

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI

सर्वश्री आर.सी.शर्मा, लेखा सदस्य एवं श्री अमरजित सिंह, न्यायिक सदस्य

BEFORE SHRI R.C.SHARMA, AM

&

SHRI AMARJIT SINGH, JM

आयकर अपील सं./ITA Nos.307&308/Mum/2013

(निर्धारण वर्ष / Assessment Years :2004-05 & 2005-06)

Om Sai Ram Developers, Matruchhaya Devki Nagar, Opp. Shanti Darshan, Borivali (W), Mumbai-400092	Vs.	ITO 25(2)(4), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAFO 8056 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Ms. Pradnya Vairale

राजस्व की ओर से /Revenue by : Shri Gemesh Bare

सुनवाई की तारीख / Date of Hearing : **24/09/2015**

घोषणा की तारीख/Date of Pronouncement **20/10/2015**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the appeals filed by the assessee against the order of CIT(A) for the assessment years 2004-05 & 2005-06, in the matter of order passed u/s.144(3) r.w.s.145(3) of the I.T.Act.

2. Common ground taken in both the years pertains to disallowance of assessee's claim for deduction u/s.80IB(10) of the Act on the plea that completion certificate was not obtained within the stipulated period of four years.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a partnership firm engaged in the business of builders and developers. During the relevant period, the assessee

undertook a project by name "Vrindavan Complex" and claimed deduction u/s 80IB(10). The A.O. completed the assessment originally u/s 143(3) accepting the claim of the assessee that it was entitled to deduction u/s 801B(10). Subsequently, the A.O. received information from ITO (CIB) stating as under:

" As per the direction given by the DIT (C1B)Mumbai by her letter dated 1.9.08(copy enclosed), the verification was made in this case from local authorities regarding commencement and occupation certificate issued by them. On verification it appears that the occupation certificate was not issued by the local authorities in this case."

4. In view of rite above information, the A.O. reopened the assessment u/s 148 on the ground that local authorities did not issue the occupation certificate before 31-3-08. In response to notices u/s.148 dated 25-3-09, the assessee filed letters dated 28-4-09, stating that returns already filed for both the assessment years might be treated as sufficient compliance.

5. In the re-assessment proceedings, the AO noticed that the assessee commenced the project on 28-10-02 and, therefore, the assessee ought to have completed the housing project and obtained occupation certificate on or before 31-3-08. When confronted, the assessee submitted that necessary application for granting occupation certificate was filed before Mira Bhayander Municipal Corporation but the assessee did not receive any communication from the Municipal Corporation. The representative further submitted that the certificate issued by the architect for completion of the project was submitted before the A.O. and merely because Mira Bhandar Municipal Corporation did not issue the occupation certificate, the assessee could not penalized by

denying deduction u/s 80IB(10). It was contended that the Municipal Corporation should have communicated the reason for not granting the occupation certificate in the absence of which it shall be deemed that the occupation certificate was granted.

6. Since the assessee could not produce the completion certificate, the AO declined the assessee's claim for deduction u/s.80IB(10) of the Act.

7. By the impugned order the CIT(A) confirmed the action of the AO against which the assessee is in further appeal before us.

8. It was argued by Id. AR that project was approved in 2002 and was completed before 31st March, 2005, therefore, condition brought in the statute by Finance (No.2) Act, 2004 w.e.f. 1st April, 2005 with regard to completion of project is not applicable. The assessee contended that since the project was approved prior to 1st April, 2005, there is no requirement for furnishing its completion certificate.

9. On merits, Id. AR drew our attention to the following certificates filed before the revenue authorities to substantiate its claim of completion before 31st March, 2008 :-

- i) Copy of the order No.s906 to 914 dated 17.05.2004 issued by Mira-Bhayander Corpn. Granting water connection to project Vrindavan Complex;
- ii) Copy of Bill-cum-receipt dated 09.08.2005 by Advocate being fees for registration of society;
- iii) Copy of Order No.TNA(TNA)/HSG/(TC)/16677/2005-2006/1830/Year 2005 dated 11.08.2005 by Registrar of Cooperative Societies for Registration of society viz. Star Vrindavan CHS Ltd.;
- iv) Copy of Regn. Certificate of society bearing No.TNA(TNA)/HSG/(TC)/16677/ dated 11/08/2005;

- v) Copy of Application dated 12.02.2004 for Occupation Certificate by Architect of assessee to Municipal Authorities duly acknowledged; and
- vi) Copy of Municipality letter dated 21.04.2011 wherein they have referred the above application by assessee's Architect for O.C.

In view of the above, Id. AR contended that assessee has completed the project within the stipulated period of four years.

10. We have considered rival contentions, gone through the orders of the authorities below and deliberated on the judicial pronouncements referred by lower authorities in their orders as well as cited by Id. AR and DR during the course of hearing before us. From the record we found that the impugned project of the assessee was approved prior to 1st April, 2005 and as per the provisions applicable for the projects approved prior to 1-4-2005, there was no condition for furnishing completion certificate for claiming deduction u/s.80IB(10) of the Act.

11. The relevant provisions of law as prevailing prior to amendment by Finance (No.2) Act, 2004, effective from 1-4-2005, reads as under :-

*'Section 80-IB(10) prior to the amendment of 1.4.2005 :
Sub s. by Finance (No.2) Act, 2004 (23 of 2004), Section 18(d), for sub-Section (10) w.e.f. 1.4.2005). Earlier sub-Section (10) was amended by the Finance Act, 2000 (10 of 2001), Section 39(e)(i) and (ii) (w.e.f. 1.4.2001), by Finance Act, 2003 (32 of 2003), Section (c) (i) and (ii) (w.e.f. 1.4.2002). Sub-Section (10), before substitution by Finance (No.2) Act, 2004, stood 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 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;*
- (b) *the project is on the size of a plot of land which has minimum area of one acre; and*

- (c) *the residential unit has a minimum 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 ITA 298/2013 page 2 of 21 limits of these cities and one thousand and five hundred square feet at any other place.'*

12. Soon after Finance (No.2) Act,2004 w.e.f. 1.4.2005, the amended provision reads as under :—

"80-IB. (1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to[(11), (11A) and (11B)] (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.

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[(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day 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, within four 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) *the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such*

housing project is issued by the local authority;

- (b) *the project is on the size of a plot of land which has a minimum area of one acre:*

Provided that nothing contained in clause (a) or clause (b) shall apply to a housing project carried out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf;

- (c) *the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the city 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; [and]*
- (d) *the built-up area of the shops and other commercial establishments included in the housing project does not exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet, whichever is less.]*

The following clauses (e) and (f) shall be inserted after clause (d) of sub-section (10) of section 80-IB by the Finance (No.2) Act, 2009, w.e.f. 1-4-2010 :

- (e) *not more than one residential unit in the housing project is allotted to any person not being an individual; and*
- (f) *in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely:-*
- (i) *the individual or the spouse or the minor children of such individual,*
- (ii) *the Hindu undivided family in which such individual is the karta,*
- (iii) *any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta.*

[Explanation. - For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State Government).]"

13. From the perusal of clause (a) of section 80IB(10) as it stood prior to amendment w.e.f. 1-4-2005, there is mere condition for commencement of housing project on or after 1st October, 1998. However, there is no

condition for completion of project. The Finance (No.2) Act, 2004 brought sub.clause (i) & (ii) of cl.(a) stipulating condition for completion of project within specified time period. However, this amendment is effective from 1-4-2005, therefore, not applicable for projects approved prior to 1-4-2005. It is apparent that the assessee is entitled for the deduction, if he complied with all the conditions as has been stipulated, at the time its project for development of housing project is approved. This is an undisputed fact that in the case of the assessee, the project was approved prior to 1-4-2005.

14. The Hon'ble Bombay High Court in the case of Happy Homes Enterprises, 51 taxmann.com 281, clearly held that amendment brought in by Finance (No.2) Act, 2004 is applicable for the projects approved after 1-4-2005, and not for the projects approved prior to 1-4-2005. Precise observation was as under :-

“The provisions of section 80-IB(10) were substantially amended by way of the Finance (No. 2) Act, 2004 with effect from 1-4-2005. As can be noted from the amended provisions, there were several conditions that were imposed in the newly substituted section 80-IB(10) that were absent in the said section prior to its amendment. One such condition inserted with effect from 1-4-2005 was clause (d) that put a restriction on the quantum of commercial area that could be included in a housing project in order to entitle the assessee to claim the deduction as set out in the said section. It is pertinent to note that in the appeals, it is an admitted fact that the housing projects were approved prior to 31-3-2005. It cannot be thought that the Legislature intended to give any retrospectivity to clause (d) of section 80-IB(10). This more so because it is clearly a condition that relates to and/or is linked with the approval and construction of the housing project. It would be highly unfair to require an assessee to comply with section 80-IB(10)(d) who has got his housing project approved by the local authority, before 31-3-2005 and has either completed the same before the said date or even shortly thereafter, merely because the assessee has offered its profits to tax in Assessment year 2005-06 or thereafter. This, could never have been the intention of the Legislature. In fact, it would run counter to the

very object for which these provisions were introduced, namely to tackle the shortage of housing in the country and encourage investment therein by private players. It is therefore clear that clause (d) of sub-section (10) of section 80-IB cannot have any application to housing projects that are approved before 31-3-2005. The said clause (d) being inextricably linked to the date of approval of the housing project, it will have to be held that the said clause operates only prospectively i.e. for housing projects approved after 1-4-2005. This is notwithstanding the fact that the profits were offered to tax by the assessee for the assessment year 2005-06 or thereafter. Thus, clause (d) of section 80-IB(10) is prospective in nature and would not apply to housing projects approved prior to 31-3-2005.”

15. In the instant case also there is no dispute to the fact that housing project was approved prior to 1-4-2005 insofar as the AO himself has stated that housing project was commenced on 28-10-2002 and completed before 31-3-2005, which means it was approved prior to 31-3-2005. The Indore Bench of ITAT in the case of Raj Reality, 53 taxmann.com 439, held that project approved prior to 1-4-2005, the condition regarding its completion within the stipulated period, as introduced by Finance (No.2) Act, 2004 w.e.f. 2005 is not applicable. The Hon'ble Bombay High Court in the case of Happy Homes Enterprises (supra), also held that clause-d inserted in Section 80IB(10) by Finance (No.2) Act, 2004 effective from 1-4-2005 is not applicable in respect of projects approved prior to 1-4-2005.

16. In view of the above discussion, respectfully following the decision of coordinate bench as well as decision of Hon'ble Bombay High Court, we do not find any merit for declining of claim of deduction on the plea of completion certificate having been not obtained within a period of four years, in respect of projects which was approved prior to 1st April, 2005.

Accordingly, the AO is directed to allow assessee's claim for deduction u/s.80IB(10) for both the years under consideration.

17. As we have decided ground No.1 in assessee's favour, we are not going to decide ground Nos.2 & 3, which pertain to completion of housing project by assessee before 31st March, 2008.

18. In the result, appeals of the assessee for both the years under consideration, are allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 20/10/2015.

Sd/-

(अमरजित सिंह)

(AMARJIT SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated

प्र.कु.मि/pkm, नि.स/ 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), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

Sd/-

(आर.सी.शर्मा)

(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

20/10/2015

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai