<u>आयकर अपीलीय अधिकरण "ई" न्यायपीठ मुंबई में।</u>

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

BEFORE SHRI SANJAY ARORA, AM AND SHRI PAWAN SINGH, JM

आयकर अपील सं./I.T.A. No. 2271/Mum/2013

(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Salasar Developers, Gr. Flr., Vrindavan, Salasar Brijbhoomi, Temba Hospital Road, Bhayander (W), Thane-401 101	**<u>बनाम</u>**/ Vs.	Asst. CIT-11, Thane
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAKFS 6465 R		
(Assessee)	:	**(Revenue)**

आयकर अपील सं./I.T.A. No. 2939/Mum/2013

(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Asst. CIT-11, Thane	**<u>बनाम</u>**/ Vs.	Salasar Developers, Thane-401 101
(Revenue)	:	**(Assessee)**

Assessee by	:	Shri Virag H. Shah
Revenue by	:	Shri Mohammed Rizwan

सुनवाई की तारीख / **Date of Hearing**	:	17.5.2016
घोषणा की तारीख / **Date of Pronouncement**	:	12.8.2016

<u>आदेश / O R D E R</u>

<u>Per Sanjay Arora, A. M.:</u>

These are cross appeals, i.e., by the Assessee and the Revenue, directed against the Order by the Commissioner of Income Tax (Appeals)-II, Thane ('CIT(A)' for short) dated 26.12.2012, 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.) 2009-10 vide order dated 09.12.2011.

2. The principal issue raised by the assessee per its' appeal, as explained by the ld. Authorized Representative (AR), the assessee's counsel, is with regard to the built-up area in-as-much as the first appellate authority has found some of the residential units (of the relevant housing project, i.e., Saraswati Brijbhoomi) to have a built-up area in excess of the prescribed limit of 1000 sq. ft. for the projects at Mumbai *qua* its' said project at Bhyandar, a suburb of Mumbai and, accordingly, allowed it proportionate deduction. The assessee's case in this regard is that the Assessing Officer (A.O.) had worked out the built-up area in terms of section 80-IB(14)(a), defining built-up area, inserted by Finance (No.2) Act, 2004 w.e.f. 01.4.2005. The same has been held by the Hon'ble Apex Court in *CIT vs. Sarkar Builders* (reported at [2015] 375 ITR 392 (SC)) as only prospective, so that it shall apply on or after the date on which the said amendment comes into force, i.e., A.Y. 2005-06 onwards. The relevant project being admittedly approved on 28.5.2003 (PB pg. 37), i.e., prior to the commencement of the relevant previous year, being financial year 2004-05, on and from which the amendment comes into force, the same would not apply. He would then take us through the relevant part of the said decision (paras 18-20), copy of which is placed on record (at PB pgs. 116-131). The ld. Departmental Representative (DR) could not controvert the said reliance by the ld. AR. The Revenue's objection, he would though add, is with regard to the date of the completion of the project, which is not by 31.3.2008, i.e., the last date by which the projects approved before 01.4.2004 are to be completed, i.e., in order to qualify as an eligible project u/s. 80-IB(10) (s. 80-IB(10)(a)(i)). On being asked by the Bench as to how the assessee's claim for deduction u/s. 80-IB(10) was upheld by the tribunal for the preceding years, i.e., A.Ys. 2004-05 and 2005-06 (PB pgs. 60-67), he explained that this objection was not raised by the A.O. for that year/s, and is raised by the Revenue for the first time - forming in fact the substratum of its' case for the current year. The ld. AR would, in rejoinder, explain that this objection is again not valid even as held by the Hon'ble Delhi High Court in *CIT vs. CHD Developers* (reported at [2014] 43 taxmann.com

249 (Del)), adverting to the last paragraph (para 10) of that the order, placed at PB pgs. 140-150. As held by the Hon'ble Court, the stipulation as to the date of completion of the construction is a unreasonable restriction and, therefore, could operate only prospectively, i.e., to projects approved on and after the date from which the amendment by Finance (No.2) Act, 2004 comes into force; the said Act also amending section 80-IB(10)(a), per which the said stipulation stands prescribed. Rather, on facts, of the eight buildings comprising the relevant project, completion certificates for seven had been received by 31.3.2008, and was received subsequently only for one building 'Goverdhan', even as application for the same had been given prior to 31.3.2008, on the completion of the construction of the said building.

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

The Revenue has denied the assessee's claim u/s. 80-IB(10) for four separate reasons. We shall accordingly discuss each of the said objections. The Revenue's first objection rests on the date of completion. In our view, it may not be correct to say that the limit prescribed by Finance (No. 2) Act, 2004 shall not apply to the projects commenced prior to 01.4.2004, i.e., w.e.f. which date (or financial year commencing whereat) the amendment by Finance (No.2) Act, 2004 comes into effect. This is as there is no estoppel against law. True, the provision specifying completion date was brought (once again) on the statute by Finance (No. 2) Act, 2004, but it does not place the projects commencing prior to 01.4.2004 any more disadvantageously than those approved and commenced on or after the said date. In fact, completion dates were specified in the provision as it stood up to A.Y. 2001-02, stood discontinued for the intervening years before being again stipulated from A.Y. 2005-06. While projects commencing on or after 01.4.2004 are allowed a completion period of four years, those approved prior to 01.4.2004, are, irrespective of the stage of their completion (as on 31.3.2004), allowed a further period of four years, i.e., by 31.3.2008, for completion. *That is, no unreasonable condition can be said to be placed on the*

existing/continuing projects which are thus deemed to have commenced only on 01.4.2004. The Legislature while introducing the provision was well aware that the requirement as to the completion was being reintroduced, it should not cause any disturbance to the existing set up. The condition, *it may be noted, is not* qua *the terms of the approval* which cannot, once finalized, be changed to oust a project, otherwise eligible. But only in the nature of the additional condition for availing section 80-IB(10), and for which, most importantly, a *further* period of four years - the time period stipulated for completion of new projects, stands allowed. Apart from the legal position that there is no vested right against the statute, and that the law as applicable on the first day of the assessment year shall be applicable, it cannot be anybody's case that the projects commencing prior to a particular date (01.4.2004) be allowed indefinite time period for completion, or that the completion of a housing projects was, prior to Finance (No.2) Act, 2004, *not within the contemplation of the assessee-builders or the local authorities approving the same, or even the Legislature*. The authority approving the plan has not stipulated any completion period/date. As afore-said, there is no estoppel against law (*CIT vs. Durga Prasad More* [1971] 82 ITR 540 (SC)). As such, while the provision is not retrospective, so that the profit arising on the projects commencing prior to 01.4.2004, assessable for the years 2002-03 to 2004-05, would continue to enjoy deduction u/s. 80-IB(10) irrespective of the completion date, deduction for A.Y. 2005-06 onwards would inure only where completed by 31.3.2008, as evidenced by completion certificate, i.e., as provided by the statute.

So, however, the Hon'ble High Court in *CHD Developers Ltd.* (supra) has ruled otherwise, holding that the provision is not retrospective, and that it shall therefore not apply to the projects approved prior to 01.4.2004. Respectfully following the said judicial precedent, irrespective of our view, which stands humbly expressed for consideration by the Hon'ble High Court, we are not inclined to accept the Revenue's objection. We may though clarify that the relevant date would be '01.4.2004' and not '01.4.2005' as the approvals on or after 01.4.2004 would be

covered by the law applicable for A.Y. 2005-06, i.e., the year from which the amendment by Finance (No. 2) Act, 2004 comes into effect (refer s. 80-IB(10)(a)). In the present case, however, the approval being without doubt on 28.5.2003, the same would not impact the assessee's claim for deduction. Respectfully following the decision in *CHT Developers* (supra), i.e., in ratio, we dismiss the Revenue's objection to the assessee's claim for deduction u/s. 80-IB(10).

The Revenue's second objection is with regard to the commercial area, i.e., the built-up area of the shops and other commercial establishments included in the housing project, being admittedly at about 8% (of the total area of the project). The same is again not valid. It needs to be emphasized that the character of the project, given the extent of the commercial area (8% of the total built-up area) is principally residential. The Hon'ble jurisdictional High Court has in *CIT vs. Brahma Associates* [2011] 333 ITR 289 (Bom) clarified that the amendment (by Finance (No.2) Act, 2009) w.e.f. 01.4.2010 to section 80-IB(10)(d), prescribing a limit or cap on the commercial area, is prospective, so that it would apply from A.Y. 2010-11 onwards. The same shall have no application for years prior to that year. This would also meet the Revenue's argument of the impugned project being approved by the local authority as a '*Commercial cum residential project*'. Once it has been clarified that a housing project, independent of the extent of commercial area, would be liable to be considered prospectively, the assessee's claim for deduction u/s. 80-IB(10) is to be considered *de hors* the said amendment to section 80-IB(10)(d). This is of-course subject to the caveat that it cannot operate to allow deduction to a project which is essentially or predominantly commercial, so that the character of the project as a residential project should remain undiluted, as is the case in the instant case.

This leaves us with only one issue, i.e., *qua* the working of the built-up area, which has been computed by the A.O. by excluding balconies and projections, besides taking into account the fact of the combination of some flats. The primary facts are not in dispute; the assessee's case being limited to the manner of the working of the

built up area. The Hon'ble Apex Court has in *Sarkar Builders* (supra) clarified the amendment to section 80-IB(14)(a), defining the built-up area, to apply prospectively. The working of the built-up area is, therefore, to be made *de hors* the said amendment. We, accordingly, direct a *status quo* in the matter, so that the built-up area would be computed in the same manner as done while approving the project, i.e., the working of the built-up area shall be covered by the applicable DC Rules. The ld. AR would submit that in the event of the Bench giving such a direction, which was made known during hearing itself, the assessee does not wish to press its' Ground 2, taken before the Tribunal for the first time, claiming the relevant project to be located beyond 25 kms. of the municipal limits of Mumbai, so that the increased (1500 sq. ft.) built-up area stipulation shall apply thereto, which is the subject matter of condition u/s. 80IB(10)(c). The assessee's second ground is accordingly dismissed as not pressed.

We may before parting though add that the Hon'ble jurisdictional High Court has in *Brahma Associates* (supra), since approved by the Apex Court in *Sarkar Builders* (supra), abundantly clarified that a housing project is a single project, either qualifying as an eligible project u/s. 80-IB(10), satisfying all the conditions incident thereon, or not, and that therefore there is no scope for deduction on a part of the project. Reference in this regard may be made to paras 28 and 30(d) of the decision, which we reproduce hereunder for ready reference:

> '28. In the present case, though the commercial user is more than 10 per cent of the plot area, the Tribunal has allowed section 80-IB(10) deduction in respect of 15 residential buildings on the ground that the profits from these exclusively residential buildings could be determined on stand alone basis. *In our opinion that would not be proper, because, 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 a part of the project*. In the present case, the commercial user is allowed in accordance with the DC Rules and hence the assessee was entitled to section 80-IB(10) deduction on

> the entire project approved by the local authority. However, the assessee has not challenged the decision of the Tribunal in restricting the deduction to a part of the project. Therefore, while holding that in law, the assessee was entitled to section 80-IB(10) deduction on the profits of the entire project, in the facts of the present case, since the assessee has not challenged the decision of the Tribunal, we are not inclined to disturb the decision of the Tribunal in restricting the section 80-IB(10) deduction only in respect of the profits derived from 15 residential buildings.
>
> 30. In the result, the questions raised in the appeal are answered thus:—
>
> (d) Since deductions under section 80-IB(10) is on the profits derived from the housing projects approved by the local authority as a whole, *the Tribunal was not justified in restricting section 80-IB(10) deduction only to a part of the project*. However, in the present case, since the assessee has accepted the decision of the Tribunal in allowing section 80-IB(10) deduction to a part of the project, we do not disturb the findings of the Tribunal in that behalf.'
>
> [emphasis, ours]

So, however, the tribunal in *Asst. CIT vs. Ekta Sankalp Developers* [2015] 152 ITD 805 (Mum), after analyzing the provision of s. 80-IB(10)(c), has held that the said clause, in contradistinction to the other conditions, which operate *qua* a housing project, does so *qua* each residential unit. As such, all such units that fall within the prescribed area stipulation would form part of the eligible housing project, and others not. The assessee shall accordingly be allowed deduction with reference to the profits derived from the qualifying residential units, working the built-up area according to the applicable DC Rules, and aggregating the area of flats which were found by the AO to be combined.

We decide accordingly.

4. In the result, the Revenue's appeal is dismissed and the assessee's appeal is partly allowed.

Order pronounced in the open court on August 12, 2016

Sd/-	Sd/-
(Pawan Singh)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 12.08.2016
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**