishments also. But from the day the said provision was inserted, they wanted to limit the built up area of shops and establishments to 5% of the aggregate built up area or 2000 sq.ft., whichever is less. However, the Legislature itself felt that this much commercial space would not meet the requirements of the residents. Therefore, in the year 2010, the Parliament has further amended this provision by providing that it should not exceed 3% of the aggregate built up area of the housing project or 5000 sq.ft., whichever is higher. This is a significant modification making complete departure from the earlier yardstick. On the one hand, the permissible built up area of the shops and other commercial shops is increased from 2000 sq.ft. to 5000 sq.ft. On the other hand, though the aggregate built up area for such shops and establishment is reduced from 5% to 3%, what is significant is that it permits the builders to have 5000 sq.ft. or 3% of the aggregate built up area, 'whichever is higher'. In contrast, the provision earlier was 5% or 2000 sq.ft., 'whichever is less'. (g) From this provision, therefor, it is clear that the housing project contemplated under sub-section (10) of Section 80IB includes commercial establishments or shops also. Now, by way of an amendment in the form of Clause (d), an attempt is made to restrict the size of the said shops and/or commercial establishments. Therefore, by necessary implication, the said provision has to be read prospectively and not retrospectively. As is clear from the amendment, this provision came into effect only from the day the provision was substituted. Therefore, it cannot be applied to those projects which were sanctioned and commenced prior to 01.04.2005 and completed by the stipulated date, though such stipulated date is after 01.04.2005.

21) These aspects are dealt with by various High Courts elaborately and convincingly in their judgments. It is not necessary to go into the detailed reasoning given by these High Courts. However, we would like to extract the following discussion from the judgment dated 25.07.2014 of the Bombay High Court in ITA Nos. 201 and 308 of 2012, where this very aspect is answered in the following manner: "36. There is yet another reason for coming to the aforesaid conclusion. Take a scenario where an Assessee, following the project completion method of accounting, has completed the housing project approved by the local authority complying with all the conditions as set out in section 80-IB(10) as it stood prior to 1st April, 2005. If we were to accept the argument of the Revenue, then in that event, despite having completed the entire construction prior to 1st April, 2005 and complying with all the conditions of section 80-IB(10) as it stood then, the Assessee would be disentitled to the entire deduction claimed in respect of such housing project merely because he offered his profits to tax in the A.Y. 2005-06. In contrast, if the same Assessee had followed the work-in-progress method of accounting, he would have been entitled to the deduction under section 80-IB(10) upto the A.Y. 2004-05, and denied the same from A.Y. 2005-06 and thereafter. It could never have been the intention of the Legislature that the deduction under section 80-IB(10) available to a particular Assessee would be determined on the basis of the accounting method followed. This, to our mind and as rightly submitted by Mr. Mistry, would lead to startling results. We therefore have no hesitation in holding that section 80-IB(10) is prospective in nature and can have no application to a housing project that is approved before 31st March, 2005. As the deduction sought to be claimed under section 80-IB(10) is inseparably linked with the date of approval of the housing project, it would make no difference if the construction of the said project was completed on or after 1st April, 2005 or that the profits were offered to tax after 1st Apri, 2005 i.e. in A.Y. 2005-06 or thereafter. We therefore find no substance in the argument of the Revenue that notwithstanding the fact that the housing project was approved prior to 31st March 2005, if the construction was completed on or after 1st April, 2005 or if the

profits are brought to tax in the A.Y. 2005-06 or thereafter, the said housing project would have to comply with the provisions of clause (d of section 80-IB(10). To our mind, we do not think that the condition/restriction laid down in clause (d) of section 80-IB(10) has to be revisited and/or looked at and complied with in the assessment year in which the profits are offered to tax by the Assessee. 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. We have come to this conclusion only because we find that clause (d) of section 80-IB(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. We may hasten to add that if a particular condition is not inseparably linked to the date of approval of the housing project, different considerations would arise. However, we are not called upon to decide any such condition and hence we are not laying down any general proposition of law, save and except that clause (d) of section 80-IB(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." 22) At this juncture, we would like to quote the following passage from Commissioner of Income Tax, U.P. v. M/s. Shah Sadiq and Sons7 : "14. Under the Income Tax Act of 1922, the assessee was entitled to carry forward the losses of the speculation business and set off such losses against profits made from that business in future years. The right of carrying forward and set off accrued to the assesee under the Act of 1922. A right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. This is the effect of Section 6 of the General Clauses Act, 1897. 15. In this case the 'savings' provision in the repealing statute is not

exhaustive of the rights which are saved or which survive the repeal of the statute under which such rights had accrued. In other words, whatever rights are expressly saved by the 'savings' provision stand saved. But, that does not mean that rights which are not saved by the 'savings' provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6(c) of the General Clauses Act, 1897. The right to carry forward losses which had accrued under the repealed Income Tax Act of 1922 is not saved expressly by Section 297 of the Income Tax Act, 1961. But, it is not necessary to save a right expressly in order to keep it alive after the repeal of the old Act of 1922. Section 6(2) saves accrued rights unless they are taken away by the repealing statute. We do not find any such taking away of the rights by Section 297 either expressly or by implication."

23) The aforesaid discussion persuades us to conclude that the judgments of the High Courts, which are impugned in these appeals, take correct view that the assesees were entitled to the benefit of Section 80IB(10). As a result, these appeals fail and are hereby dismissed.

5.2 The Hon'ble Supreme Court has analyzed the amendment made vide Finance Act 2004 in the context of the condition imposed as per clause (d) of section 80IB(10) and observed that restricting commercial area in the project to 5% or 2000 sq.ft whichever is less resulting impossible compliance in the ongoing project as the preposition becomes irreversible to reduce this commercial space in the project. The Hon'ble Supreme Court has taken into consideration the purpose of prescribing particular date before which such project is to be approved by the local authority as well as to be completed on or before fixed date so as to give time to the

developer to arrange their affairs in such a manner that the housing project is started and finished within those stipulated dates. It is observed by the Hon'ble Supreme Court that a construction of provision resulting in unreasonable harsh and absurd result must be avoided. The said observation was only in respect of the condition imposed under clause (d) of section 80IB(10) and not for the conditions of completion of the project on or before 31.03.2008. Thus, the issue was limited only to the application of restriction provided in clause (d) of section 80IB(10) on a project which was approved prior to 01.04.2005. Even if the proposition laid down by the Hon'ble High Court which has been upheld by the Hon'ble Supreme Court in those judgments is taken into consideration then the conditions as existed in the statute book as on the date of approval of the project would be applicable for claiming deduction u/s 80IB(10) of the Act. The provisions of section 80IB(10) as existed as on the date of approval of the project i.e. 14.09.2000 as well as on the date of commencement of the project i.e. 31.01.2001 are as under:

> *"10) The amount of profits in case of an undertaking developing and building housing projects approved by a local authority, shall be hundred per cent of the profits derived in any 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 the same before the 31st day of March, 2001;*

(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 kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place."

5.3 The deadline for completion of project was extended from 31.03.2001 to 31.03.2003 by amendment vide Finance Act 2000. Thus, as on the date of approval as well as on the date of commencement of the project the conditions as per section 80IB(10) are that such undertaking has commenced or commences development and construction of housing project on or after 1st day of October 1998 and completes the same before 31st day of March 2003. The condition as contemplated in clause (a) are obviously not satisfied in the case of the assesse because the project was not completed within stipulated deadline. The assesse is claiming the benefit of section 80IB(10) on the basis of the subsequent amendment brought in this section by Finance Act 2003 w.e.f. 01.04.2002 then the assesse cannot take a plea that the conditions of completion of project on or before 31.03.2008 as inserted by Finance Act 2004 w.e.f. 01.04.2005 cannot be applied in the case of the assesse because on the principle of applicability of the provisions as on the date of approval as well as date of commencement of the project the assessee was required to complete project before 31.03.2003. If the assesse takes benefit of relaxation of this condition by amendment vide Finance Act 2003

w.e.f 01.04.2002 then the restriction as placed by Finance Act 2004 w.e.f 01.04.2005 regarding completion of the project would also be applicable. The Hon'ble jurisdictional High Court in case *of CIT vs. Global Reality (supra)* after considering all these decisions including the judgment of Hon'ble Supreme Court in case of *CIT vs. Veena Developers(supra) CIT vs. Sarkar Builders (supra) as well as CIT vs. Bramha Associates (Supra)* has held that the submission of completion certificate issued by the local authority on or before the cut of date is mandatory conditions failing which the assesse is disentitled for claiming of deduction u/s 80IB(10). Though the said judgment of Hon'ble Jurisdictional High Court has been stayed by Hon'ble Supreme Court reported in 270 taxmann 178 however, the fact remains that the assessee has even not claimed or produced any documentary evidence in the shape of certificate of the architect to show that the project was completed within the stipulated period prescribed u/s 80IB(10)(a) or even till date. Therefore, it is not open to the assesse to claim deduction u/s 80IB(10) without completing project for indefinite period. The conditions for restrictions of commercial space in the residential project as inserted by clause (d) vide Finance Act 2004 w.e.f 01.04.2005 is in the nature of asking the assesse to comply with a conditions which is not possible if the project has already reached to advance stage as per the approved plan by the local authority but the condition of completion of project cannot be in the nature of impossible task because a reasonable period of more than three years is provided by the said amendment w.e.f 01.04.2005 as the

project is required to be completed on or before 31.03.2008. In any case the time period of completion of the projects which are approved after 01.04.2005 is also only four years and therefore, the project which was approved in the year 2000 has already availed more than five years as on the date of amendment and further period of three years was allowed to complete such project for availing benefit of section 80IB(10) which is a proper and reasonable restriction placed by the legislature to protect the interest of the buyers who have booked their houses in ongoing project but would not get completed houses within a reasonable time. Even otherwise the assessment year under consideration are not prior to the amendment w.e.f. 01.04.2005 and therefore, the question of retrospective applicability of this amendment prescribing time limit for completion of the project does not arise. Since the issue of requirement of completion certificate issued by the local authority is sub-judice before the Hon'ble Supreme Court therefore, in the facts and circumstances of the case we remand this issue to the record of the AO for fresh adjudication as per provisions as existed as on the date of approval of the project and subject to the decision of Hon'ble Supreme Court in case of *Global Reality (supra)* as well as *Global Estate (supra).*

6. As regards the denial of claim of deduction on the ground of commercial area exceeding the prescribed limit in clause(d) of section 80IB(10) is concerned this issue is covered by the judgment of Hon'ble Supreme Court in case of *CIT vs. Sarkar Builders (supra)* cited and reproduced in forgoing part of this order. Therefore, the

claim of deduction cannot be disallowed on the ground that commercial space in the project is more than the prescribed limit as per clause (d) section 80IB(10) if the said commercial part of the project is duly approved by the local authority. The AO has to verify from the sanction plan about commercial area in the project approved by the local authority and the construction is in the conformity of the local approved plan. Accordingly the matter is remanded to the record of the AO for fresh adjudication in the light of above observations.

7. In the result, both appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 27.09.2024.

Sd/-	**Sd/-**
(B.M. BIYANI)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Indore,_ 27 .09.2024

Patel/Sr. PS

Copies to: *(1) The appellant*
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore