

**आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI**

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 2882/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2006-07)

M/s Savita Builders and Developers, Sakharam Baba Sankul, Bolinji, Near Union Bank, Virar (W), Taluka - Vasai, Dist Thane - 401 303.	<b>बनाम/</b> v.	The Deputy Commissioner of Income Tax - Central Circle - 4, Thane.
स्थायी लेखा सं./PAN : AAYFS1480N		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee by	Shri Anil Sathe
Revenue by :	Shri Vishwas Jadhav (D.R.)

सुनवाई की तारीख / **Date of Hearing** : 02-08-2016

घोषणा की तारीख / **Date of Pronouncement** : 26-10-2016

**आदेश / ORDER**

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee, being ITA No. 2882/Mum/2012, is directed against the appellate order dated 8<sup>th</sup> November, 2011 passed by learned Commissioner of Income Tax (Appeals)- II, Thane (hereinafter called "the CIT(A)"), for the assessment year 2006-07, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 29<sup>th</sup> December, 2008 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income Tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") read as under:-

“1. The learned Commissioner of Income Tax (Appeals) erred in disallowing the appellant's claim of deduction under sec. 80IB (10) of the Income-tax Act 1961 of Rs. 16,48,773/- without appreciating that the appellant had duly complied with all the requisite conditions provided in the Act.

2. The learned Commissioner (Appeals) failed to appreciate the fact that the project was constructed on a size of plot of land admeasuring 9734.86 sq. mtrs which was more than one acre.

3. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that assessee had received completion certificate in respect of both the buildings undertaken by them and copies of the occupation certificates have already been placed on record and that the project constructed was completed before 31.03.2008.

4. The learned Commissioner of Income Tax (Appeals) erred in holding that the size of plot of land on which the building is constructed is to be more than one acre without appreciating that the specified size is with respect to the entire plot of land and not with respect to the size of each housing project.

5. The learned CIT (Appeals) failed to appreciate that there can be multiple housing projects on a plot of land having minimum area of one acre.”

3. The Brief facts of the case are that the assessee is a partnership firm engaged in the business of builders and developers. The assessee firm has undertaken the construction of the project viz. building No. 3 having 3 wings and building No. 4 during the year under review. The building developed and constructed by the assessee is "Audumbar" and "Panchamrut ". The project was approved by the local authority i.e. CIDCO vide commencement certificate No. CIDCO/VVSR/CC/BP-1785/W-284 dated 12-05-2000 and this was subsequently amended on 18<sup>th</sup> October, 2001 and 27<sup>th</sup> February, 2004. The assessee also furnished occupancy certificate in respect of residential

building No. 3 and 4 dated 20<sup>th</sup> March, 2006 and 14<sup>th</sup> August, 2007 respectively. During the year under consideration, the assessee has shown the sales at Rs. 1,05,26,361/- and net profit declared at Rs. 11,50,794/- which works out @ 10.93%. The entire net profit of Rs. 11,50,794/- and disallowance on account of FBT and u/s. 40A of the Act, total amounting to Rs. 4,97,979/- aggregating to net profit of Rs. 16,48,773/- was claimed as deduction u/s. 80IB(10) of the Act in respect of the above project and accordingly claimed entire profit of Rs. 16,48,773/- as exempt from tax.

It was observed by the A.O. that commencement certificate was issued by the local authority i.e. CIDCO on 12<sup>th</sup> May, 2000. Since the commencement certificate was issued prior to 1st April, 2004, the project should have been completed by 31<sup>st</sup> March, 2008, the assessee was asked to submit completion certificate. The assessee submitted the completion certificate and according to the certificates issued by the CIDCO, the said project was completed on 20<sup>th</sup> March 2006 and 14<sup>th</sup> August, 2007 with respect to the afore-stated two buildings. The A.O., on perusal of the audit report in form No. 10CCB claiming deduction u/s 80IB(10) of the Act as per column 23(c) observed that the size of plot of land of the project is mentioned at 2131.40 sq.mtrs. i.e. 22933.864 sq.feet which is less than 1 acre. To qualify for the deduction u/s. 80IB(10) of the Act, the assessee is required to have minimum size of plot not less than 1 acre i.e. 40000 sq. feet, while the assessee size of the plot is less than one acre and hence the assessee has not fulfilled the condition as laid down u/s 80IB(10) of the Act, the assessee firm is not entitled for the deduction u/s 80IB(10) of the Act.

The A.O. also made request to the government registered valuer to undertake physical measurement of the plot of land bearing S.No. 205A at village Boling on which the assessee has constructed building namely "Audumbar" and "Panchamrut". The physical measurement of the said plot of land was

conducted by government registered valuer in the presence of the A.O. and the partner of the assessee firm , who submitted its report dated 25<sup>th</sup> December, 2008 whereby the size of plot including the area reserve for garden comes to 2163.90 sq. mtrs which is less than 1 acre. The copy of the measurement has also been handed over to the assessee. The A.O. held that since the size of the plot of land was less than one acre and the assessee failed to complete its project and obtained the completion certificate before 31<sup>st</sup> March, 2008 , and hence the assessee is not entitled for the deduction u/s 80IB(10) of the Act. The assessee was show caused by the AO and in reply the assessee submitted a letter issued by M/s Sanath Mehta and Associates stating the total area of Sakharam Baba Sankul where two buildings of the assessee are situated. The assessee has purchased total of 9734.86 sq. mtrs of area vide development agreement dated 24<sup>th</sup> September, 2008. The assessee further submitted that due to market conditions and lack of demand in the area where the buildings are situated, the assessee decided not to proceed with the further development of the construction of the building and allowed to lapse validity of the C.C. issued by the CIDCO for the rest of the buildings. The assessee submitted that it has also received completion certificate for the both the buildings undertaken by it. The assessee also placed copies of occupation certificate on record and hence request was made by the assessee to consider the whole plot of land as purchased by the assessee for calculating piece of land as per section 80IB (10) of the Act which is more than 1 acre and 80IB (10) benefit should be granted to the assessee was the contention of the assessee before the AO.

The A.O. considered the submissions of the assessee and held that the assessee has not fulfilled the conditions as laid down u/s 80IB (10) Act as the project undertaken by the assessee has not been completed on or before 31<sup>st</sup> March, 2008 ( the commencement of project being prior to 1st April, 2004 ) . The area of the plot of land on which the project is constructed is less than 1

acre. The assessee did not offered any comments with respect to the physical measurement report of the Government registered valuer which means that the assessee has accepted the report and has no objections about the area of the plot of land . The A.O. observed that the assessee firm did not fulfilled the conditions laid down u/s 80IB(10) of the Act and accordingly disallowed an amount of Rs. 16,48,773/- claimed as deduction u/s 80IB of the Act and the same was brought to tax , vide assessment order dated 29.12.2008 passed by the AO u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 29.12.2008 passed by the A.O. u/s. 143(3) of the Act, the assessee filed first appeal before the ld. CIT(A).

5. Before the ld. CIT(A), the assessee submitted that the assessee is new in the above business and could complete only two out of eight buildings and the occupancy certificate for such building was also received and is placed on record. The assessee submitted that the assessee should not be denied the benefit of section 80IB(10) of the Act on the completed project only on the ground that no further C.C. was obtained for the balance FSI which was there unutilized in the project. The assessee further submitted that the architect of the assessee M/s Sanat Mehta & Associates had issued a letter showing the total area of project as stated in development agreement which was 9734.86 sq. mtrs and since the entire area of 9734.86 sq. mtrs. is purchased by the firm for development, it cannot be said that the size of plot of the project is less than 1 acre. Thus, in nutshell the entire project is of an area of 9734.86 sq. meters as stated by the assessee in its letter dated 26<sup>th</sup> December, 2008. It was submitted that the objective behind introduction of Section 80IB(10) of the Act was to promote housing activity. Since, the two buildings were completed, the assessee should be granted the benefit of Section 80IB(10) of the Act w.r.t. these two completed buildings and non completion of the other buildings shall not act as detrimental to the grant of benefit u/s 80IB(10) of

the Act. The ld. CIT(A) considered the submission of the assessee and observed that there is no merit in the submissions of the assessee. The learned CIT(A) observed that the provisions of the clause (b) of section 80IB(10) of the Act are clear and unambiguous which states that the project is on the size of a plot of land which has minimum area of one acre and the area of the plot on which the housing project is constructed has to be minimum 1 acre in size which means that it should be constructed on a single plot having minimum of 1 acre of land. The ld. CIT(A) also observed that the assessee has also not denied that the area of the plot is less than 1 acre and has not contradicted the observations of the government approved valuer regarding the size of the plot taken after physical measurement at 2163.90 square meters which amounts to acceptance of the fact that size of the plot as measured by the Government Approved Valuer is less than one acre and also accepting the violation of the provisions of Section 80IB(10) of the Act. Thus, the ld. CIT(A) confirmed the assessment order dated 29.12.2008 passed by the A.O. u/s 143(3) vide appellate orders dated 08-11-2011 passed by learned CIT(A) as the assessee has not complied with the basic condition specified in clause (b) of Section 80IB(10) of the Act which states that “the project is on the size of a plot of land which has minimum area of one acre” and the assessee has violated the above conditions and therefore the assessee is not entitled for the benefit of deduction u/s. 80IB(10) of the Act and hence the action of the AO disallowing the deduction of Rs.16,48,773/- u/s. 80IB(10) of the Act was confirmed by learned CIT(A) vide appellate orders dated 08-11-2011.

6. Aggrieved by the appellate orders dated 08-11-2011 passed by the ld. CIT(A) , the assessee filed further appeal before the Tribunal.

7. The ld. Counsel for the assessee submitted that the assessee has acquired the development right over a plot of land admeasuring 9734.86 sq.

mtrs. for the purpose of construction of eight buildings. The area of plot of land is 9734.86 square meters which is more than one acre. The CIDCO approval was obtained for the construction of eight buildings. The assessee constructed only two buildings which were constructed prior to 31-03-2008 . The plinth area of the land is less than one acre so far as the two buildings constructed by the assessee are concerned which was 2163.90 square meters, while the total plot area was 9734.86 square meters for which the assessee entered into development agreement which was more than one acre and hence the assessee has duly complied with conditions of Section 80IB(10) of the Act. The rest of the six buildings could not be completed by the assessee due to adverse market conditions and lack of demand of residential units. It was submitted by learned counsel for the assessee accordingly the benefit of section 80IB(10) of the Act was denied to the assessee in entirety despite the fact that two buildings were completed prior to 31-03-2008. The ld. Counsel drew our attention to the orders of authorities below whereby the assessee has completed only two buildings prior to 31<sup>st</sup> March, 2008 out of eight building approved in the housing project , and obtained the completion certificate w.r.t. two building completed prior to 31-03-2008 . The ld. Counsel also drew our attention to the Development Right agreement for the total plot area of 9734.86 square meters which is placed at paper book page 1 to 34 which also included the English version of original agreement in vernacular language. The ld. Counsel also drew our attention to the occupancy certificate which have been obtained by the assessee with respect to the two buildings which are also placed on record vide paper book page 41 to 46 and the certificate of completion is placed at paper book page 47. The certificate of the Architect is placed at paper book page 48. The ld. Counsel relied on the decision of Hon'ble Bombay High Court in the case of CIT v. Vandana Properties, (2012) 206 TAXMAN 584 (Bombay) and submitted that the plot of land size is more than 1 acre on which housing projects was constructed comprising two buildings prior to 31-03-2008 and hence deduction should be

allowed u/s. 80IB(10) of the Act. The ld. Counsel also relied on the following decisions:-

1. Hon'ble Bombay High Court decision in the case of CIT v. Happy Home Enterprises, (2014) 90 CCH 0106 Mum HC.
2. ITAT, Hyderabad decision in the case of ITO v. Prashanth Sai Builders, (2014) 39 CCH 0029 Hyd Trib.
3. ITAT Mumbai Bench decision in the case of Mudhit Madanlal Gupta v. ACIT, (2011) 51 DTR (Mumbai)(Trib) 217.
4. ITAT, Mumbai decision in the case of Saroj Sales Organisation v. ITO, (2008) 115 TTJ 0485
5. Hon'ble Delhi High Court decision in the case of CIT v. CHD Developers Ltd., (2014) 362 ITR 0177 (Delhi).

8. The ld. D.R., on the other hand, relied on the order of the authorities below and submitted that the agreement does not mention the name of the assessee.

9. We have considered the rival contentions and also perused the material available on record including the case laws relied upon. We have observed that the assessee has entered into development agreement dated 24<sup>th</sup> September, 2004 with respect to development of 9734.86 sq. mtrs of land which is for the purpose of development of eight residential buildings at village Bolinj, Taluka Vasai, Dist Thane bearing survey No. 205/A for a total consideration of Rs. 1,20,46,000/-. The Development Agreement is placed on record before us in paper book at page 1-34. The assessee has completed only two buildings out of eight buildings proposed to be constructed on the said plot of land as approved by CIDCO . However, the plinth area of land is less than 1 acre w.r.t. construction of these two completed residential buildings which is 2163.90 square meters as per the physical measurement which is an undisputed and admitted position between the rival parties. The

assessee stated that it did not continue with the construction of the rest six buildings due to economic downturn and lack of demand of residential units which are beyond control of the assessee. The authorities below denied the deduction u/s. 80IB(10) of the Act to the assessee as the plinth area of plot of land on which two buildings were constructed was 2163.90 square meters which is less than one acre in size. It is not borne out from the records before us whether the assessee has undertaken any effective step towards the construction of the rest six buildings before abandoning the same and after entering into development agreement dated 24-09-2004 with the land-owners , and at what stage the said plans for development/construction of rest six buildings were abandoned by the assessee and cancellation agreement entered into with the landowners. It is also not borne out from records whether the assessee made full payment or not to the land owners as stipulated in the development agreement dated 24-09-2004 before abandoning/cancelling the development agreement w.r.t. six buildings not constructed by the assessee on the said plot of land. which facts also needs verification by lower authorities to establish that the assessee was genuinely and bonafidely involved in construction/development of eight buildings on plot of land of 9734.86 square meters which is more than one acre in size , but for the reasons beyond assessee's control the rest six buildings could not be completed despite assessee taking effective steps for construction of these rest six buildings which plan for construction was abandoned later on by the assessee. In case the assessee is able to prove the genuineness and bona-fide of development agreement dated 24-09-2004 entered into by the assessee with the land owners and its plans and capabilities to construct eight buildings , the assessee in that case will be entitled for benefit of deduction under section 80IB(10) of the Act with respect to two buildings completed prior to 31-03-2008. Thus, in nut-shell genuineness of the development agreement dated 23-09-2004 needed to be ascertained before allowing the deduction u/s 80IB(10) of the Act w.r.t. two completed buildings in the

instant case keeping in view the peculiar facts and circumstances of the instant case. The assessee, in our considered view, has not placed sufficient material before the authorities below as well before us to verify the genuineness of the development agreement dated 24-09-2004 and bona-fide of its plan to construct eight buildings vide development agreement dated 24-09-2004. In our considered view, these aspects as set out above by us need's further enquiry and verifications' by the authorities below and hence we are inclined to set-aside and restore the issue to the file of the AO for conducting necessary enquiry and verifications by the AO as referred to by us as above before de-novo adjudication of the issue on merits. The assessee is directed to produce all the relevant evidences and explanations before the A.O. such as development agreement entered into by the assessee with the owners for development/ construction of eight buildings on the plot of land admeasuring 9734.87 square meters, payments made by the assessee as per the development agreement to the owners of the plot of land, effective steps taken by the assessee for construction of the rest six buildings on the plot of land, permissions obtained from the authorities for constructing six buildings, the cancellation agreement entered into by the assessee with the land owners' and the stage of entering cancellation agreement with the land owners etc., to establish that the assessee genuinely and bonafidely entered into development agreement dated 24-09-2004 with the land owners to construct eight buildings on the plot of land of 9734.86 square meters but for reasons beyond its control due to lack of demand for residential units and downturn in the economy, the plans for construction of rest six buildings were shelved/abandoned. The assessee is directed to produce all the relevant evidences and explanations before the A.O. . Needless to say the A.O. shall provide proper and sufficient opportunity of being heard to the assessee in accordance with the principles of natural justice and in accordance with law. We order accordingly.

10. In the result, the appeal filed by the assessee in ITA No. 2882/Mum/2012 for the assessment year 2006-07 is allowed for statistical purposes.

Order pronounced in the open court on 26<sup>th</sup> October, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 26-10-2016 को की गई ।

Sd/-  
(C.N. PRASAD)  
JUDICIAL MEMBER

sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 26-10-2016

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व.नि.स/ ए.के., Ex. 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)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "E" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai