

**आयकर अपीलिय अधिकरण “सी” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI**  
**BEFORE SHRI SANJAY ARORA, AM AND SHRI AMARJIT SINGH, JM**

आयकर अपील सं./I.T.A. No. 3382/Mum/2014  
(निर्धारण वर्ष / Assessment Year: 2010-11)

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| Income Tax Officer-25(2)(2),<br>C-11, Bldg., Room No. 106,<br>Pratyakshkar Bhavan, Kurla Complex,<br>Bandra(E), Mumbai-51 | <b>बनाम/</b><br>Vs. | Prathmesh Realtors<br>A-101, Sweta Park, Daulat Nagar<br>Road No. 2, Borivali (E),<br>Mumbai-400 066 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAIFP 8580 C   |                     |  |
| (अपीलार्थी /Appellant)  | :                   | (प्रत्यर्थी / Respondent)  |
| अपीलार्थी की ओर से / Appellant by   | :                   | Shri S. Pandian  |
| प्रत्यर्थी की ओर से/Respondent by   | :                   | Shri Tarun Ghia  |
| सुनवाई की तारीख /<br>Date of Hearing  | :                   | 16.03.2016   |
| घोषणा की तारीख /<br>Date of Pronouncement   | :                   | 10.06.2016   |

**आदेश / ORDER**

Per Sanjay Arora, A. M.:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-35, Mumbai ('CIT(A)' for short) dated 14.2.2014, partly allowing the Assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2010-11 vide order dated 12.3.2013.

2. The first issue under appeal (raised vide Grounds 1 and 2) is the validity or otherwise in law of the proportionate deduction to the assessee's, a builder and developer, housing project by the name 'Prathmesh Heritage', at Mira Road (E),

Thane (falling within 25 km of the municipal limits of Mumbai), i.e., *qua* the residential units that do not meet the stipulated criteria of the maximum built-up area of 1000 sq. ft. per section 80-IB(10)(c). The Revenue pleads its' case with reference to the decision by the Tribunal in the case of *Asst. CIT vs. Viswas Promoters (P.) Ltd.* [2010] 126 ITD 263 (Chen), advocating literal interpretation of the statute, so that the word 'project' appearing therein, not defined, is to be considered as one single project as approved by the local authority. The assessee, on the other hand, has relied on a series of the decisions by the tribunal, which though have been rendered without considering the decision in *Viswas Promoters (P.) Ltd.* (supra). More importantly, the said decision stands since disapproved by the Hon'ble High Court in *Viswas Promoters (P) Ltd. v. Asst. CIT* [2013] 29 taxmann.com 19 (Mad) dated 01.11.2012 (copy on record).

3. We have heard the parties, and perused the material on record.

Even as clarified by the Bench during hearing, the Hon'ble jurisdictional High Court has in *CIT vs. Brahma Associates* [2011] 333 ITR 289 (Bom) clearly held likewise, i.e., as by the Tribunal in *Viswas Promoters (P.) Ltd.* (supra), as noted by the tribunal in *Asst. CIT vs. Ekta Sankalp Developers* [2015] 152 ITD 805 (Mum), reproducing from the said decision (refer para 31 at pgs. 302-303 of the reports) at para 5 of the order:

*'Section 80-IB(10) allows deduction to the entire project approved by the local authority and not to a part of the project. If the conditions set out in section 80-IB(10) are satisfied, then deduction is allowable on the entire project approved by the local authority and there is no question of allowing deduction to the part of the project.'*

[emphasis, ours]

Further still, the said understanding by the Hon'ble Court stands approved by the Hon'ble Supreme Court in *CIT vs. Sarkar Builders* [2015] 375 ITR 392 (SC), with the dictum of non-deduction on or with reference to a part of the project, rather, follows

that of the entire project being a single project. The conditions for eligibility are, it may be appreciated, qualifying conditions and, therefore, operate cumulatively. So, however, the tribunal per its' decision in *Ekta Sankalp Developers* (supra) has clarified that the condition as to the cap on the built-up area, specified per clause (c) of section 80-IB(10), does not apply to the housing project as a whole, but only *qua* each residential unit. We may reproduce herein under the relevant part of the said order (refer para 5):

'5. We, faced with the decision by the hon'ble jurisdictional high court in the case of *Brahma Associates* (supra), .....

The provision is accordingly examined closely, to find clause (c) as worded differently from the other clauses of section 80-IB(10), setting forth the conditions precedent for the eligibility to deduction of the profits of the project. The said clause, on a fair construction, was found to contain a condition with reference to the residential unit comprising the housing project. *The condition, by necessary implication, applies to all the residential units of the housing project.* The converse, however, cannot be said to hold, so that only such housing project, all the residential units comprising which satisfy the condition of section 80-IB(10)(c), is an eligible project. The word 'project', clearly mentioned in each of the other clauses, is conspicuous by its absence in clause (c). That is, s. 80-IB(10)(c) represents a condition precedent *qua* the residential unit comprising the housing project and not *qua* the project; its language not admitting of such a view. We may though at once clarify that the decision by the hon'ble court being binding, we would not have for a moment hesitated to hold otherwise if we found anything to so suggest in the decision in *Brahma Associates* (supra), which is *sans* any reference to s. 80-IB(10)(c), or if that meaning or intention was found expressed in its plain language; it being trite that there is no equity about tax and there is no room for intendment, so that one has to look fairly at the language used, even as exhorted time and again by the apex court. Also, fiscal statutes are to be strictly interpreted, and so are the exemption provisions. It is only once an entity or income, which is the subject matter of exemption, is found, on such construction, to be within the ambit of the provision, that a liberal approach is to be adopted toward effectuating the object of the provision, for which we may refer to *Bajaj Tempo Ltd. vs. CIT* [1992] 196 ITR 188 (SC) relied upon by the tribunal in the various

orders, as far as appears on a reading of their extracts as listed in the tribunal's order for A.Y. 2007-08 (supra). The interpretation is also in accord with a purposive and liberal approach, advocated by the apex court in, *inter alia*, *Bajaj Tempo Ltd.* (supra). The provision being an incentive provision, toward promoting the growth of affordable housing in the country, the construction enables the same, while at the same time operating to exclude the extension of the incentive to housing that is not covered or targeted by the provision, as sought to be included by the Id. AR. Again, it is trite law that the benefit of any ambiguity, if any, in the language of the provision, so that two reasonable views are permissible, is to go to the tax payer.

We may clarify that our decision, even as sought to be emphasized earlier, despite approving the proportionate deduction, i.e., w.r.t. section 80-IB(10)(c), is, for the reasons afore-stated, thus not in conflict with the decision by the hon'ble jurisdictional high court in *Brahma Associates* (supra). The deduction toward the residential units satisfying the condition of s. 80-IB(10)(c), arrived at on a proportionate basis, is therefore upheld.'

The decision by the Hon'ble High Court in *Viswas Promoters (P) Ltd.* (supra) shall, in view of the binding decisions in the case of *Brahma Associates* (supra) and *Sarkar Builders* (supra), therefore not obtain, even as noticed by the tribunal in *Ekta Sankalp Developers* (supra). So, however, for the reasons mentioned therein, and which we have reproduced hereinbefore, proportionate deduction, as explained therein, on the profits of a housing project which otherwise satisfies the condition of section 80-IB(10), i.e., as referable to residential units having the maximum built-up area as prescribed per clause (c) thereof, would qualify for deduction on a proportionate basis, i.e., to the exclusion of the other residential units. We decide accordingly, disposing Grounds 1 & 2 of the appeal.

4. The only other issue raised by the Revenue is of addition u/s. 69C in respect of bogus purchases at Rs.22,76,268/-, agitated vide Grounds 3 to 7 of its' appeal. Toward this, the Id. AR would before us raise an alternative argument, i.e., even granting so,

the assessee would stand to be allowed deduction u/s.80-IB(10) on the enhanced profit, i.e., to the extent of an addition u/s. 69C.

5. We have heard the parties, and perused the material on record.

The Id. CIT(A), we find, has disallowed 15% of the impugned purchases, restricting thus the addition to income to Rs.3,41,440/-, following the decision in *CIT vs. Simit P. Sheth* [2013] 356 ITR 451 (Guj). Further, she regarded the same as a disallowance u/s. 37(1). The first question therefore that arises is if the 'addition' is of unexplained expenditure, deemed as income u/s. 69C, or would appropriately be disallowable as an expenditure u/s. 37(1). This is so as it may be appreciated that it is only in the case of the latter that the disallowance would go to swell the profit (from the same qualifying unit), bear the same character, so as to be eligible for deduction - and which in the instant case is u/s.80-IB(10), on the increase therein. Toward this, we are at loss to understand as to how and on what basis the assessee having claimed the expenditure through its' books of account, so that the source is explained with reference thereto, the Revenue regards it as unexplained expenditure and, consequently, deems it as income u/s. 69-C. We, accordingly, agree with the Id. CIT(A) that even if regarded as bogus purchase, the same would stand to be disallowed u/s. 37(1), leading to an increase in the assessable profits of the eligible unit. We may here also clarify that had it not been so, the addition of income u/s. 69C, i.e., on account of expenditure not explained as to its source, the same would not be liable to be regarded as the profit of the eligible unit.

The next issue before us would be if the assessee's alternate contention could be acceded to; it being not in appeal as well as having not preferred a cross objection, i.e., could the same be admitted for consideration. In our view, the same is to be regarded as concession by the assessee with regard to the issue in principle, i.e., *qua* the addition for Rs.22.76 lacs, which we have clarified to be in law a disallowance u/s. 37(1) of the Act. The question of application or otherwise of the decision in the case

of *Simit P. Sheth* (supra), i.e., with reference to which the Id. CIT(A) has allowed relief to the assessee, and which decision was not even referred to during hearing, does not consequently arise. Further, even if therefore the assessee is not in appeal, with there further being no plea, similarly, for deduction u/s.80-IB(10) on the sum disallowed, we regard the same as in the nature of a consequential plea – legal in nature. We have already held that the addition as made has been rightly regarded by the Id. CIT(A) as a disallowance u/s. 37(1). We, therefore, accepting the assessee's plea that the entire amount 'added' be regarded as a disallowance, approve of the allowance of the assessee's claim for deduction u/s.80-IB(10)(a) with reference to the increased amount and directed for the computation of deduction u/s.80-IB(10) at the amount so determined. We decide accordingly.

6. In the result, the Revenue's appeal is dismissed on the afore-said terms.

*Order pronounced in the open court on June 10, 2016*

Sd/-

(Amarjit Singh)

न्यायिक सदस्य / Judicial Member

Sd/-

(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 10.06.2016

व.नि.स./Roshani, Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**