HARSHVARDHAN CONSTRUCTIONS vs. INCOME TAX OFFICER

IN THE ITAT BOMBAY BENCH 'H'

M. BALAGANESH, AM. & RAVISH SOOD, JM.

ITA No.5225/Mum/2017 & ITA No. 4730/Mum/2016, ITA No. 5912/Mum/2017, ITA No. 5523/Mum/2016 & ITA No. 5913/Mum/2017

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(2020) 183 ITD 0497 (Mumbai), (2020) 81 ITR (Trib) 0299 (Mumbai), (2020) 207 TTJ 0663 (Mumbai)

Legislation Referred to

Section 34(1)(a), 80-IA, 80-IB, 80IB(1), 80IB(1)(a)(iii, 80IB(10(a)(iii), 80IB(10), 80IB(10)(a), 80-IB(10)(a), 80-IB(10)(c), 80IB(10)(a)(iii), 80IB(10)(c), 80IB(14), 80IB(14)(a), 133(6), 139, 142, 142(2), 143, 143(1), 143(2), 143(3), 147, 148

Case pertains to

Asst. Year 2011-12, 2012-13 & 2013-14

Cases Referred to

ACIT vs. Ekta Sankalp Developers (2015) 152 ITD 805 (Mum)
AIR Developers.,(2010) 122 ITD 125 (Nag)
Ashiana Amar Developers vs. ITO (2016) 178 TTJ 474 (Kol)
Brahma Associates vs. JCIT, 119 ITD 255 (Bom)
Calcutta Discount Co. Ltd. vs. ITO (1961) 41 ITR 191 (SC)
CIT vs. Amaltas Associates (2016) 389 ITR 175 (Guj)
CIT vs. Classic Binding Industries (2018) 407 ITR 429 (SC)
CIT vs. Elegant Estates (2016) 383 ITR 49 (Mad)
CIT vs. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)
CIT vs. M/s Raviraj Kothari Punjabi Associates [ITA No. 1628 of 2013, dated 24.04.2015] (Bom)
CIT vs. N.C Budhiraja and Anr. (1993) 204 ITR 412 (SC)
CIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500 (SC)
CIT vs. Sarkar Builders (2015) 375 ITR 392 (SC)
CIT vs. Tarnetar Corporation (2014) 362 ITR 174 (Guj)
CIT, Aurangabad vs. Hindustan Dsamuh Awas Ltd. (2015) 377 ITR 150 (Bom)
CIT, Calcutta vs. Burlop Dealers Ltd. (1971) 79 ITR 609 (SC)

CIT, Chennai vs. Mahalakshmi Housing (2014) 222 Taxman 356 (Mad)
Commissioner of Customs (Import) Mumbai vs. Dilip Kumar and Company and Others (2018) 9 SCC 1 (SC)
DCIT vs. Brigade Enterprises Pvt. Ltd.,(2008) 119 TTJ (Bang) 269
DCIT, Central Circle- 3(2), Mumbai vs. JSW Limited & Ors. [ITA No. 6264/Mum/18; dated 14/05/2020
Export Credit Guarantee Corporation of India Ltd. vs. Addl. CIT (2013) 350 ITR 651 (Bom)
GKN Sinter Metals Ltd. vs. Ms. Ramapriya Raghavan, ACIT & Ors. (2015) 371 ITR 225 (Bom)
Harshvardhan Constructions vs. Income-tax Officer & Ors. in CWP(Lodg No.) 3499 of 2015
IPCA Laboratories Ltd. vs. DCIT (2004) 266 ITR 521 (SC)
ITO vs. Siddhivinayak Homes, ITA No. 8726/Mum/2010
Jindal Mittal Griha (2017) 51 CCH 240 (Pune)
Kumar Builders Consortium vs. ACIT, 7 Taxcorp (AT) 32844 (Pune)
Kumrar Beharey Rathi & Raviraj Kothari Punjabi Associates vs. DCIT, 22 DTR 1 (Pune)
Otters Club vs. DIT (2017) 392 ITR 244 (Bom)
Pandian Chemicals vs. VIT (2003) 262 ITR 278 (SC)
PCIT vs. Aarham Softronics (2019) 261 Taxman 529 (SC)
Petron Engg. Construction Pvt. Ltd. vs. CBDT &Ors. (1989) 175 ITR 523 (SC)
Puran Ratilal Mehta vs. ACIT, Circle 23(3), Mumbai (2019) 175 ITD 190 (Mum)
Runwal Multihousing Pvt. Ltd. vs. ACIT, ITA Nos. 1015, 1016 & 1017/PN/2011
S. Naryanappa vs. CIT (1967) 63 ITR 219 (SC)
Sheh Developers Pvt. Ltd. 33 SOT 277 (Bom)
Shivsagar Veg Restaurant vs. ACIT [(2009) 317 ITR 433 (Bom)]
Tushar Developers vs. ITO, 6 Taxcorp (AT) 30190 (Pune)
Varun Developers vs. DCIT, 7 Taxcorp (AT) 1978 (Pune)
Viswas Promoters Private Limited vs. ACIT (2013) 214 Taxman 524 (Mad)

Counsel appeared:

Nitesh Joshi, A.R for the Assessee.: S.C Tiwari, CIT D.R for the Revenue.

PER BENCH:

The captioned cross-appeals for A.Y 2011-12 and A.Y 2012-13 and the appeal of the revenue for A.Y 2013-14 are directed against the respective orders of the CIT(A)-32, Mumbai, as under:

ITA No./appellant	Assessment Year	Details of impugned order	Details of assessment/penalty order
I T A 5225/Mum/2017 (Assessee)	A.Y 2011-12	CIT(Appeals)-32, Mumbai - Order dated 20.06.2017.	Assessment order u/s. 143(3) r.w.s 147, dated 18.03.2016.
I T A 5912/Mum/2017 (Revenue)	A.Y 2011-12		
I T A 4730/Mum/2016 (Assessee)	A.Y 2012-13	CIT(Appeals)-32,Mumbai - Order dated 06/06/2016	Assessment order u/s 143(3), dated 31.03.2015
I T A	A.Y 2012-13		

5523/Mum/2016 (Revenue)			
I T A 5913/Mum/2017 (Revenue)	A.Y 2013-14	CIT(Appeals)-32,Mumbai - Order dated 20/06/2017.	Assessment order u/s 143(3), dated 18.03.2016.

As the issues involved in the abovementioned appeals are inextricably interlinked or in fact interwoven, therefore, the same are being taken up and disposed off together by way of a common order. We shall first advert to the cross-appeals for A.Y 2011-12. The impugned order has been assailed by the assesse on the following effective grounds of appeal before us:

> "1. The CIT(A) erred in upholding the reassessment proceedings initiated by the A.O under section 147 of the Act to be valid.
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> 2. The CIT(A) failed to appreciate that jurisdictional pre-conditions necessary to be satisfied before assuming jurisdiction under sections 147 to 151 of the Act had not been fulfilled in the present case rendering the reassessment proceedings to be illegal and bad in law. "

On the other hand, the revenue has challenged the impugned order on the following grounds of appeal before us:

> "1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 80IB(10) of the IT Act, 1961 to the assessee when the assessee failed to produce the Building Completing Certificate and the Occupation Certificate as required u/80IB(10)(a)(iii) r.w explanation (ii) of the IT Act, 1961.
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> 2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 80IB(10) of the IT Act, 1961 to the assessee in spite of fact that the assessee did not fulfil the conditions laid down under the section 80IB(10)(c) of IT Act, as some of the flats were more than the prescribed area.
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> 3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 80IB(1) of the IT Act, 1961 to the assessee in spite of the fact that the assessee has claimed high gross profit of 63.08% when the assessee had not fulfilled all the conditions laid down in the provisions of the Act.
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> Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying upon the judgment of Hon'ble Bombay High Court decision in the case of CIT Vs. Hindustan Samuh Awas Ltd. (2015) 62 Taxmann.com 175 (Bom) without appreciating that the facts of the present case are totally different from the facts of the case in the above decision. In Hindustan Samuh Awas Ltd. (supra), the Hon'ble High Cout held that since the assessee had complied with all the norms of Intimation of disapproval (IOD) and had applied for completion certificate well in time before the Municipal Authority, therefore, the delay in issuing project completion certificate cannot be attributable to the assessee, whereas in the present case, the Municipal Corporation of Greater Mumbai (MCGM) had not issued completion certificate to the assessee as the assessee had not fulfilled in all the norms of IOD at the time of applying for completion certificate. Thus, the assessee is wholly and exclusively responsible for this delay. Hence, the case law relied upon by the Ld. CIT(A) is not applicable in this case.
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> 4. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 80IB(10) of the IT Act, 1961 to the assessee on those flats which were less than 1000 sq. feet in size, when the provisions of section 80IB(10) of the Act allow

deduction only upon completion of the entire project and not on part project or on part fulfilment of the requirements stated in the provisions of the section. "

2. Briefly stated, the assessee firm which is engaged in the business of a property developer had filed its return of income for A.Y 2011-12 on 29.09.2011, declaring its total income at Rs. Nil. Return of income filed by the assessee was processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act. In the course of the assessment proceedings, it was observed by the A.O that the assessee had in its return of income claimed deduction of Rs. 29,69,84,644/- u/s 80IB(10) of the Act in respect of a housing project "Adityavardhan " that was developed by it at 186-B, Saki Vihar Road, Andheri (East), Mumbai. On the basis of the material furnished in the course of the assessment proceedings the A.O found the claim for deduction raised by the assessee u/s 80IB(10) in order, and accepted the same while framing the assessment u/s 143(3), vide his order dated 28.03.2013.

3. Subsequently, while framing the assessment for the immediately succeeding year i.e A.Y 2012-13, it was noticed by the A.O that the assessee had raised a claim for deduction of Rs. 19,20,04,491/- u/s 80IB(10) of the Act. Observing, that the assessee had failed to comply with the requisite conditions envisaged in Sec. 80IB(10) of the Act, the A.O while framing the assessment for A.Y 2012-13 vide his order passed u/s 143(3), dated 31.03.2015, held the assessee as ineligible for claim of deduction under the said section. It was noticed by the A.O that as the assessee had obtained the "Commencement Certificate " for its project viz. "Adityavardhan " from the Municipal Corporation of Greater Mumbai (for short "MCGM ") on 18.07.2006 (i.e approved after 01.04.2005) therefore, the said project was required to be completed on or before 31.03.2012 i.e within 5 years from the end of the financial year in which it was so approved. However, as per the details gathered by the A.O in the course of the assessment proceedings for A.Y 2012-13, it stood revealed viz. (a). that the assessee had not completed its housing project viz. "Adityavardhan " within the stipulated period contemplated in Sec. 80IB(10)(a)(iii) of the Act; and (b). that the built up area of all 3 BHK flats in the said project was more than 1000 sq. ft. which was in violation of the conditions specified in Sec. 80IB(10)(c) of the Act. In the backdrop of the aforesaid facts, the A.O holding a conviction that the assessee had failed to comply with the provisions of Sec. 80IB(10)(a) and Sec. 80IB(10)(c) of the Act, disallowed its claim for deduction of Rs. 19,20,04,491/- raised u/s 80IB(10) of the Act.

4. Observing, that the assessee had raised a claim for deduction of Rs. 26,69,84,644/- u/s 80IB(10) for the same housing project i.e "Adityavardhan " in its return of income for the year under consideration i.e A.Y 2010-11, which was allowed by him vide his assessment order passed u/s 143(3), dated 28.03.2013, the A.O reopened the case of the assessee u/s 147 of the Act. Notice u/s 148, dated 20.04.2015 was issued by the A.O after recording the 'reasons to believe' and obtaining necessary approval from the Joint Commissioner of Income-tax, Range-23(1), Mumbai. As is discernible from the facts borne from the records, the Joint Commissioner of Income-tax, Range 23(1), Mumbai, is stated to have communicated his approval for reopening of the concluded assessment vide his letter No. JCIT/R.23(1)/Approval/151, dated 16.04.2015. In compliance to the notice issued u/s 148 of the Act, the assessee had requested that its 'Original' return of income filed on 06.12.2011 for A.Y 2011-12 may be treated as a return filed in compliance to the same. Accepting the said request of the assessee the A.O had proceeded with the assessment and issued notices u/ss. 143(2)/142(1) of the Act. On a perusal of the assessment order, we find that the A.O had vide his office letter dated 20.07.2015 provided to the assessee a copy of the 'reasons to believe' on the basis of which its case was reopened u/s 147 of the Act. As is discernible from a perusal of the 'reasons to believe' the case of the assessee was reopened by the A.O u/s 147 of the Act for two reasons viz. (i). that in the course of the assessment proceedings in the case of the assessee for A.Y 2012-13 "fresh information " was received from MCGM that Building Completion Certificate/Occupation Certificate had not been issued to the assessee, and accordingly, the building had not been completed till date; and (ii). that the "built-up area " of some of the residential units constructed by the assessee exceeded the prescribed area allowable under Sec. 80IB(10). On receipt of the copy of the 'reasons to believe' the assessee vide its letter dated

05.08.2015 objected to the validity of the jurisdiction assumed by the A.O u/s 147 of the Act. However, the A.O was not inclined to accept the objections raised by the assessee and rejected the same vide his order dated 17.11.2015. It was noticed by the A.O that the assessee had assailed the validity of the reopening of its case by way of a Writ Petition before the Hon'ble High Court of Bombay, which however, was not admitted and was dismissed by the High Court vide its order dated 16.12.2015. In the backdrop of the aforesaid facts, the A.O held a conviction that there was no merit in the objections raised by the assessee as regards the validity of the reopening of its case u/s 147 of the Act.

5. After the rejection of the assessee's writ petition by the Hon'ble High Court the assessee participated in the assessment proceedings. On being called upon to furnish the "Building Completion Certificate " and the "Occupation Certificate " issued by the local authority for its project "Adityavardhan " , it was submitted by the assessee that the same were not issued by the local authority till date. However, the assessee in order to drive home its claim that the project viz. "Adityavardhan " was completed well within the stipulated time period as envisaged in Sec. 80IB(10) of the Act, therein drew support from the fact that an application dated 19.10.2010 was already filed by its architect i.e Mr. Bhupendra Patrawala with the Assistant Engineer Building Proposal, MCGM, requesting for grant of "Occupation Certificate " for its said project. For the sake of clarity, the chronology of events pertaining to the assessee's claim that the project viz. "Adityavardhan " was completed within the time frame contemplated in Sec. 80IB(10)(a)(iii) of the Act as was narrated by the assessee in the course of the assessment proceedings is reproduced as under:

Sr. No.	Date	Particulars
1.	18.07.2006	BMC issued commencement certificate in respect of the housing project at plot bearing No. 186-B, Saki Vihar Road, Andheri (E), being the Adityavardhan Project (the said project). The said project comprised of 2 wings each of stilt plus 10 upper floors. The total no. of flats in the said 2 wings were 108. As per the plan as approved by MCGM in respect of the said project there were two D.P Roads running on the said plot which were to be constructed by the assessee and handed over to them. It is an undisputed position that the assessee has constructed as well as handed over the road running on East side of the plot to MCGM. However the Assessee could not construct the road on the South side of the plot of land as where the road was to be constructed there is a hill on which there is a pylon i.e., a transmission tower for transmission of electricity of Tata Electric Company. Since the South side road was not constructed, MCGM has not accepted the handing over of the same. Since the housing project was approved after 01.04.2005, as per section 80-IB(10)(a)(iii) of the Act the said project ought to have been completed within 5 years from the end of the financial year in which the said project was approved i.e on or before 31.03.2012.
2.	17.06.2010	The construction of the said project was completed by the assessee before this date, as its architect Mr. Bhupendra Patrawala issued a Certificate stating that the latest amended plans for residential building had been approved by Municipal Corporation of Greater Mumbai vide its letter No. CE/4040/EPES/AL dated 17.12.2009 for which final commencement certificate had been granted on 23.12.2009. He also certified that on site works was completed in

		respect of the residential building in all respects and the flats were ready for occupation.
3.	19.10.2010	Assessee's architect Mr. Bhupendra Patrawala filed an application to MCGM for grant of occupation certificate in respect of the residential building in the said project. Along with the said application he annexed certificate from the site supervisor to the effect that construction of the residential building was complete in accordance with regulations 45 and 46 of the Development Control Regulations. He also annexed certificate from Structural Consultants Engineers & Architects to certify that structural work of the said building had been carried out as per his structural design which complied with the requirement of I.S Code No. 1893 for earthquake design and requirement as mentioned in clause Nos. 45 and 46 of Development Control Regulations. The said certificate also enclosed two sets of complete plans of the structural work.
4.	2006(onwards)	Assessee made several attempts to convince Tata Electric Company to shift its transmission tower to another location with a view to enable completion of the D.P. road on South side of the plot of land (see pages 1A to A28 of our submissions vide letter dated 05.08.2015). Since the assessee was unsuccessful various representations were also made by proposed society formed by the flat purchasers to Tata Electric Company as the completion certificate in respect of the said building was held up by MCGM for this purpose. (See pages 29B to B41 of our submissions vide letter dated 05.08.2015). As an alternative, the Assessee represented before MCGM to construct the road on South side of the plot on their own for which it agreed to reimburse the cost of construction to MCGM, (See pages 42C to C49 of our submissions vide letter dated 05.08.2015). However, none of the aforesaid alternatives could give a positive result. The Assessee therefore submits that in these circumstances, it was impossible for it to comply with the said condition in the approved plan. However the construction of building in the said project was complete in all regards.
5.	31.03.2011	Since the said project was completed during the year under consideration, assessee offered for tax income arising from the said project up to 31.03.2011 during the year. Total number of flats sold during upto 31.03.2011 were 54 and in respect of 44 flats the assessee had also granted possession to the purchasers. Upto 31.03.2012, the total number of flats sold stood at 92 of which possession has been granted by the assesee to the flat purchasers in respect of all the 92 flats. In respect of the flats sold by the assessee for which possession was also given to the flat purchasers, the electricity and the water bills have been met by the flat purchasers. They were also liable to share in the maintenance charges of the said building. Since the assessee had granted possession of almost 85% of flats to the flat purchasers before 31.03.2012, the presumption should be that the buildings were complete in all respects and were ready for occupation.
6.	29.09.2011	Assessee filed its return of income for A.Y 2011-12 declaring total

		income of Rs. Nil. Since it had fulfilled the conditions as prescribed under section 80-IB(10) of the Act it claimed deduction of Rs. 26,69,84,644/- under the said section.

Accordingly, it was the claim of the assessee that since it had fulfilled all the conditions as prescribed u/s 80IB(10) of the Act, therefore, it had rightly raised the claim for deduction of Rs. 26,69,84,644/- under the said statutory provision.

6. Adverting to the facts, it was submitted by the assessee that as it had obtained "Commencement Certificate " from MCGM on 18.07.2006 for its project viz. "Adityavardhan " which comprised of 2 wings each of stilt plus 10 upper floors, therefore, the same as per the mandate of Sec. 80IB(10)(a)(iii) was to be completed latest by 31.03.2012. As per the approved plan 108 flats were to be constructed in the said 2 wings. Further, as per the approved plan the assessee was to construct and hand over two D.P Roads on the said plot to MCGM viz. (i) the road on the east side of the plot; and (ii). the road on the south side of the plot. As can be gathered from the records, though the assessee had constructed and handed over the road running on the east side of the plot to MCGM but had failed to construct the road on the south side of the plot of land. As claimed by the assessee, it had failed to construct the road on the south side of the plot, as where the road was to be constructed there was a hill on which there was a pylon i.e a tower for transmission of electricity of Tata Electric Company. It is stated by the assessee that all efforts on its part to convince Tata Electric Company to shift its transmission tower to another location in order to facilitate completion of the D.P road on the South side of the plot had failed. Also, similar was the fate of the persuasions/representations made by the proposed society that was formed by the flat purchasers before the Tata Electric Company. Alternatively, the assessee is stated to have tried to persuade MCGM to construct the road on South side of the plot on its own, at the cost of the assessee, which too is claimed to have not materialized. To sum up, the assessee in the course of the reassessment proceedings tried to impress upon the A.O that the failure to construct road on the South side of the plot was for reasons beyond its control. At the same time, it was stated by the assessee that as certified by its architect viz. Mr. Bhupendra Patrawala, the on site works of the project i.e "Adityavardhan " were completed as regards the residential buildings in all respects and the flats were ready for occupation. Also, as claimed by the assessee, the architect had filed an application with MCGM for grant of "Occupation Certificate " in respect of the residential buildings in the said project. Alongwith the said application, the assessee's architect had filed certain certificates/documents evidencing that the construction of the building was complete viz. (i). certificate from the site supervisor to the effect that the construction of the residential building was complete in accordance with regulations 45 and 46 of the Development Control Regulations; and (ii). certificate from Structural Consultants Engineers & Architects therein certifying that structural work of the building was carried out as per his structural design which complied with the requirement of I.S. Code No. 1893 for earthquake design and requirements as mentioned in clause Nos. 45 and 46 of the Development Control Regulations. Apart from that, it was submitted by the assessee that total number of flats sold upto 31.03.2011 were 54 out of which possession of 44 flats had already been given to the purchasers. Further, it was stated by the assessee that by the end of the next year i.e upto 31.03.2012 it had sold 92 flats and had delivered possession of all of them to the respective purchasers. In order to fortify its claim that the construction of the building was completed within the stipulated time period i.e latest by 31.03.2012, it was submitted by the assessee that the 92 flat purchasers who were put into possession of their respective flats were on their own meeting out their electricity bills, water bills, and also sharing the maintenance charges etc. Also, the Fire Brigade department of MCGM had granted NOC for occupation and use of the said building on 22.12.2010. As such, it was the claim of the assesee that since it had granted possession of almost 85% of flats to the purchasers before 31.03.2012, therefore, it could safely be presumed that the buildings were complete in all respect and were ready for occupation. In the backdrop of the aforesaid facts, it was the claim of the assessee that de hors issuance of the Building Completion Certificate/Occupation certificate by the local authority for reasons beyond

the assessee's control, since the housing project i.e the residential buildings were complete in all respect before the stipulated time period i.e 31.03.2012, therefore, its claim for deduction u/s 80IB was in order.

However, the A.O was not persuaded to accept the aforesaid claim of the assessee. It was inter alia observed by the A.O, that the assessee had failed to complete the residential project within the stipulated time period envisaged in Sec. 80IB(10)(a)(iii) of the Act. On the basis of information received by the A.O from MCGM vide its letter No. DyChE/BP/19415/ES, dated 19.03.2015, it was intimated that the "Building Completion Certificate " and "Occupation Certificate " was not issued to the assessee on account of certain failure on its part to comply with the building I.O.D (Intimation of Disapproval) conditions for its project "Adityavardhan " . In the backdrop of the aforesaid facts, it was observed by the A.O that as per the information received from MCGM the project was yet not completed and was still in progress due to the violation of I.O.D norms. On the basis of his aforesaid observations, it was concluded by the A.O that as no Building Completion Certificate/Occupation Certificate was issued to the assessee till date i.e upto 19.03.2015 (date of letter received from MCGM), which was much beyond the stipulated date by which the project was supposed to be completed i.e 31.03.2012, therefore, the assessee was not eligible for claim of deduction u/s 80IB(10) of the Act. Accordingly, the A.O on the basis of his aforesaid deliberations concluded that the assessee had failed to comply with the mandate of Sec. 80IB(10)(a)(iii) of the Act.

7. As regards the observation of the A.O that as the built up area of all 3 BHK flats in the aforesaid project was more than 1000 sq. ft., therefore, the assessee had also violated the condition specified in Sec. 80IB(10)(c) of the Act, the same was rebutted by the assessee. It was submitted by the assessee that the area of the 3 BHK flats as per their calculation was 997 sq.ft. In order to fortify its aforesaid claim, the assessee had drawn support from the certificate of Shri. Bhupendra Patrawala, Architect, that was furnished in the course of the assessment proceedings. It was the claim of the assesee that while calculating the "built-up area " of the 3 BHK flats it had excluded the area of "dry balcony " as it was 6 inches below the floor level. On the basis of his aforesaid submissions, it was the claim of the assessee that as it had duly complied with the conditions contemplated in Sec. 80IB of the Act, therefore, its claim for deduction under the said statutory provision was in order. However, the A.O was not inclined to accept the said claim of the assessee. Observing, that unlike the flower bed area which was approximately 2 feet below the floor level and was not usable, the A.O was of the view that the 'dry balcony area' was only 6 inches below the floor level and was usable. Also, on the basis of a report of his inspector who on the basis of an open field enquiry undertaken u/s 142(2) of the Act had carried out physical verification of a flat (held by the assessee as stock-in-trade), it was gathered by the A.O that the 'dry balcony area' was almost at the floor level and was in the nature of a usable area. Apart from that, it was observed by the A.O that a perusal of the Index-II of 3 BHK flat in the project "Adityavardhan " revealed that the built-up area of the flat i.e 98.88 square meter (1064 sq. feet) was being charged and sold by the assessee to its customers. Further, referring to the definition of "built-up area " as provided in sub-section (14) of Sec. 80IB of the Act, it was observed by the A.O that as per the section and its "Explanation " , the built-up area was to be taken as the sum total of the inner measurements of the residential unit at the floor level, alongwith the projections and balconies. As such, the A.O held a conviction that the area of all projections like drying area etc. were to be added while calculating the built-up area of the residential units. Based on his aforesaid observations, it was concluded by the A.O that the built-up area of certain residential units of the assessee exceeded 1000 sq. feet. In order to support his aforesaid observation, the A.O relied on the order of the ITAT, Mumbai in the case of ITO Vs. Siddhivinayak Homes, ITA No. 8726/Mum/2010, A.Y 2007-08 & ITA No. 5986/Mum/2011, A.Y 2008-09. Accordingly, the A.O concluded that as the area of the flats constructed by the assessee exceeded the prescribed area of 1000 sq. feet, therefore, the assessee had violated the provisions of Sec. 80IB(10)(c) of the Act.

8. On the basis of his aforesaid deliberations the A.O framed the assessment vide his order passed u/ss. 143(3) r.w.s 147, dated 18.03.2016, wherein he rejected the assessee's claim for deduction of Rs.

26,69,84,644/- u/s 80IB(10) of the Act. Accordingly, the A.O vide his order passed u/s 143(3) r.w.s 147, dated 18.03.2016, assessed the income of the assessee company at Rs. 26,69,84,644/-.

9. Aggrieved, the assessee assailed the assessment order before the CIT(A). As regards the claim of the assessee that the A.O had exceeded his jurisdiction in reopening the case of the assessee for the year under consideration, the CIT(A) was not inclined to accept the same. Insofar the declining of the assessee's claim for deduction u/s 80IB(10) by the A.O, for the reason, that as the "Building Completion Certificate " and "Occupation Certificate " was not obtained by the assessee from MCGM, therefore, the project viz. "Adityavardhan " could not be held to have been completed within the stipulated time period as envisaged in Sec. 80IB(10)(a)(iii) i.e latest by 31.03.2012, the same did not find favour with the CIT(A). It was observed by the CIT(A) that the withholding of the aforesaid certificates by the local authority was because the assessee which as per the approved plan was mandated to construct and hand over a 18.3 mtr wide DP road on the South side of the plot had failed to comply with the said requirement. On a perusal of the facts borne from the records, it was observed by the CIT(A) that the construction of the aforesaid road was being obstructed by a power pylon transmission line belonging to Tata Electric Company, which had to be relocated before the road could be constructed. It was further observed by the CIT(A) that despite persuasion by the assessee the aforesaid power company had refused to relocate or shift the power pylon. After deliberating at length on the facts attending to the issue under consideration, it was observed by the CIT(A) that as it was impossible on the part of the assessee to remove the hill for constructing the road, therefore, for the said reason it had failed to comply with the said condition in the IOD/CC. In the backdrop of the aforesaid facts, the CIT(A) was of the view that the assessee should not have been denied deduction under Sec. 80IB(10) for not performing of an act which was impossible of performance, and that the Building Completion Certificate/Occupation Certificate could not be obtained for reasons beyond its control. The CIT(A) further drawing support from the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Hindustan Samuh Awas Ltd. (2015) 62 taxmann.com 175 (Bom), therein observed that the facts borne from the records viz. purchasers of the flats had taken possession and were residing in the said flats; approvals were obtained by the assessee from the Fire Brigade authority, Lift Inspector, Asst. Engineer MCGM for drainage works etc., evidenced that the assessee had completed the physical construction of the project. Accordingly, the CIT(A) holding a conviction that the assessee had completed its project viz. "Adityavardhan " within the time allowed u/s 80IB(10)(a)(iii), therein vacated the adverse inferences that were drawn by the A.O. As regards the view taken by the A.O that the area of certain flats in the project of the assessee exceeded the prescribed limit of 1000 sq. ft, the CIT(A) after deliberating on the facts borne from the records, observed, that the assessee had not sold the 'dry balcony area' to the purchasers and the same represented service projections. It was further observed by him that MCGM had considered the built-up area of the residential flats in the building for the purpose of approving the building plan. Further, it was noticed by the CIT(A) that the assessee's architect had also certified that the built-up area of each flat did not exceed 1000 sq. ft. In the backdrop of his aforesaid observations, the CIT(A) concluded that there was no violation of Sec. 80IB(10)(c) as was alleged by the A.O.

10. On the basis of his aforesaid deliberations, the CIT(A) after upholding the validity of the jurisdiction assumed by the A.O u/s 147 of the Act, however, on merits found favour with the claim of deduction raised by the assessee u/s 80IB(10) of the Act.

11. Both the assessee and the revenue being aggrieved with the order of the CIT(A) have carried the matter by way of cross-appeals before us. Insofar the assessee is concerned, it has assailed the order of the CIT(A), to the extent, he had upheld the validity of the jurisdiction assumed by the A.O u/s 147 of the Act. On the other hand, the revenue has challenged the order of the CIT(A) on the ground that he had erred both in law and the facts of the case in setting aside the well reasoned order of the A.O and allowing the assessee's claim for deduction u/s 80IB(10) of the Act.

We shall first advert to the contentions advanced by the ld. A.R in support of his claim that the A.O

had traversed beyond the scope of his jurisdiction in reopening the case of the assessee. At the very outset of the hearing of the issue under consideration, it was submitted by the ld. Authorised representative (for short "A.R') for the assessee, that the latter had assailed the validity of the jurisdiction assumed by the A.O u/s 147 of the Act by filing a writ petition before the Hon'ble High Court of Bombay i.e CWP(Lodg No.) 3499 of 2015 in Harshvardhan Constructions Vs. Income-tax Officer & Ors, which however was dismissed as withdrawn by the Hon'ble High Court, vide its order dated 16.12.2015 (copy placed on record). It was submitted by the ld. A.R that the A.O in the garb of the present reassessment proceedings had sought to review the concluded assessment that was earlier framed by his predecessor vide an order passed u/s 143(3), dated 28.03.2013. It was submitted by the ld. A.R that the A.O while framing the 'Original' assessment u/s 143(3), vide his order dated 28.03.2013 had deliberated at length on the assessee's claim for deduction u/s 80IB(10) of the Act, and after making exhaustive verifications and calling for requisite documents had found the same to be in order. It was averred by the ld. A.R, that the case of the assessee was reopened merely on the basis of a 'change of opinion' as regards its entitlement towards claim of deduction u/s 80IB(10) of the Act. In the backdrop of his aforesaid submissions, it was averred by the ld. A.R that as per the settled position of law a concluded assessment could not be reopened merely on the basis of a 'change of opinion'. In his attempt to drive home his claim that the case of the assessee was reopened on the basis of a mere 'change of opinion', the ld. A.R took us through the copy of the 'reasons to believe' on the basis of which the case of the assessee was reopened [(Page 45) of the assessee's 'Paper book' (for short "APB ")]. Further, the ld. A.R took us through a query letter dated 22.02.2013 that was issued by the A.O in the course of the 'Original' assessment proceedings, wherein at " Sr. No. 8-10 " queries were raised as regards the aforesaid project viz. "Adityavardhan " , inter alia seeking details as regards the area of flats, date of completion of the project etc. Our attention was also drawn to the reply dated 09.03.2013 (Page 9 of 'APB'), wherein the assessee had furnished the requisite details as regards its aforementioned project and had submitted that the said project was completed during the year under assessment. The ld. A.R also took us through the complete sold/unsold flat vise details that was furnished with the A.O in the course of the 'Original' assessment proceedings (Page 13 -23 of 'APB'). Also, our attention was drawn to the "Closing stock " of Wing A & B- flats, as were lying with the assessee as on 31.03.2011 (Page 26-29 of 'APB'). The ld. A.R further took us through a letter dated 16.03.2013 filed by the assessee in the course of the assessment proceedings, wherein in compliance to the details called for by the A.O in the course of the 'Original' assessment proceedings, the assessee had furnished its reply alongwith supporting documents viz. area of land alongwith supporting documents; copy of Commencement Certificate issued by MCGM; copy of the plan of the project approved by MCGM; copy of the application filed by the assessee's architect as regards the completion of the project etc (Page 30-31 of 'APB'). Further, the ld. A.R took us through a letter of Shri Bhupendra Patrawala, Architect, dated 17.06.2010, wherein it was certified by him that the latest amended plans for residential buildings comprising of two wings of the aforesaid property had been approved by MCGM, vide its letter dated 17.12.2009, and full "Commencement Certificate " had been granted on 23.12.2009 (Page 32 of 'APB'). Also, the ld. A.R drew our attention to another letter dated 19.10.2010 of Shri Bhupendra Patrawala, Architect, that was addressed to Asst. Engineer, Building Proposals, MCGM, wherein on the basis of certain documents forwarded to MCGM viz. Building Completion Certificate; one set of completion plans on canvas; Structural engineer's completion with plans; and Site supervisors completion certificate, a request was made for grant of "Occupation Certificate " for the aforesaid project viz. "Adityavardhan " . Further, the ld. A.R took us through a letter of the Site Supervisor, dated 07.10.2010 addressed to the Executive Engineer, MCGM (Page 34 of 'APB'); Certificate of stability of structure, dated 16.10.2010 issued by Shri. Niranjan Pandya, Structural Consultants (Page 35 of 'APB'); and letter dated 28.03.2013 of the assessee addressed to the A.O, as per which the assessee had inter alia enclosed Building Completion Certificate issued by its architect viz. Mr. Bhupendra Patrawala. In the backdrop of the aforesaid facts, it was submitted by the ld. A.R that in the course of the 'Original' assessment proceedings, the A.O. only after exhaustive verifications had allowed the assessee's claim for deduction u/s 80IB(10) of the Act. It was vehemently submitted by the ld. A.R that the A.O vide his letter dated 22.02.2013 (supra), had in the course of the 'Original' assessment proceedings called upon the assessee to furnish the "Completion Certificate " of the project

issued by the local authorities. In the backdrop of the aforesaid fact, it was submitted by the ld. A.R that the assessee had furnished with the A.O viz.(i). copy of the application that was filed by its architect alongwith supporting documents/certificates with MCGM for grant of "Occupation Certificate " ; and (ii). building completion certificate issued by its architect, on the basis of which the A.O had formed an opinion that the requisite condition as regards completion of the residential project within the stipulated time period was duly complied with by the assessee. Accordingly, it was submitted by the ld. A.R, that the aforesaid opinion formed by the A.O as regards the eligibility of the assessee towards claim of deduction u/s 80IB of the Act, could not have thereafter been disturbed by reopening its case on the basis of a mere 'change of opinion' of his successor. In order to buttress his aforesaid claim reliance was placed by the ld. A.R on the judgment of the Hon'ble High Court of Bombay in the case of GKN Sinter Metals Ltd. Vs. Ms. Ramapriya Raghavan, ACIT & Ors. (2015) 371 ITR 225 (Bom) and that of the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC). Relying on the said judicial pronouncements, it was submitted by the ld. A.R that an assessment cannot be reopened on a mere 'change of opinion'. It was further submitted by the ld. A.R that now when the assessee in course of verification of its claim for deduction u/s 80IB(10) of the Act, had furnished the requisite details/documents as were called for by the A.O during the 'Original' assessment proceedings, thereafter it was not obligated to inform the A.O of the probable inferences that may be raised on the basis of the facts disclosed. The said contention was advanced by the ld. A.R to support his claim that though the assessee in the course of the 'Original' assessment proceedings was only obligated to furnish the requite documents/details as were called for by the A.O in respect of its claim for deduction raised u/s 80IB(10) of the Act, but thereafter, there was no obligation cast upon the assessee to inform the A.O as to what inferences as regards its eligibility towards claim for deduction under the said statutory provision were to be drawn. It was submitted by the ld. A.R, that if on the basis of necessary deliberations the A.O had opined, whether rightly or wrongly, that the assessee was eligible for claim of deduction u/s 80IB(10) of the Act, thereafter, for the reason that the A.O had not drawn correct inferences, income which had escaped assessment could not be brought to tax u/s 147 of the Act. In support of his said claim the ld. A.R had relied on the judgment of the Hon'ble Supreme Court in the case of CIT, Calcutta Vs. Burlop Dealers Ltd. (1971) 79 ITR 609 (SC). Per Contra, the ld. Departmental Representative (for short "D.R ") took us through the relevant pages of the assessment order. It was submitted by the ld. D.R, that the assessee after obtaining the copy of the 'reasons to believe' had vide its letter dated 05.03.2016 filed objections as regards the validity of the reopening of its concluded assessment. It was submitted by the ld. D.R, that the objections raised by the assessee were rejected by the A.O by a speaking order dated 17.11.2015. Thereafter, the assessee had challenged the validity of the reopening of its assessment by filing a writ petition with the Hon'ble High Court of Bombay, which however was dismissed vide order dated 16.12.2015. It was submitted by the ld. D.R, that as the writ petition of the assessee was dismissed by the Hon'ble High Court, therefore, there was no merit in the objections raised by the assessee as regards the validity of the jurisdiction assumed by the A.O for reopening its concluded assessment. As regards the claim of the assessee that it had furnished the requisite details in support of its claim for deduction u/s 80IB in the course of the 'Original' assessment proceedings, the same was rebutted by the ld. D.R. In fact, it was submitted by the ld. D.R that the assessee had misrepresented the facts before the A.O. In order to buttress his aforesaid contention the ld. D.R took us through Page 36 of the 'APB'. It was submitted by the ld. D.R, that though the A.O in the course of the 'Original' assessment proceedings had specifically called upon the assessee vide his letter dated 22.02.2013 [Page 6-7 - Para 10(iv)] to place on record the "Completion Certificate " issued by the local authorities, however, the assessee instead of complying with the said requirement had furnished the "Building Completion Certificate " issued by its architect (Page 36 of 'APB'). It was further submitted by the ld. D.R that as in the present case the reopening was done within a period of four years from the end of the assessment year, therefore, the requirement of proving that there was no full and true disclosure on the part of the assessee was not to be shown. It was submitted by the ld. D.R that the only issue which was required to be examined for verifying the validity of the reopening of the concluded assessment of the assessee for the year under consideration was as to whether was there any "tangible material " with the A.O, on the basis of which he could validly arrive at a satisfaction that the income of the assessee chargeable to tax had escaped

assessment. It was submitted by the ld. D.R that the 'Original' assessment in the case of the assessee for the year under consideration i.e A.Y 2011-12 was framed by the A.O vide his order passed u/s 143(3), dated 28.03.2013, wherein the assessee's claim for deduction u/s 80IB(10) was accepted. However, it was in the course of the assessment proceedings for A.Y 2012-13 that the A.O was intimated by the MCGM vide its letter No. DyChE/BP/19415/ES, dated 19.03.2015, that the "Building Completion Certificate " and "Occupation Certificate " was not issued to the assessee on account of certain failure on part of the assessee in complying with the building I.O.D (Intimation of Disapproval) conditions. It was submitted by the ld. D.R, that it was in the backdrop of the aforesaid information that it stood revealed that the residential project of the assessee was not completed within the stipulated time period envisaged in Sec. 80IB(10)(a)(iii) of the Act. Also, as averred by the ld. D.R, it was in the course of the assessment proceedings for A.Y 2012-13, that the fact that the built-up area of all 3BHK flats in the project viz. "Adityavardhan " was more than 1000 sq. ft had surfaced which was in clear violation of the norms prescribed in Sec. 80IB(10)(c) of the Act. On the basis of the aforesaid facts, it was submitted by the ld. D.R that the A.O having 'reason to believe' that by wrongly allowing the assessee's claim for deduction u/s 80IB(10) of the Act, its income chargeable to tax had escaped assessment, had thus rightly assumed jurisdiction and reopened the concluded assessment of the assessee by taking recourse to Sec. 147 of the Act. In support of his aforesaid claim the ld. D.R had relied on the judgment of the Hon'ble High Court of Bombay in the case of Export Credit Guarantee Corporation of India Ltd. Vs. Addl. CIT (2013) 350 ITR 651 (Bom). Also support was drawn from the judgments of the Hon'ble Supreme Court in the case of Calcutta Discount Co. Ltd. Vs. ITO (1961) 41 ITR 191 (SC) and S. Naryanappa Vs. CIT (1967) 63 ITR 219 (SC). In the backdrop of his aforesaid submissions, it was averred by the ld. D.R that the A.O had validly assumed jurisdiction u/s 147 of the Act, and it was absolutely incorrect on the part of the assessee's counsel to canvas that its concluded assessment was reopened on the basis of a mere 'change of opinion'.

12. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them in context of the aforesaid issue under consideration. Admittedly, the A.O while framing the 'Original' assessment, vide his order passed u/s 143(3), dated 28.03.2013, had raised exhaustive queries as regards the eligibility of the assessee towards claim of deduction u/s 80IB(10) of the Act. Being of the view, that the claim raised by the assessee for deduction u/s 80IB(10) was in order, the same was allowed by the A.O, as such. However, as observed by us hereinabove, it was only in the course of the assessment proceedings in the case of the assessee for A.Y 2012-13 that the A.O was informed by the MCGM vide its letter No. DyChE/BP/19415/ES, dated 19.03.2015, that the "Building Completion Certificate " and "Occupation Certificate " was not issued to the assessee on account of certain failure on the part of the latter as regards effecting compliance to the building I.O.D (Intimation of Disapproval) conditions. Accordingly, in the backdrop of the aforesaid information received subsequent to the culmination of the 'Original' assessment framed vide order passed u/s 143(3), dated 28.03.2013 for A.Y 2011- 12, that the A.O had arrived at a bonafide belief that the failure on the part of the assessee to complete the project viz. "Adityavardhan " within the stipulated time period contemplated in Sec. 80IB(10)(a)(iii) of the Act, had rendered it ineligible for claim of deduction under the said statutory provision. Also, as observed by us hereinabove, in the course of the assessment proceedings for A.Y 2012-13 it was gathered by the A.O that the built-up area of all 3BHK flats in the project viz. "Adityavardhan " was more than 1000 sq. ft, which was in clear violation of the norms prescribed in Sec. 80IB(10)(c) of the Act. We find that it was on the basis of the aforesaid facts that the A.O held a bonafide reason to believe that by wrongly allowing the assessee's claim for deduction u/s 80IB(10) of the Act, its income chargeable to tax for the year under consideration i.e A.Y 2011-12 had escaped assessment. Accordingly, on the basis of the aforesaid factual matrix the A.O had assumed jurisdiction and reopened the case of the assessee u/s 147 of the Act.

13. Before adverting to the issue as to whether or not the A.O had validly assumed jurisdiction for reopening the concluded assessment of the assessee, it would be relevant to point out that as such reopening was done by the A.O within a period of four years from the end of the assessment year,

therefore, the requirement of proving that there was no full and true disclosure on the part of the assessee would not be germane for the present adjudication. Admittedly, as observed by the Hon'ble **Supreme Court** in case of **CIT Vs. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)** , one needs to give a schematic interpretation to the words "reason to believe" failing which, an A.O would get vested with arbitrary powers to reopen assessments on the basis of a "mere change of opinion", which cannot be per se reason to reopen. As observed by the Hon'ble Apex Court, the conceptual difference between power to review and power to reassess has to be kept in mind, as the A.O. has no power to review but he has the power to reassess. To sum up, it was observed by the Hon'ble Apex Court that an A.O is not vested with any jurisdiction to review a concluded assessment in the garb of reassessment. But then, it was also observed by the Hon'ble Apex Court that after 1st April, 1989, A.O has the power to reopen a concluded assessment, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. It was further observed by the Hon'ble Court that the reasons must have a live link with the formation of the 'belief'. Accordingly, in the backdrop of the aforesaid settled position of law, we shall deliberate upon the aspect as to whether the A.O on the basis of "tangible material" had came to a conclusion that the income of the assessee chargeable to tax had escaped assessment, and thus reopened its concluded assessment u/s 147 of the Act, or had done so on the basis of a mere "change of opinion " . As is discernible from the facts borne from the records, the assessee in the course of the "Original " assessment proceedings had despite specific direction by the A.O failed to place on record the "Completion Certificate " of its project viz. "Adityavardhan " , as issued by the local authorities. In fact, as observed by us hereinabove, the assessee had filed with the A.O. a building completion certificate issued by its architect i.e Mr. Bhupendra Patrawala. It was only in the course of the assessment proceedings in the case of the assessee for the immediately succeeding year i.e A.Y 2012-13 that the A.O was intimated by the MCGM vide its letter No. DyChE/BP/19415/ES, dated 19.03.2015, that the "Building Completion Certificate " and "Occupation Certificate " was not issued to the assessee, till date, on account of certain failure on its part as regards complying with the building I.O.D (Intimation of Disapproval) conditions. As such, on the basis of the aforesaid information/tangible material gathered by the A.O subsequent to the culmination of the 'Original' assessment framed by him vide his order passed u/s 143(3), dated 28.03.2013 for the year under consideration i.e A.Y 2011-12, that the A.O had a reason to believe that the failure of the assessee to complete its project viz. "Adityavardhan " within the stipulated time period provided in Sec. 80IB(10)(a)(iii) of the Act, had thus, rendered it ineligible for claim of deduction under the said statutory provision. Apart from that, the A.O on the basis of verifications carried out in the course of the assessment proceedings for A.Y 2012-13, had also gathered that the built-up area of all 3BHK flats in the project viz."Adityavardhan " was more than the prescribed area of 1000 sq. ft, which clearly contravened the norms prescribed in Sec. 80IB(10)(c) of the Act. Accordingly, on the basis of the aforesaid "fresh material " gathered by the A.O in the course of the assessment proceedings for the immediately succeeding year i.e A.Y 2012-13, we find that he had arrived at a bonafide belief that the assessee who had violated the requisite conditions contemplated in Sec. 80IB(10) of the Act, viz. (a). Sec. 80IB(10)(a)(iii); and (b). 80IB(10)(c), was wrongly allowed deduction u/s 80IB(10) while framing of its regular assessment for A.Y 2011-12, which had thus resulted to escapement of its income chargeable to tax. Although, we are in agreement with the claim of the ld. A.R that an A.O even within a period of four years has no power to review a concluded assessment, but then, as in the case before us there was fresh "tangible material " before the A.O to come to a bona fide belief that there was an escapement of income from assessment, the power to reopen the concluded assessment was well within his jurisdiction. In our considered view, at the stage when the A.O reopens an assessment it is not necessary that the 'material' before him should conclusively prove or establish that income of the assessee chargeable to tax had escaped assessment. As such, a reason to believe at the stage of reopening of a concluded assessment is all that is relevant. Our aforesaid view is fortified by the judgment of the Hon'ble **Supreme Court** in the case of **CIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500 (SC)** . We find that it is the claim of the ld. A.R that the A.O while framing the 'Original' assessment, vide his order passed u/s 143(3), dated 28.03.2013 for the year under consideration i.e A.Y 2011-12, had accepted the 'Building Completion Certificate' issued by the assessee's architect i.e Mr. Bhupendra Patrawala, alongwith other documents that were placed on his

record by the assessee, for concluding, that the assessee had completed its project viz. "Adityavardhan " within the stipulated time period i.e latest by 31.03.2012. In the backdrop of his aforesaid claim, it was submitted by the ld. A.R that the subsequent reopening of its concluded assessment on the ground that the said project was not completed till date, for the reason, that MCGM had not issued "Completion Certificate " /"Occupation Certificate " would tantamount to reopening on the basis of a mere 'change of opinion' of the successor A.O, which is not permissible in the eyes of law. We are afraid that the said contention of the ld. A.R does not find favour with us. On a bare perusal of the 'Explanation (ii)' to Sec. 80IB(10)(a) of the Act, 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. As such, it can safely be concluded that the said material statutory requirement was overlooked by the A.O while framing the 'Original' assessment vide his order passed u/s 143(3), dated 28.03.2013 for the year under consideration. We are unable to persuade ourselves to subscribe to the claim of the ld. A.R that overlooking of the aforesaid statutory requirement by the A.O in the course of the 'Original' assessment proceedings has to be construed as a deemed acceptance of the completion of the project on the basis of the certificate of the assessee's architect and other supporting documents which were filed by the assessee. Be that as it may, in our considered view, the failure on the part of the assessee to support its claim as regards the completion of the construction of its housing project within the stipulated time period envisaged in Sec. 80IB(1)(a)(iii), on the basis of a completion certificate issued by the local authority would clearly suffice for formation of a 'belief' on the part of the A.O that as the assessee had failed to cumulatively satisfy the conditions envisaged in Sec. 80IB(10) of the Act, its income chargeable to tax to the said extent had escaped assessment. Our aforesaid view is fortified by the judgment of the Hon'ble **High Court of Bombay** in the case of **Export Credit Guarantee Corporation Of India Ltd. Vs. Addl. CIT (2013) 350 ITR 651 (Bom)** . In the said judgment, it was observed by the Hon'ble High Court that an A.O who has plainly ignored relevant material in arriving at an assessment acts contrary to law. Now, in the case before us, though the A.O had specifically as per the mandate of law, vide his query letter dated 22.02.2013 had directed the assessee to furnish a copy of "Completion Certificate " issued by the local authorities, but thereafter, he had lost sight of the settled position of law and de hors furnishing of the requisite "Completion Certificate " by the assessee, had concluded, that the assessee had completed the development of the said project. Be that as it may, it is an admitted fact that subsequent to the culmination of the regular assessment for the year under consideration, the A.O was in receipt of information from MCGM vide its letter No. DyChE/BP/19415/ES, dated 19.03.2015, that the "Building Completion Certificate " and "Occupation Certificate " was not issued to the assessee on account of certain failure on its part to comply with the building I.O.D (Intimation of Disapproval) conditions. We hold a strong conviction that the said "fresh information " received by the A.O from MCGM justified formation of a bonafide belief on his part that the income of the assessee chargeable to tax had escaped assessment. Apart from that, we find that in the course of the assessment proceedings for the immediately succeeding year i.e A.Y 2012-13, specific information was gathered by the A.O that some of the residential units constructed by the assessee in its housing project viz. "Adityavardhan " exceeded the maximum area allowable u/s 80IB(10)(c) of the Act. In our considered view, the said information gathered by the A.O on the basis of verifications carried out in the course of the assessment proceedings for A.Y 2012-13, therein justifiably formed a basis for arriving at a belief that the assessee had contravened the provisions of Sec. 80IB(10)(c) of the Act, and resultantly its income chargeable to tax to the extent such deduction was allowed while framing the assessment vide order passed u/s 143(3), dated 28.03.2013, had escaped assessment. In our considered view, there is no substance in the claim of the assessee that reopening of the assessment on the aforesaid reasons was nothing but a result of a mere 'change of opinion' on the part of the successor A.O. In the backdrop of our aforesaid deliberations, we are of the considered view that the A.O. had rightly assumed jurisdiction for reopening the concluded assessment of the assessee u/s 147 of the Act.

14. Before parting, we shall deal with the judicial pronouncements that had been pressed into service by the ld. A.R in his attempt to buttress his claim that the A.O had exceeded his jurisdiction while reopening the concluded assessment in the case of the assessee, as under:

(i). CIT, Calcutta Vs. Burlop Dealers Ltd. (1971) 79 ITR 609 (SC) :

The ld. A.R in the course of hearing of the appeal had drawn support from the aforesaid judgment of the Hon'ble Apex Court. It was submitted by the ld. A.R that once the assessee had disclosed the material facts in its 'books of account', thereafter, it was under no obligation to inform the A.O about the possible inferences that might be raised against it. On a perusal of the said judgment, we find that the same was delivered in context of Sec. 34(1)(a) of the Income-tax Act, 1922, as per which the ITO had an authority to serve a notice when he had reason to believe that by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the year, income chargeable to tax had escaped assessment. It was observed by the Hon'ble Apex Court that under s. 34(1)(a) if the assessee has disclosed primary facts relevant to the assessment, he would thereafter be under no obligation to instruct the ITO about the inference which he may raise from those facts. In our considered view, reopening of the case u/s 34(1)(a) of the 1922 Act, is more or less pari materia to certain situations which are taken within its fold by the 'first proviso' to Sec. 147 of the Act. As such, in a case where an assessment for the relevant assessment year had earlier been framed under sub-section (3) of Section 143 or Sec. 147, no action shall thereafter be taken after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax had escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub- section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment , for that assessment year. In our considered view, as the case of the assessee before us had been reopened within a period of four years from the end of the relevant assessment year, therefore, the aforesaid judicial pronouncement being distinguishable on facts would not assist its case.

(ii). GKN Sinter Metals Ltd. Vs. Ms. Ramapriya Raghavan ACIT & Ors. (2015) 371 ITR 225 (Bom) :

The ld. A.R had in the course of hearing of the appeal had relied on the aforesaid judgment of the Hon'ble High Court of Bombay. Facts in brief are that the assessee petitioner had three manufacturing units - one located at Pimpri and two at Ahmednagar. The two manufacturing units of the assessee located at Ahmednagar were entitled to the benefit of tax holiday under Sec. 80-IA/80-IB of the Act, as they were situated in a backward region. Along with its return of income for A.Y 2002-03, the assessee had filed two auditor certificates both dated 26.10.2002 in respect of its two manufacturing units situated at Ahmednagar, therein claiming benefit of deduction aggregating to Rs. 2.86 crores u/ss. 80-IA/80-IB of the Act. Along with the auditor's report, the assessee petitioner had also filed a " Note " indicating the manner in which it had worked out its claim for deduction u/s 80-IA of the Act. As per the " Note " the expenses were allocated between the three manufacturing units on its turnover, actual basis and time spent depending upon the nature of expenses. During the course of the assessment proceedings, the A.O called for exhaustive information/clarification as regards the working of the claim for deduction u/ss. 80-IA/80-IB of the Act. In reply, the assessee petitioner responded to the queries raised by the A.O as regards its working of deduction u/ss. 80-IA/80-IB of the Act, and in particular gave details of the manner in which the expenses had been allocated amongst the three manufacturing units, i.e., two in the backward region and one at Pimpri. The A.O vide his assessment order passed u/s 143(3), dated 09.03.2005 accepted the assessee's claim for deduction u/ss. 80- IA/80-IB to the extent of Rs. 2.08 crores. Subsequently, the A.O was in receipt of a communication from the Addl. CIT, who had assessed the assessee petitioner to tax for A.Y 2004-05, indicating that the allocation of expenditure amongst the three manufacturing units of the assessee was disproportionate having regard to its turnover, resulting in excessive allocation of the expenditure to the non-section 80-IA/80-IB unit. Acting upon the aforesaid information (though not borne out from the reasons), the A.O sought to reopen the case of the

assessee and issued a notice u/s 148 on 14.03.2007. On a perusal of the 'reasons to believe', we find that the reopening of the case was sought by the A.O, on the ground, that there was a disproportionate allocation of expenses between the various units eligible and those not eligible for deduction u/s 80-IA. It was further stated in the 'reasons to believe', that the assessee had claimed most of its expenditure in the units which were not eligible for Sec. 80-IA deduction, thereby inflating the profits of the units which were eligible for deduction. We find that it was in the backdrop of the aforesaid facts that the Hon'ble High Court had concluded that the A.O in the course of the regular assessment had called upon the assessee to furnish details as regards its claim for deduction u/ss. 80-IA/80-IB of the Act. It was further noticed by the Hon'ble High Court that the A.O on being satisfied with the assessee's reply, had vide his assessment order passed u/s 143(3), dated 09.03.2005 accepted its claim for deduction u/ss. 80-IA/80-IB of Rs. 2.08 crores. As such, it was in the backdrop of the aforesaid facts that the Hon'ble High Court had observed that the A.O while passing the assessment order u/s 143(3), dated 09.03.2005, had formed an opinion in respect of allocation of expenses amongst the three manufacturing units for deduction u/ss. 80-IA/80-IB of the Act. Further, the Hon'ble High Court had also declined to accept the claim of the revenue that the reopening was based on the communication dated January 15, 2007 that was received by the A.O from the Addl. CIT who had assessed the assessee petitioner to tax for A.Y 2004-05. It was observed by the Hon'ble High Court that the aforesaid communication dated January 15, 2007, was not even referred in the reasons recorded while issuing the impugned notice dated March 14, 2007. Accordingly, it was in the backdrop of the aforesaid observations that the Hon'ble High Court had concluded that as the reopening of the concluded assessment of the assessee was based on a mere 'change of opinion' as regards the basis of allocation of expenses amongst the three manufacturing units of the assessee, the same could not be sustained and was liable to be vacated.

(ii). As observed by us hereinabove, the facts in the case before us are clearly distinguishable as against those involved in aforesaid case viz. GKN Sinter Metals Ltd.(supra). The A.O in the case before us had reopened the concluded assessment of the assessee for two reasons viz. (a). that as per intimation received by the A.O from the MCGM vide its letter No. DyChE/BP/19415/ES, dated 19.03.2015, the "Building Completion Certificate " and "Occupation Certificate " was not issued to the assessee till date by the local authorities on account of certain failure on its part as regards complying with the building I.O.D (Intimation of Disapproval) conditions, on the basis of which the A.O held a bona fide belief that as the assessee had contravened the provisions of Sec. 80IB(10)(a)(iii), it was thus not entitled for claim of deduction u/s 80IB; and (b). the A.O on the basis of verifications carried out in the course of the assessment proceedings for A.Y 2012-13, had gathered, that the built-up area of some of the residential units in the project viz."Adityavardhan " was more than the prescribed area of 1000 sq. ft, which being in contravention of the norms prescribed in Sec. 80IB(10)(c) of the Act, rendered the assessee ineligible for claim of deduction under the said statutory provision. Accordingly, the reopening of the case before us was carried out on the basis of fresh "tangible material " which clearly established that the A.O had a 'reason to believe' that the income of the assessee chargeable to tax had escaped assessment. As such, the facts involved in the aforesaid case being distinguishable as against those in the case before us, would thus not assist the case of the assessee.

15. On the basis of our aforesaid observations we find no infirmity in the assumption of jurisdiction by the A.O u/s 147 of the Act, and are thus not inclined to subscribe to the claim of the ld. A.R that the concluded assessment in the case of the assessee had been reopened on a mere 'change of opinion'. As such, holding a conviction that the A.O had rightly assumed jurisdiction and reopened the case of the assessee u/s 147 of the Act, we uphold the same to the said extent. **Grounds of appeal Nos. 1 & 2** are dismissed.

16. Resultantly, the appeal of the assessee is dismissed.

ITA No. 5912/Mum/2017 A.Y 2011-12

(Revenue's appeal)

We shall now take up the appeal of the revenue for A.Y 2011-12. The Revenue has assailed the order of the CIT(A), to the extent he had set aside the order of the A.O and held the assessee's claim for deduction u/s 80IB as being in order. As elaborated at length by us hereinabove, the A.O vide his reassessment order passed u/s. 143(3) r.w.s 147 of the Act, dated 18.03.2016, had withdrawn the assessee's claim for deduction of Rs. 26,69,84,644/- u/s 80IB of the Act. The A.O had held the assessee to have failed to carry out a cumulative satisfaction of the requisite conditions contemplated in Sec. 80IB(10) of the Act, on two counts viz. (a). that as per intimation received by the A.O from the MCGM vide its letter No. DyChE/BP/19415/ES, dated 19.03.2015, as the "Building Completion Certificate " and "Occupation Certificate " was not issued to the assessee, till date, on account of certain failure on its part as regards complying with the building I.O.D (Intimation of Disapproval) conditions, therefore, the assessee was held to have contravened the provisions of Sec. 80IB(10)(a)(iii); and (b). that as the verifications carried out by the A.O in the course of the assessment proceedings for A.Y 2012-13 had revealed that the built-up area of some of the residential units in the project viz."Adityavardhan " was more than the prescribed area of 1000 sq. ft, thus the assessee had contravened the norms prescribed in Sec. 80IB(10)(c) of the Act. On appeal, the CIT(A) finding the claim for deduction raised by the assessee u/s 80IB in order, had vacated the disallowance made by the A.O. Aggrieved, the revenue has assailed the allowing of the assessee's claim for deduction u/s 80IB by the CIT(A) in appeal before us. The ld. D.R submitted that on the basis of information received by the A.O from the MCGM vide its letter No. DyChE/BP/19415/ES, dated 19.03.2015, it was gathered by him that the "Building Completion Certificate " and "Occupation Certificate " was not issued by MCGM to the assessee, till date, on account of certain failure on its part as regards complying with the building I.O.D (Intimation of Disapproval) conditions. As per the information received from MCGM, the Building Completion Certificate/Occupation Certificate was not issued to the assessee since as per the approved plan portion of 18.30 mtr. wide D.P road passing through the south side of the plot was not constructed and handed over by it to MCGM. The ld. D.R took us through the aforesaid letter dated 19.03.2015 that was received by the A.O from M.C.G.M. It was submitted by the ld. D.R that as the assessee who as per the mandate of Sec. 80IB(10)(a)(iii) of the Act remained under an obligation to have completed the aforesaid residential project latest by 31.03.2012 i.e within a period of five years from the end of the financial year in which the housing project was approved by the local authorities, had failed to do so even upto 19.03.2015 (i.e the date of letter received from M.C.G.M), therefore, it was not eligible for claim of deduction u/s 80IB of the Act. The ld. D.R drawing our attention towards 'Explanation (ii)' to Sec. 80IB(10)(a), therein submitted, that as per the mandate of law the date of completion of construction of the housing project statutorily has to be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority. Further, it was submitted by the ld. D.R that as the built-up area of all 3 BHK residential units and flats in the assessee's housing project viz. "Adityavardhan " had exceeded the maximum allowable area of 1000 sq. feet, therefore, the assessee having violated the conditions of Sec. 80IB(10)(c) of the Act, was thus rightly held by the A.O to be ineligible for claim of deduction under the said statutory provision. In the backdrop of his aforesaid contentions, it was submitted by the ld. D.R that the CIT(A) was in error in setting aside the well reasoned order of the A.O in context of the issue under consideration and holding the assessee as eligible for claim of deduction u/s 80IB(10) of the Act.

Per contra, the ld. A.R supported the order of the CIT(A), to the extent he had held that the assessee's claim for deduction u/s 80IB of the Act was in order. It was submitted by the ld. A.R, that as it had obtained "Commencement Certificate " from MCGM on 18.07.2006 for its project viz. "Adityavardhan " which comprised of 2 wings each of stilt plus 10 upper floors, therefore, the construction of the same as per the mandate of Sec. 80IB(10)(a)(iii) was to be completed latest by 31.03.2012. It was submitted by the ld. A.R that as per the approved plan 108 flats were to be constructed in the said 2 wings. Further, as per the approved plan the assessee was to construct and hand over two D.P Roads on the

said plot to MCGM viz. (i) the road on the east side of the plot; and (ii). the road on the south side of the plot. It was submitted by the ld. A.R, that though the assessee had constructed and handed over the road running on the East side of the plot to MCGM, but had failed to construct the road on the South side of the plot of land, as where the road was to be constructed there was a hill on which there was a pylon i.e a tower for transmission of electricity of Tata Electric Company. It was stated by the ld. A.R that all efforts on the part of the assessee to convince Tata Electric Company to shift its transmission tower to another location in order to facilitate construction of the D.P road on the South side of the plot had failed. Further, as submitted by the ld. A.R, the representations made by the proposed society formed by the flat purchasers i.e Adityavardhan Residents Welfare Association to Tata Electric Company for shifting of its Pylon had also gone in vain. The ld. A.R submitted that under the aforesaid circumstances the assessee had requested MCGM to construct the road on the South side of the plot on their own, at the cost of the assessee, which proposal also did not see the light of the day. It was submitted by the ld. A.R that the failure to construct the road on the South side of the plot was for reasons beyond the control of the assessee. It was submitted by the ld. A.R that the assessee had completed the construction of its housing project within the stipulated time period i.e upto 31.03.2012, which fact could safely be gathered from material/evidence that was obtained by the assessee from the respective departments of MCGM and furnished with the A.O in the course of the assessment proceedings viz. (i). approval granted by Chief Electrical Engineer, vide his orders dated 11.08.2010, 10.11.2010 and 22.12.2010.; (ii). no objection certificate dated 22.12.2010 issued by the Deputy Chief Fire Officer (ES) in the Miumbai Fire Brigade; (iii) certificate of Assistant Engineer Building Proposal, MCGM, dated 02.07.2010 that the drainage system in the project was complete; (iv). provision of water connection in the buildings w.e.f 23.12.2011; and (v). confirmation of the Assistant Commissioner L-Ward in MCGM, dated 15.11.2011 that the flats of the housing project were occupied. Ld. A.R further submitted that the fact that out of 108 flats in the housing project the assessee had sold and given possession of 92 flats by 31.03.2012, in itself proved to the hilt that the construction of the housing project was complete well within the stipulated time period. The ld. A.R also took us through the certificates of independent professionals viz. (i). certificate of its architect viz. Mr. Bhupendra Patrawala, stating that the onsite works of the project i.e "Adityavardhan " were completed as regards the residential buildings in all respects and the flats were ready for occupation; (ii).application filed by the architect with MCGM for grant of "Occupation Certificate " in respect of the residential buildings in the said project; (iii). certificate from the site supervisor to the effect that the construction of the residential building was complete in accordance with regulations 45 and 46 of the Development Control Regulations; and (iv). certificate from Structural Consultants Engineers & Architects therein certifying that structural work of the building was carried out as per his structural design which complied with the requirement of I.S. Code No. 1893 for earthquake design and requirements as mentioned in clause Nos. 45 and 46 of the Development Control Regulations. It was submitted by the Ld. A.R, that now when it was proved to the hilt that the residential project of the assessee was completed within the time frame prescribed in Sec. 80IB(10)(a)(iii) of the Act i.e latest by 31.03.2012, its claim for deduction under the said section could not be denied merely for the reason that "Completion Certificate " was not obtained from the local authority. It was vehemently submitted by the ld. A.R, that the Building Completion Certificate/Occupation Certificate had been withheld by MCGM, for the reason, that the assessee for reasons beyond its control was unable to construct the 18.30 mtr wide D.P road passing through the South side of the plot. The ld. A.R reiterated the facts leading to the failure on the part of the assessee to construct and hand over the aforesaid 18.30 mtr wide D.P road on the South side of the plot. It was submitted by the ld. A.R, that considering the fact that the construction of the housing project of the assessee was completed in all respects, the CIT(A) had rightly concluded that the assessee having completed the project within the stipulated time period, was thus eligible for claim of deduction u/s 80IB(10) of the Act. In support of his aforesaid contention the ld. A.R relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Hindustan Samuh Awas Ltd. (2015) 62 taxmann.com 175 (Bom). Further, the ld. A.R relied on the judgment of the Hon'ble High Court of Gujarat in the case of CIT Vs. Tarnetar Corporation (2014) 362 ITR 174 (Guj). It was submitted by the ld. A.R that the Hon'ble High Court in the said order had observed that if substantial compliance thereof is established on record, in a given case, then the court

may take a view that minor deviation thereof would not vitiate the very purpose for which deduction was being made available. The ld. A.R also took support of the orders of the Hon'ble Supreme Court in the case of CIT Vs. Classic Binding Industries (2018) 407 ITR 429 (SC) and PCIT Vs. Aarham Softronics (2019) 261 Taxman 529 (SC). Also, reliance was placed by the ld. A.R on the orders of the coordinate benches of Tribunal in the case of (i). Puran Ratilal Mehta Vs. ACIT, Circle 23(3), Mumbai (2019) 175 ITD 190 (Mum); and (ii). Ashiana Amar Developers Vs. ITO (2016) 178 TTJ 474 (Kol). Further, rebutting the observation of the A.O that the built up area of all 3 BHK flats in the aforesaid project was more than 1000 sq. ft., it was submitted by the ld. A.R that the area of the 3 BHK flats as per their calculation was 997 sq.ft. In order to fortify his aforesaid claim, the ld. A.R had drawn our attention to the certificate of Shri. Bhupendra Patrawala, Architect, that was filed with the A.O in the course of the assessment proceedings. It was the claim of the ld. A.R that while calculating the "built-up area " of the 3 BHK flats it had excluded the "dry balcony area " as it was 6 inches below the floor level. It was submitted by the ld. A.R that as per the definition of the term "built-up area " in Sec. 80IB(14)(a), only that area which is at floor level has to be counted. Further, it was averred by the ld. A.R that the "dry balcony area " did not form part of the residential unit which was the subject matter of sale. In order to buttress his said claim the ld. A.R had had taken us through an "agreement to sell " that was entered into by the assessee firm with a flat purchaser. It was submitted by the ld. A.R that MCGM had considered the built-up area of the residential flat in the building for the purpose of approving the building plan. Lastly, the ld. A.R took us through the certificate issued by the assessee's architect wherein he had cerified that the built-up area of each flat did not exceed 1000 sq. feet. In support of his aforesaid claim the ld. A.R had relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. M/s Raviraj Kothari Punjabi Associates [ITA No. 1628 of 2013, dated 24.04.2015] (Bom) and that of the Hon'ble High Court of Madras in the case of CIT, Chennai Vs. Mahalkshmi Housing (2014) 41 taxmann.com 146 (Madras), wherein it was held that open terrace area cannot form part of the "built-up area " of the residential unit. It was thus averred by the ld. A.R that as the assessee had duly complied with the conditions contemplated in Sec. 80IB(10) of the Act, therefore, its claim for deduction under the said statutory provision was in order.

17. Rebutting the aforesaid contentions of the ld. A.R the counsel for the revenue vehemently submitted that in interpreting a taxing statute, equitable considerations are entirely out of place. Accordingly, it was submitted by the ld. D.R that a taxing statute has to be interpreted in the light of what is clearly expressed and it can neither imply anything which is not expressed nor can it import provisions in the statute so as to supply any deficiency. In support of its aforesaid contention reliance was placed by the ld. D.R on the judgment of the "Constitution bench " of the Hon'ble Supreme Court in the case of Commissioner of Customs (Import) Mumbai Vs. Dilip Kumar and Company and Others (2018) 9 SCC 1 (SC). Per Contra, the ld. A.R took us through the aforesaid judgment of the Hon'ble Apex Court and submitted, that it was observed by the court that strict interpretation would not encompass within its fold strict literalism, as the same would therein result in ignoring an important aspect that is "apparent legislative intent " . It was averred by the ld. A.R that the Hon'ble Apex Court had observed, that strict interpretation does not encompass such literalism which would lead to absurdity and go against the legislative intent. Accordingly, it was submitted by the ld. A.R that the rule of strict interpretation was to be utilised in a manner to decipher the legislative intent and thereafter provide an appropriate interpretation for the exemption provided under the provisions of the Act which would be neither too narrow nor too broad. It was further submitted by the ld. A.R that the Hon'ble Apex Court had observed that the doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardships in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequent aspects which cannot be described as the "essence " or the "substance " of the requirements. The ld. A.R drawing support from the aforesaid observations of the Hon'ble Apex Court, therein submitted, that now when the assessee by having completed the construction of the housing project within the stipulated time period i.e latest by 31.03.2012, had substantially complied with the mandate of Sec. 80IB(10) of the Act, then merely for the reason that as per the approved plan it had failed to construct a 18.30 mtr. wide D.P road road on the South side of the plot of land, for reasons beyond its control, would in no way justify divesting it of

its claim for deduction u/s 80IB(10) of the Act. The ld. A.R submitted that the CIT(A) in the totality of the facts of the case had rightly concluded that the assessee was eligible for claim of deduction u/s 80IB(10) of the Act.

18. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the judicial pronouncements relied upon by them in context of the aforesaid issue under consideration. Before adverting any further and adjudicating upon the issue as to as to whether or not the assessee firm had in letter and spirit complied with the mandate of Sec. 80IB(10) of the Act, it would be relevant to reproduce Sec. 80IB(10), which read as under:

> **"Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.**
>
> **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.
>
> (2) to (9)……
>
> [(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 [but not later than the 31st day of March, 2005], within four years from the end of the financial year in which the housing project is approved by the local authority.
>
> [(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five 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 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;]

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed [three per cent] of the aggregate built-up area of the housing project or [five thousand square feet, whichever is higher].]

[(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, the Hindu undivided family in which such individual is the karta, 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).]

As observed by us at length hereinabove, the assessee had obtained the "Commencement Certificate " for its project viz. "Adityavardhan " from Municipal Corporation of Greater Mumbai on 18.07.2006. As the project was approved after 01.04.2005 therefore, as per Sec. 80IB(10)(a)(iii) of the Act, it was required to be completed on or before 31.03.2012 i.e within 5 years from the end of the financial year in which it was so approved. Further, as per the "Explanation (ii) " to Sec. 80IB(10)(a), the date of completion of construction of the housing project statutorily had to be taken to be the date on which the completion certificate in respect of such housing project was issued by the local authority. As is discernible from the records, the A.O while framing the assessment had observed that as the assessee in the course of the assessment proceedings for A.Y 2012-13 despite specific directions had failed to furnish evidence in respect of completion of the project by placing on record the "Building Completion Certificate " as well as the "Occupation Certificate " issued by the local authority, therefore, the A.O had called for the requisite information by issuing notice u/s 133(6) of the Act to MCGM. Information was received by the A.O from MCGM vide its letter No. DyChE/BP/19415/ES, dated 19.03.2015, which revealed that the "Building Completion Certificate " and "Occupation

Certificate " was not issued to the assessee, till date, on account of certain failure on its part as regards complying with the building I.O.D (Intimation of Disapproval) conditions. The letter dated 19.03.2015 received by the A.O from MCGM read as under:

"To,

" MUNICIPAL CORPORATION OF GREATER MUMBAI
No. DyChE/BP/19415/ES, dated 19.03.2015
Office of the Dy. Chief Engineer (Building Proposal)
E.S., Near Raj Legacy Paper Mill Compund L.B.S Marg,
Vikhroli (West), Mumbai - 400083

Shri Durga Nand Raut

Income Tax Officer 23(1)(5), Mumbai-07 R.No. 113, 1 st Floor, Matru Mandir, Tardeo, Mumbai 400007.

Sub: Furnishing of Building Completion Certificate and Occupation Certificate in case of M/s Harshvardhan Constructions, C.T.S No. 186/B-1 of village Tungwa of Saki Vihar Road, Kurla (West), Mumbai, A.Y 2012-13, PAN: AADFH6590D

Madam/Sir,

With reference to above subject matter and as requested by you, the remarks regarding for the file No. CE/4040/BPES/AL are as follows:

(1). Regarding Point No. (i).: - First Commencement Certificate by this office has been issued on 18/07/2006.

(2). Regarding Point No. (ii) & (iii): - No Occupation Certificate/Building Completion Certificate has been issued by this office for the building under reference. Occupation Certificate/Building Completion Certificate has not been issued by this office since portion of set back of 18.30 mt. wide D.P road passing through the plot under reference has not been handed over to M.C.G.M as per IOD conditions issued by this office.

Yours faithfully

Sd/-
Executive Engineer (Building Proposal) E.S.I "

In the backdrop of the aforesaid facts, we find that as the assessee as per the approved plan had failed to construct and hand over 18.30 mt wide D.P Road passing through the south side of the plot to MCGM, therefore, the "Building Completion Certificate " and "Occupation Certificate " was not issued to it by the said local authority. The ld. A.R had emphasized on two main aspects pertaining to the aforesaid issue under consideration viz. (i). that the failure on its part to construct the road on the south side of the plot of land was for reasons beyond its control, as where the road was to be constructed there was a hill on which there was a pylon i.e a tower for transmission of electricity of Tata Electric Company, which the latter despite level best persuasions of the assessee had not agreed to shift to another location; and (ii). that de hors issuance of the BCC/OC by MCGM, now when the construction of the housing project of the assessee was completed in all respects within the stipulated time period, therefore, its claim of deduction u/s 80IB(10) of the Act was in order. We have deliberated at length on the aforesaid contentions of the ld. A.R and are unable to persuade ourselves to subscribe to his claim. On a bare perusal of Sec. 80IB(10)(a)(iii) of the Act, we find that the assessee was obligated to

complete the construction of the housing project latest by 31.03.2012. As observed by us hereinabove, the legislature in all its wisdom, vide the Finance (No.2) Act, 2004, w.e.f 01.04.2005 had carried out an intentional, purposive and conscious insertion of an "Explanation " to Clause (a) of Sec. 80IB(10) of the Act. On a perusal of clause (ii) of the "Explanation " , we find that it has been therein provided that 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 . As such, an assessee w.e.f A.Y 2005-06 is obligated to substantiate its claim of having completed the housing project within the stipulated time period by placing on record the completion certificate issued by the local authority. Although, we are in agreement with the contention of the ld. A.R that in cases where but for certain technical reasons the completion certificate is not issued by the local authority, say for instance the assessee having completed the housing project within the stipulated time period had applied for the completion certificate, but the issuance of the same involved delay on the part of the local authority, in such type of cases there would be no justification in denying the assessee's claim for deduction u/s 80IB(10) of the Act. But then, the facts of the case before us stand on an absolutely different footing. The completion certificate in the case of the assessee before us was not issued by the local authority i.e MCGM, because the assessee had failed to complete the project as per the approved plan, and had failed to construct and hand over 18.30 mt wide D.P Road passing through the south side of the plot to MCGM as per the I.O.D conditions . To be brief and explicit, it can safely be concluded that as the assessee had failed to complete the housing project as per the approved plan, therefore, the completion certificate was not issued by the local authority. We are unable to agree with the claim of the ld. A.R that as it had placed on record material/certificates from the respective departments of MCGM and independent professionals, which as per him evidenced the fact that the housing project was completed within the stipulated time period i.e. upto 31.03.2012, therefore, no adverse inference as regards completion of the said project within the prescribed time limit contemplated in Sec. 80IB(10)(a)(iii) was liable to be drawn. As observed by us hereinabove, the said claim of the ld. A.R has to fail on two grounds viz. (i). that as per the mandate of law the housing project is to be taken to have been completed on the date on which a completion certificate is issued by the local authority; and (ii). that it remains a fact borne from the records that the assessee by not constructing and handing over a 18.30 mt wide D.P Road passing through the south side of the plot to MCGM as per the I.O.D conditions i.e as per the approved plan, had thus failed to complete the construction of the project within the prescribed time limit. The ld. A.R had also advanced a contention that now when the buildings viz. Wing A & B of the housing project had been completed, and out of 108 flats in the housing project the assessee had sold and given possession of 92 flats by 31.03.2012, therefore, it would be incorrect to conclude that the assessee had not completed the "housing project " within the stipulated time period. We are not at all impressed by the said claim of the ld. A.R. In our considered view, the assessee was obligated to complete the construction of the housing project as per the approved plan and comply with the I.O.D conditions, and by no means could be permitted to construe the completion of the construction of buildings as completion of the housing project.

We shall now advert to the claim of the ld. A.R that as the failure to construct and hand over 18.30 mt wide D.P Road passing through the south side of the plot to MCGM as per the I.O.D conditions was for reasons beyond its control, therefore, it could not have been justifiably be denied of its claim for deduction u/s 80IB(10) of the Act. We are unable to agree with the said claim of the assessee. As observed by us hereinabove, the obligation to construct and hand over 18.30 mt wide D.P Road passing through the south side of the plot to MCGM as per the I.O.D conditions was there at the time of approval of plan. In other words, the obligation to construct the 18.30 mt wide D.P Road passing through the south side of the plot to MCGM formed part of the I.O.D conditions, and was not an obligation that was subsequently cast upon the assessee. In fact, the assessee at the time of approval of its plan was well conversant of the fact that on the South side of the plot of land where the road was to be constructed there was a hill on which there was a pylon i.e a tower for transmission of electricity of Tata Electric Company. In our considered view, now when the assessee at the time of getting its plan approved was well aware of the existence of a pylon i.e. a tower for transmission of electricity of Tata Electric Company on the south side of the plot where it had agreed to construct a 18.30 mt wide D.P

Road, it could not thereafter be allowed to plead impossibility of performance of the said act. Be that as it may, in the backdrop of our aforesaid observations, we are of a strong conviction that as the assessee had failed to complete the construction of the housing project within the prescribed time limit envisaged in Sec. 80IB(10)(a)(iii) of the Act, therefore, the A.O had rightly declined its claim for deduction u/s 80IB(10) of the Act.

19. We shall now advert to the judicial pronouncements relied upon the ld. A.R, which we find being distinguishable on facts would not assist the case of the assessee:

(i). CIT, Aurangabad Vs. Hindustan Dsamuh Awas Ltd. (2015) 377 ITR 150 (Bom)

In the aforesaid case, the assessee company was required to complete its project prior to 31.03.2008. The assessee had well in time i.e on 25.03.2008 submitted an application alongwith its architect's certificate with the Municipal authority for issuance of the "Completion Certificate " of its housing project. However, the Municipal authority had on 27.03.2008 directed the assessee to deposit certain amount for issuance of the "Completion Certificate " . Accordingly, the assessee deposited the amount on 31.03.2008, pursuant whereto the "Completion Certificate " was issued by the Municipal authority in the Month of October, 2008. It was in the backdrop of the aforesaid facts that the Hon'ble High Court had observed that as the delay in issuance of the "Completion Certificate " could not be attributed to the assessee company, therefore, the assessee was entitled for exemption u/s 80IB(10) of the Act.

(a). Unlike the facts of the aforesaid case, the facts involved in the case before us are totally distinguishable. As observed by us hereinabove, the "Completion Certificate " for the project viz. Adityavardhan, had till date not been issued to the assessee because it had admittedly failed to comply with the building I.O.D (Intimation of Disapproval) conditions, and had not completed the "housing project " as per the approved plan. On the basis of our aforesaid observations, we are of the considered view that as the aforesaid case is distinguishable on facts, therefore, the same would not assist the case of the assessee before us.

(ii). CIT Vs. Tarnetar Corporation (2014) 362 ITR 174 (Guj)

In the aforesaid case, the fact that the assessee had completed the construction of the "housing project " within the stipulated time period i.e well before 31.03.2008, was not in doubt. In fact, the assessee had not only completed the construction two years before the final date and had applied for the "Building Use " (for short "BU ") permission, which was rejected not on the ground that the construction was not completed but on some other technical ground. However, thereafter upon revised efforts of the assessee the "BU " was granted by the local authority vide its order dated March 19,2009. Accordingly, it was in the backdrop of the aforesaid facts that the Hon'ble High Court while allowing the assessee's claim for deduction, had observed, that where substantial compliance of the statutory requirement was established on the part of the assessee, the court may take the view that minor deviation thereof would not vitiate the very purpose for which the deduction was being made available.

Again, the facts involved in the aforesaid case relied upon by the ld. A.R are totally distinguishable as against the facts involved in the case before us. In the aforesaid case, the Hon'ble High Court had observed that though the assessee before them had completed the construction of the "housing project " much prior to the last date i.e March 31,2008, however, the "BU " was declined by the local authority for a technical reason. It was thus in the backdrop of the said facts that the Hon'ble High Court had observed that if substantial compliance thereof is established on record, in a given case,

the court may take the view that minor deviation thereof would not vitiate the very purpose for which the deduction was being made available. As such, it was observed by the High Court that delay in obtaining of the "BU " permission by the assessee for a 'technical reason' would not justify denial of the assessee's claim for deduction u/s 80IB(10) of the Act. However, in the case before us the "Completion Certificate " for the project viz. Adityavardhan, had till date not been issued to the assessee, for the reason, that it had failed to comply with the building I.O.D (Intimation of Disapproval) conditions and thus not completed the "housing project " as per the approved plan. In our considered view, as the assessee in the case before us by not completing the construction of the "housing project " viz. Adityavardhan had clearly failed to carry out a substantial compliance of the mandate of Sec. 80IB, therefore, the aforesaid judicial pronouncement relied upon by the ld. A.R being distinguishable on facts would not come to the rescue of the assessee.

(iii). Ashiana Amar Developers Vs. ITO (2016) 178 TTJ 474 (Kol)

(a) In the aforesaid case, the assessee had duly applied for the "Completion Certificate " from JDA i.e the local authority, immediately after the completion of the project. However, the local authority directed the assessee developer to take the completion certificate from a registered architect for official purposes. It was in the backdrop of the aforesaid facts, that the Tribunal had observed that insistence of the A.O on the certificate from the local authority would only result in impossibility of performance on the part of the assessee. Observing, that the "housing project " was completed within the allotted time frame and the possession certificate was also duly furnished before the A.O, the Tribunal concluded that the deduction u/s 80-IB(10) could not be denied on the ground of non-production of "completion Certificate " from the local authority.

(b) As in the aforesaid case, the assessee had admittedly completed the "housing project " within the stipulated time period, therefore, the Tribunal had concluded that the assesse's claim for deduction u/s 80-IB(10) could not be declined on the basis of a technical issue. In the case before us, as the assessee had admittedly failed to complete its "housing project " viz. Adityavardhan within the stipulated time period, therefore, the said fact in itself places the facts of the case before us as distinguishable in comparison to those before the Tribunal in the aforesaid matter. Accordingly, we are afraid that the reliance placed by the ld. A.R on the aforesaid order of the ITAT, being distinguishable on facts would not be of any assistance for adjudicating the case of the assessee before us.

(iii). Puran Ratilal Mehta vs. ACIT (2019) 102 taxmann.com 187 (Mum)

(a). In the aforesaid case, the observations of the Tribunal were recorded in the backdrop of the fact that as observed by the CIT(A) the project was completed by the assessee before the stipulated time period i.e 31.03.2008. It was in the backdrop of the said fact, that it was further observed that the assessee after the completion of the project had filed an application for obtaining the Occupation Certificate from MCGM. Accordingly, the Tribunal taking cognizance of the fact that the project was completed by the assessee in all respect before 31.03.2008, had therein observed that merely for the reason that the "Occupation Certificate " was not issued by MCGM would not justify declining of the assessee's claim for deduction u/s 80-IB(10) of the Act.

(b). Again, as is discernible from the facts of the aforesaid case, we find, that the assessee in the said case had admittedly completed the project. As such, it was observed by the Tribunal that in the totality of the facts of the case, the assessee's claim for

deduction u/s 80IB(10) could not justifiably be declined for the reason that the "Occupation Certificate " was not issued by MCGM to the assessee. As the facts of the case of the assessee before us, wherein the construction of the "housing project " had not been completed till date as per the approved plan, therefore, the same are distinguishable as against the facts of the aforesaid case law relied upon by the ld. A.R before us.

We shall now deal with the claim of the ld. A.R that a statute is to be construed in a manner that the same makes it effective and workable and a construction which reduces the same to a futility is to be avoided. It was submitted by the ld. A.R that as the assessee by completing the construction of the "housing project " within the prescribed time frame had substantially complied with the mandate of Sec. 80IB(10) of the Act, therefore, by taking recourse to a strict literal interpretation its entitlement towards claim of deduction under the said statutory provision could not be declined. In sum and substance, the ld. A.R advocated the principle of liberally construing a statutory provision in a case where the assessee is found to have substantially complied with the conditions therein envisaged. The ld. A.R by pressing into service the "Principles of Statutory Interpretation " by Justice G.P Singh, submitted, that the general rule that non-compliance of mandatory requirements results in nullification of the act is inter alia subject to an exception viz. where the performance of the requirement is impossible, then the performance of the same is to be excused. Accordingly, it was submitted by the ld. A.R that the failure on the part of the assessee to construct the 18.30 mt wide D.P Road passing through the south side of the plot, being an act which could not possibly be performed, would clearly fall within the exceptions to the mandatory requirements envisaged in Sec. 80IB(10) of the Act. To sum up, it was averred by the ld. A.R that as the assessee had substantially complied with the mandate of Sec. 80IB(10) and had completed the construction of the "housing project " viz. Adityavardhan within the prescribed time limit, therefore, it could not be divested of its claim for deduction contemplated under the said statutory provision. We have given a thoughtful consideration to the aforesaid claim of the ld. A.R and in the backdrop of the facts of the case before us are unable to persuade ourselves to subscribe to the same. As observed by the Hon'ble Supreme Court in the case of **IPCA Laboratories Ltd. Vs. DCIT (2004) 266 ITR 521 (SC)** , that even though a liberal interpretation has to be given, the interpretation has to be as per the wording of the section. If the wordings of the section are clear, then benefits, which are not available under the section cannot be conferred by ignoring or misinterpreting the words in the section. Adopting a similar view, the Hon'ble Apex Court in the case of **Petron Engg. Construction Pvt. Ltd. Vs. CBDT &Ors. (1989) 175 ITR 523 (SC)** , had earlier observed, that liberal interpretation of an incentive provision can be resorted to only when it is possible without impairing the legislative requirement and the spirit of the provision. It was observed by the Hon'ble Apex Court, that where the phraseology of a particular provision takes within its sweep the transactions which are taxable, it is not for the courts to strain and stress the language so as to enable the taxpayer to escape the tax. On a similar footing the Hon'ble Apex Court in the case of **Pandian Chemicals Vs. VIT (2003) 262 ITR 278 (SC)** , had observed, that rules of interpretation would come into play only if there is any doubt with regard to the express language used in the provision. It was observed by the Hon'ble Court that where the words are unequivocal, there is no scope for importing the rule of liberal interpretation of an incentive provision. Also, in the case of **CIT Vs. N.C Budhiraja and Anr. (1993) 204 ITR 412 (SC)** , the Hon'ble Supreme Court had held that interpretation of an incentive section should not do violence to the plain language. It was observed by the Hon'ble Apex Court that the object of an enactment should be gathered from a reasonable interpretation of the language used therein.

Apart from the aforesaid judicial pronouncements of the Hon'ble Apex Court, we shall now advert to the judgment of the " **Constitutional bench"** of the Hon'ble **Supreme Court** in the case of **Commissioner Customs (Imports), Mumbai Vs. Dilip Kumar And Company And Others (2018) 9 SCC 1** relied upon by the ld. D.R. The ld. D.R by drawing support from the said judgment had claimed that in case of any ambiguity in understanding an exemption notification or an exemption clause the benefit of such ambiguity must be strictly interpreted in favour of revenue. On a perusal of the

aforesaid judgment, we find that the Hon'ble Apex Court had deliberated on the aspect as to how a concession/exemption/incentive/rebate/subsidy notifications or provisions are to be construed. In its said judgment the Hon'ble Apex Court had observed that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section, and if the words of the charging section are ambiguous or open to two interpretations then the benefit of interpretation of such charging provisions has to be given to the assessee. In so far interpretation of an exemption proviso is concerned, the Hon'ble Apex Court had observed that in case of any ambiguity in interpretation of an exemption notification or exemption clause, the benefit of such ambiguity must go in favour of the Revenue/State. Apart from that, it was observed by the Hon'ble Apex Court that the benefit of proving applicability of exemption would be on the assessee who would be obligated to show that his case comes squarely within the parameters of the exemption notification or exemption clause. As regards the stages involved in interpreting an exemption provision, it was observed by the Hon'ble Apex Court that the same comprised of two parts viz. (i). the question as to whether the assessee falls in the notification or in the exemption clause has to be strictly construed; and (ii). that once the ambiguity or doubt is resolved by interpreting the applicability of the exemption clause strictly, then the court may construe the notification by giving full play bestowing wider and liberal construction. As regards the tools for interpreting a statutory provision, it was held by the Hon'ble Apex court that an 'Explanation' to a statute is inter alia an internal aid for construction of the same. Further, it was observed by the Hon'ble Court that if the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said meaning irrespective of consequences. It was observed that if the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. In fact, the Hon'ble Court observed that the words used declared the intention of the legislature. Apart from that, it was observed that the fact that applying of the rule of plain meaning had resulted into any hardship or inconvenience cannot be allowed to form a basis to alter the meaning to the language employed by the legislation. It was further observed by the Hon'ble Apex Court that any vagueness in the exemption clauses must go to the benefit of the revenue, as the same being the creation of the statute itself has to be construed strictly. It was further observed that as exemptions have tendency to increase the burden on the other unexempted class of tax payers, therefore, a person claiming exemption has to establish that his case squarely falls within the exemption notification, and in case of any ambiguity such notification has to be construed against the assessee. As observed by the Hon'ble Court, the need to resort to any interpretative process arises only where the meaning is not manifest on the plain words of the statute. If the words are plain and clear and directly convey the meaning, there is no need for any interpretation. Further, it was observed by the Hon'ble Court that if an exemption is available on complying with certain conditions, then the said conditions have to be complied with. As regards the aspect of "substantial compliance " , we find that the Hon'ble Apex Court had observed that the doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted. It was further observed, that an exemption from taxation is to be allowed based wholly by the language of the notification and exemption cannot be gathered by necessary implication or by construction of words. In other words one has to look to the language alone and the object and purpose for granting exemption is irrelevant and immaterial.

20. In the backdrop of the aforesaid observations of the Hon'ble **Supreme Court** in the case of **Commissioner Customs (Imports), Mumbai Vs. Dilip Kumar And Company And Others (2018) 9 SCC 1** , we are in agreement with the contention advanced by the ld. D.R that if the words used in a statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said meaning irrespective of consequences. In fact, we find that the Hon'ble Apex Court had observed that if the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. Now, in so far construing of Sec. 80IB(10) is concerned, we find that the said statutory provision clearly lays down the set of conditions that are

required to be cumulatively satisfied for entitling an assessee to claim deduction therein contemplated. We are unable to persuade ourselves to accept the claim of the ld. A.R that now when the assessee had substantially complied with the conditions contemplated in Sec. 80IB(10), it could not on the basis of a strict interpretation of the said statutory provision be divested of its claim for deduction therein raised. In so far the claim of the ld. A.R that the assessee had substantially complied with the mandate of Sec. 80IB(10) of the Act is concerned, we are afraid that the same does not find favour with us. As observed by us hereinabove, as per the innate statutory requirement contemplated in Sec. 80IB(10), the assessee was obligated to substantiate the date of completion of construction of its housing project viz. Adityavardhan on the basis of the "Completion Certificate " of the local authority i.e MCGM, which admittedly in its case was not issued by MCGM as the project was not completed by the assessee as per the building I.O.D (Intimation of Disapproval) conditions. As such, in the absence of strict compliance of the conditions or requirements contemplated in Sec. 80IB(10) of the Act, we are afraid that the claim of the ld. A.R that there was substantial compliance of the said statutory provision by the assessee cannot be accepted. In fact, the Hon'ble Apex Court in its aforesaid judgment had observed that the doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted. Now, in the case of the assessee before us, we are unable to comprehend that as to on what basis the failure of the assessee to complete the construction of its housing project viz. "Adityavardhan " within the prescribed time limit could be brought within the meaning of an unimportant or tangential requirement, as had been canvassed by the ld. A.R before us. In fact, we are of a strong conviction that completion of the construction of a "housing project " by an assessee developer, as per the approved plan, within the prescribed time frame forms the very basis for the eligibility of an assessee to claim deduction u/s 80IB(10) of the Act. On the basis of our aforesaid observations, we are of the considered view that the assessee had failed to strictly comply with the conditions or requirements that were important to render it eligible for deduction u/s 80IB(10) of the Act. Also, we do not find favour the claim of the ld. A.R that applying of the rule of plain meaning of Sec. 80IB(10) would result into hardship or inconvenience to the assessee, as the said fact in our understanding would not have any bearing on the entitlement or eligibility of the assessee for claim of deduction under the said statutory provision. As observed by the Hon'ble Apex Court in the case of Dilip Kumar (supra), the fact that applying of the rule of plain meaning had resulted into any hardship or inconvenience cannot be allowed to form a basis to alter the meaning to the language employed by the legislation. We are also in agreement with the claim of the ld. D.R, that though there is no ambiguity in so far construing of the clearly worded Sec. 80IB(10) is concerned, but in case even if there was any ambiguity then the benefit of the same must go in favour of the revenue. Our aforesaid view is fortified by the judgment of the Hon'ble Apex Court in the case of Dilip Kumar (supra), wherein it was observed that any vagueness in the exemption clauses must go to the benefit of the revenue, as the same being the creation of the statute itself has to be construed strictly. In fact, it was observed by the Hon'ble Apex Court that an exemption from taxation is to be allowed based wholly by the language of the notification and cannot be gathered by necessary implication or by construction of words. Further, it was observed by the Hon'ble Court that one has to look to the language alone and the object and purpose for granting exemption is irrelevant and immaterial. In so far construing of Sec. 80IB(10) is concerned, we find that the same clearly lays down the set of conditions that are required to be satisfied for entitling an assessee to claim deduction therein contemplated. We are of a strong conviction that as from the clear, plain and unambiguous words used in Sec. 80IB(10) only one meaning can be inferred, therefore, effect has to be given to the same, irrespective of the consequences. As observed by us hereinabove, "Explanation (ii) " to Sec. 80IB(10) contemplates that the date of completion of construction of the housing project has to be taken as the date on which the completion certificate in respect of such housing project is issued by the local authority. At this stage, we may herein observe that the importance of the "Explanation (ii) " to Sec. 80IB(10) cannot be undermined for the purpose of construing the scope and gamut of the said statutory provision. Our said conviction is fortified by the judgment of the Hon'ble Apex Court in the case of Dilip Kumar (supra), wherein it was observed that an "Explanation " to a statutory provision is inter alia an internal aid for construing the

same. In the backdrop of our aforesaid observations, we are of the considered view that the assessee had failed to show as to how its case comes squarely within the realm of the deduction contemplated u/s 80IB(10) of the Act. Accordingly, in our considered view, the A.O had rightly concluded that de hors satisfaction of the conditions contemplated in Sec. 80IB(10) of the Act, the assessee was not entitled for claim of deduction under the said statutory provision. We thus not finding favour with the order of the CIT(A), to the extent he had concluded that the assessee had satisfied the conditions contemplated in Sec. 80IB(10) of the Act, 'set aside' his order. The **Grounds of appeal No. 1 & 4** raised by the revenue are allowed.

21. We shall now take up the grievance of the revenue that the CIT(A) has erred in law and the facts of the case in concluding that the assessee had fulfilled the conditions laid down in Sec. 80IB(10)(c) of the Act, despite the fact that area of some of the flats was more than the prescribed area. On a perusal of Clause (c) of Sec. 80IB(10) of the Act, we find that the same reads as under:

> "80IB(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) ;
>
> (b) ;
>
> (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;]
>
> (d) ;
>
> (e)… ;
>
> (f) "

Accordingly, as per the mandate of Clause (c) of Sec. 80IB(10) the maximum built-up area of a residential unit in a "housing project " situated within Mumbai or within twenty five kilometres from its municipal limits is not to exceed one thousand square feet. Admittedly, the A.O while framing the 'Original' assessment, vide his order passed u/s 143(3), dated 28.03.2013, after raising exhaustive queries as regards the eligibility of the assessee towards claim of deduction u/s 80IB(10) of the Act, finding the same to be in order had allowed the same. However, after the culmination of the 'Original' assessment framed vide order passed u/s 143(3), dated 28.03.2013 for A.Y 2011-12, that the A.O inter alia acting upon the information that the built-up area of all 3BHK flats in the project viz. "Adityavardhan " was more than 1000 sq. ft, which was in clear violation of the norms prescribed in Sec. 80IB(10)(c) of the Act, inter alia for the said reason reopened the concluded assessment. On being called upon to explain its eligibility for deduction u/s 80IB(10)(c) in the backdrop of the fact that the built-up area of all 3 BHK flats in its project was more than 1000 sq. ft., the assessee rebutted the said allegation of the A.O. It was submitted by the assessee that the area of the 3 BHK flats as per their calculation was 997 sq.ft. In order to fortify its aforesaid claim, the assessee had drawn support from the certificate of Shri. Bhupendra Patrawala, Architect, that was furnished in the course of the assessment proceedings. It was submitted by the assessee that while calculating the "built- up area " of the 3 BHK flats it had excluded the "dry balcony area " as it was 6 inches below the floor level. On the basis of its aforesaid submissions, it was the claim of the assessee that it had duly complied with the conditions contemplated in Sec. 80IB(10)(c) of the Act. However, the A.O was not inclined to accept

the said claim of the assessee. Observing, that unlike the flower bed area which was approximately 2 feet below the floor level and was not usable, the A.O held a conviction that the "dry balcony " area was only 6 inches below the floor level and was usable. Also, on the basis of a report of his inspector who had undertaken an open field enquiry u/s 142(2) of the Act, and had carried out physical verification of a flat (held by the assessee as stock-in-trade), it was gathered by the A.O that the 'dry balcony' area was almost at the floor level and was in the nature of a usable area. Apart from that, it was observed by the A.O that a perusal of the "Index-II " of a 3 BHK flat in the project "Adityavardhan " revealed that the built-up area of the flat i.e 98.88 square meter (1064 sq. feet) was being charged and sold by the assessee to its customers. Further, referring to the definition of "built-up area " as provided in sub-section (14) of Sec. 80IB of the Act, it was observed by the A.O that as per the section and its "Explanation " the built-up area was to be taken as the sum total of the inner measurements of the residential unit at the floor level, alongwith the projections and balconies. As such, the A.O held a conviction that the area of all projections like drying area etc. were to be added to the built-up area calculation of the flats. Based on his aforesaid observations, it was concluded by the A.O that the built-up area of certain residential units of the assessee exceeded 1000 sq. feet. In order to support his aforesaid observation the A.O relied on the order of the ITAT, Mumbai in the case of ITO Vs. Siddhivinayak Homes, ITA No. 8726/Mum/2010, A.Y 2007-08 & ITA No. 5986/Mum/2011, A.Y 2008-09. Accordingly, the A.O concluded that as the area of certain flats constructed by the assessee exceeded the prescribed area of 1000 sq. feet, therefore, the assessee had violated the provisions of Sec. 80IB(10)(c) of the Act.

On appeal, the CIT(A) after deliberating on the facts borne from the records, observed, that the assessee had not sold the "dry balcony " area to the purchasers and the same represented service projections. It was further observed by him that MCGM had considered the built-up area of the residential flats in the building for the purpose of approving the building plan. Further, it was noticed by the CIT(A) that the assessee's architect had also certified that the built-up area of each flat did not exceed 1000 sq. ft. In the backdrop of his aforesaid observations the CIT(A) concluded that there was no violation of Sec. 80IB(10)(c) by the assessee, as was alleged by the A.O.

22. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. On a perusal of the records, we find that the controversy involved in context of the issue under consideration hinges around the construing of the term "built-up area " used in Sec. 80IB(10)(c) of the Act. We find that the definition of the term "built-up area " has been made available on the statute vide the Finance (No.2) Act, 2004, w.e.f 01.04.2005, and the said term thereafter stands defined in Sec. 80IB(14)(a) of the Act, as under:

> "80IB(14) For the purposes of this section,—
>
> > (a) "built-up area" means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units;
>
> As the "housing project " of the assessee viz. Adityavardhan was approved by MCGM after 01.04.2005, therefore, the aforesaid definition of the term "built-up area " would be applicable in its case.
>
> In order to deal with the issue in hand, it would be relevant to briefly cull out the reasons which had led the legislature to make available the definition of the term "built-up area " in the statute. As observed by the Hon'ble **Supreme Court** in the case of **CIT Vs. Sarkar Builders (2015) 375 ITR 392 (SC)** , prior to insertion of Section 80IB(14)(a), in many of the rules and regulations of the local authority approving the housing project "built-up area " did not include projections and balconies. Probably, taking advantage of this fact, builders provided large

balconies and projections making the residential units far bigger than as stipulated in Section 80IB(10), and yet claimed the deduction under the said provision. As observed by the Hon'ble Apex Court, in order to plug this lacuna, clause (a) was inserted in Section 80IB(14) defining the words "built-up area " to mean the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls, but did not include the common areas shared with other residential units. Now, in the case before us, it is the claim of the assessee that the projections like "dry balcony " are not be added to the "built-up area " of the flats for the reason viz. (i). that as the "dry balcony " area was 6 inches below the floor area, therefore, the same not being at the floor level was not includible in the "built-up area " as defined in Sec. 80IB(14)(a) of the Act; (ii). that as per the certificate of the architect the area of the 3 BHK flats was 997 sq. ft; and (iii). that as per "Index II " of 3 BHK flats the "dry balcony " was not sold to the flat purchasers. On the contrary, the A.O was of the view that the "dry balcony " was liable to be included for computing the "built-up area " as defined in Sec. 80IB(14)(a) of the Act, for the reason viz. (i). the 'dry balcony' which was 4 to 6 inches below the floor level implied that it was an extended area which could be very well utilized as carpet area; (ii). that as per the brochures of the assessee company and also the "Index II " of the 3 BHK flats the balconies and projections provided by the assessee had been sold to the flat purchasers; (iii). that as the 'projections' and 'balconies' are not in the nature of a common area shared with other residential units, therefore, the same would fall within the realm of the definition of "built-up area " as contemplated in Sec. 80IB(14)(a); (iv). that even otherwise the qualifier 'at the floor level' in Sec. 80IB(14)(a) was applicable to the "Inner measurements of the residential unit " and not to the 'projections' and 'balconies' which followed the term 'including the'; and (v). that even otherwise as per the Development Control Rules (DC Rules) of 2012 (for short "DCR "), the Government of Maharashtra has announced that under the new DCR, areas for balcony, flower-beds, terrace, voids, niches would be counted in the FSI. Hence, even as per the rules of the local authority, the area for balcony is to be added for computation of the 'built-up area'."

23. As observed by us hereinabove, the CIT(A) accepted the claim of the assessee that the area of neither of the flats exceeded the prescribed limit of 1000 sq. ft. It was observed by the CIT(A) that as claimed by the assessee, as per the definition of "built-up area " in Sec. 80IB(14)(a) only that area which was at floor level was to be counted, therefore, the "dry balcony " which was 6 inches below the floor level was liable to be excluded. Referring to Clause 25 - Page 25 of an "agreement to sell " , it was further observed by the CIT(A) that the "dry balcony " area did not form part of the residential unit which was the subject matter of sale. It was thus observed by the CIT(A), that the service projection neither formed part of the residential unit nor was sold to the flat purchaser. As such, the CIT(A) was of the view that the "dry balcony " area was in the nature of a service projection which was relevant from the point of view of servicing the building in case of any emergency or when repairs were required to be carried out. Further, the CIT(A) observed that the MCGM had considered the "built-up area " of the residential flat only for the purpose of approving the building plan. In order to support his view that the "built-up area " of each flat did not exceed 1000 sq. ft, the CIT(A) relied on the certificate that was issued by the assessee's architect. In the backdrop of his aforesaid observations, the CIT(A) concluded that the assessee had not contravened the provisions of Sec. 80IB(10)(c) of the Act.

24. We have given a thoughtful consideration to the issue before us and are of the considered view that the issue had not been appreciated in the right perspective by the CIT(A). As per the mandate of Sec. 80IB(10)(c) the maximum "built-up area " of the residential unit in the housing project of the assessee viz. Adityavardhan was not to exceed one thousand square feet. Finance (No.2) Act, 2004 w.e.f 01.04.2005 had provided for a definition of the term "built-up area " in Sec. 80IB(14)(a) of the Act. As per the definition of "built-up area " in Sec. 80IB(14)(a), the same would include the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but would not include the common areas shared with other residential units. In sum and substance, the built-up area would include inner measurements of a

residential unit on the floor level added by thickness of a wall as also projections and balconies. This would however, exclude the common areas shared with other residential units. As such, in order to be a part of the built-up area, the same must be part of the inner measurements of a residential unit or projection or balcony. In our considered view, the claim of the assessee that as the "dry balcony " was 6 inches below the floor level, therefore, the same for the said reason would not fall within the realm of the definition of "built-up area " is absolutely misconceived. As observed by us hereinabove, the inner measurements of a residential unit or projection or balcony would inter alia form part of the "built-up area " . Our aforesaid view is supported by the judgment of the Hon'ble **High Court of Gujarat** in the case of **CIT Vs. Amaltas Associates (2016) 389 ITR 175 (Guj)** . Also, support is drawn from the order of the ITAT, Mumbai in the case of **ITO Vs. Siddhivinayak Homes, ITA No. 8726/Mum/2010 - A.Y 2007-08 & ITA No. 5986/Mum/2011-A.Y 2008-09** AND ITAT, Hyderabad in the case of **Modi Builders & Realtors (P) Ltd., (2011) 12 taxmann.com 129 (Hyd)** , as had been relied upon by the A.O. In so far the observation of the CIT(A) that the "dry balcony " has not been sold by the assessee to the flat purchaser, the said fact as per records remains so. But then, we are unable to comprehend that de hors transfer of ownership of the same, on what basis the said area was being exclusively enjoyed by a specific flat purchaser. Although, in case the "dry balcony " formed part of a common area that was shared by the flat purchaser with other residential units, then the same would clearly fall in the exclusion contemplated in the definition of "built-up area " in Sec. 80IB(14). We find that though the CIT(A) had observed that the "dry balcony " was a service projection, which as per him would be relevant from the point of view of servicing the building in case of any emergency or when repairs are required to be carried out, but then what was the basis for arriving at such a conclusion is not discernible from record. On the contrary, the report of the Inspector who in the course of the assessment proceedings for A.Y 2012-13 had undertaken an open field enquiry u/s 142(2) of the Act, states otherwise.

As per the report of the Inspector, the "dry balcony area " being almost at the floor level was clearly a usable area. In fact, the observation of the A.O that the booking particulars as per the brochures that were made at the time of booking of the flats included the area of the projections, therein fortifies our conviction and strengthens our doubt that the respective flat purchasers were de facto being provided exclusive right of enjoyment of the "dry balcony " area attached to the flats. As noticed by us hereinabove, the Hon'ble **Supreme Court** in the case of **CIT Vs. Sarkar Builders (2015) 375 ITR 392 (SC)** , considering the legislative intent behind defining of the term "built-up area " by way of insertion of Section 80IB(14)(a) vide the Finance (No.2) Act, 2004 w.e.f 01.04.2005, had observed, that prior to defining of the term "built-up area " , in many of the rules and regulations of the local authority approving the housing project "built-up area " did not include projections and balconies. Probably, taking advantage of this fact, builders provided large balconies and projections making the residential units far bigger than as stipulated in Section 80IB(10), and yet claimed the deduction under the said provision. As observed by the Hon'ble Apex Court, in order to plug this lacuna, clause (a) was inserted in Section 80IB(14) defining the words "built-up area " to mean the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls, but did not include the common areas shared with other residential units. In our considered view, if the assessee in the case before us had de facto provided the exclusive possession/enjoyment of the "dry balcony " attached with a flat to the purchaser of the said flat (as advertised by it in its brochures), then the same will have to be included while computing the "built-up area " of such flat, failing which the very purpose of the definition of the said term in Sec. 80IB(14)(a) would be rendered as otiose. But then, in the absence of the correct factual position the aforesaid issue before us cannot be adjudicated. We thus in all fairness restore the issue to the file of the A.O for fresh adjudication. In case, the flat purchaser is de facto in exclusive possession/enjoyment of the "dry balcony " attached with the flat, then the area of the same shall be included while computing the "built-up area " of such flat. However, if such projection is either in the nature of a service projection to be used for servicing the building or carrying out repairs of the building, or a common area shared with the other residential units, then the same would not be included in the "built-up area " of the flat. Before parting, we may herein observe that the ld. A.R in the course of hearing of the appeal had relied

on the judgment of the Hon'ble **High Court of Bombay** in the case of **Commissioner of Income- tax Vs. M/s Raviraj Kothari Punjabi Associates [ITA No. 1628 of 2013; dated 24.04.2015]** and that of the Hon'ble **High Court of Madras** in the case of **CIT, Chennai Vs. Mahalakshmi Housing (2014) 222 Taxman 356 (Mad)** . On a perusal of the said judgments, we find that in both the cases the issue before the Hon'ble High Courts was as to whether or not open terrace/exclusive terrace would form part of the "built-up area " . However, as the issue before us is as to whether or not the 'balcony' and 'projections' of the respective residential units would form part of the "built-up area " , and it is nobody's case as to whether or not the area of open terrace/exclusive terrace is to be included in the "built-up area " , therefore, both the cases being distinguishable on facts would not assist the case of the assessee before us. The **Ground of appeal No. 2** filed by the revenue is allowed for statistical purposes.

As regards the grievance of the revenue that the CIT(A) was in error in allowing assessee's claim for deduction u/s 80IB(10) on the flats which were less than 1000 sq. feet in size, when the provisions of the said section allow deduction only upon completion of the entire project and not on part project or on part fulfillment of the requirements stated in the said section, we are afraid does not find favor with us. Although, we find that the CIT(A) after observing that area of neither of the flat in the assessee's project had exceeded the prescribed area of 1000 sq. feet, had thus not given any finding as regards allowing of deduction u/s 80IB(10) on the flats whose "built-up area " did not exceed one thousand square feet, but then, as the said issue will have a bearing in the course of "set aside " proceedings before the A.O, therefore, we shall deal with the same. In our considered view, within a composite housing project, where there are eligible and ineligible units, the assessee can claim deduction in respect of eligible units in the project and claim proportionate relief in the units satisfying the extent of the built-up area. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Madras in the case of Viswas Promoters Private Limited Vs. ACIT (2013) 214 Taxman 524 (Mad) and CIT Vs. Elegant Estates (2016) 383 ITR 49 (Mad). Also, a similar view had been taken by various co- ordinate benches of the Tribunal in viz.(i). DCIT vs. Brigade Enterprises Pvt. Ltd.,(20Q8) 119 TT J (Bang) 269; (ii). AIR Developers.,(2010) 122 ITD 125 (Nag); (iii). Sheh Developers Pvt. Ltd. 33 SOT 277 (Bom); (iv). Runwal Multihousing Pvt. Ltd. Vs ACIT, ITA Nos. 1015, 1016 & 1017/PN/2011; (v) Brahma Associates Vs JCIT, 119 ITD 255 (Bom); (vi). Kumar Builders Consortium Vs ACIT, 7 Taxcorp (AT) 32844 (Pune); (vii). Tushar Developers Vs ITO, 6 Taxcorp (AT) 30190 (Pune); (viii). Kumrar Beharey Rathi & Raviraj Kothari Punjabi Associates Vs DCIT, 22 DTR 1 (Pune); (ix). Jindal Mittal Griha (2017) 51 CCH 240 (Pune); Nirman Pvt. Ltd. Vs. ITO and (x). Varun Developers Vs DCIT, 7 Taxcorp (AT) 1978 (Pune). Before parting, we may herein observe that our findings recorded in context of the issue under consideration, are without prejudice to our observations recorded as regards the eligibility of the assessee towards deduction u/s 80IB(10)(a), as dealt with at length hereinabove.The **Ground of appeal No. 5** raised by the revenue is dismissed in terms of our aforesaid observations

We shall now advert to the grievance of the revenue that the CIT(A) has erred in allowing deduction u/s 80IB(10) of the Act, despite the fact that the assessee had claimed high gross profit of 63.08%. As is discernible from the orders of the lower authorities, we find that the A.O taking note of the fact that the assessee had shown a GP rate of 63.08% which was excessive in its line of business, had stopped short of deciding the matter against the assessee on the said ground alone. We have perused the order of the CIT(A) and concur with his view that the A.O had failed to point out any arrangement of business between the assessee and any other person with whom he had close relations, which had resulted into generation of excessive profits within the meaning of Sec. 80IB(10) of the Act. Also, the claim of the assessee that as the land was purchased way back in the year 2004/2005, therefore, the excess profit was attributable to the steep rise in the price of land in the year in which the flats were sold, had also not been taken cognizance of by the A.O in the course of the assessment proceedings. In our considered view, the CIT(A) has rightly concluded that a high GP rate cannot be a sole decisive factor for declining an assessee's claim of deduction u/s 80IB(10) of the Act. We thus not finding any infirmity in the view taken by the CIT((A) in context of the issue under consideration uphold his observations to the said extent. The **Ground of appeal No. 3** raised by the revenue is dismissed.

25. Resultantly, the appeal of the revenue is partly allowed in terms of our aforesaid observations.

A.Y 2012-13

[ITA No. 4730/Mum/2016 (Assessee's appeal)] [ITA No. 5523/Mum/2016 (Revenue appeal)]

26. We shall now advert to the cross-appeals for A.Y 2012-13. The assessee has assailed the impugned order on the following effective grounds of appeal before us:

> "1. The CIT(A) erred in upholding the disallowance of deduction under section 80-IB(10) of the Act to the extent of Rs. 4,52,95,102/-.
>
> 2. The CIT(A) erred in holding that built-up area of Flat Nos. 1,2 and 7 on each floor of the building exceeded the maximum built-up area of 1000 sq. ft. In violation of section 80-IB(10)(c) of the Act.
>
> 3. The CIT(A) failed to appreciate that the area of 30 sq, ft. Referred to as dry balcony area actually represented a service projection constructed from the point of view of servicing the building. The said area was 6 " to 7 ½ " below the floor level. Further, the said area was not a subject matter of sale and was not expected to be occupied by the flat owner and therefore could not be regarded as a part of the built-up area of the residential unit. "

On the other hand, the revenue has challenged the impugned order on the following grounds of appeal before us:

> "1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction under section 80IB(10) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') to the assessee on a high gross profit of 61.99% when the assessee had not fulfilled all the conditions laid down in the provisions of the Act.
>
> 2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction under section 80IB(10) of the Act to the assessee inspite of the fact that the assessee did not complete its project within the time as stipulated in the provisions of section 80IB(10)(a)(iii) of the Act.
>
> 3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction under section 80IB(10) of the Act to the assessee when the assessee had failed to produce the Building Completion Certificate and the Occupation Certificate as required under 80IB(10)(a)(iii) r.w explanation (ii) of the Act.
>
> 4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying upon the judgment of Hon'ble Bombay High Court decision in the case of CIT Vs. Hindustan Samuh Awas Ltd. (2015) 62 Taxmann.com 175 (Bom) without appreciating that the facts of the present case are totally different from the facts of the case in the above decision. In Hindustan Samuh Awas Ltd. (supra), the Hon'ble High Cout held that since the assessee had complied with all the norms of Intimation of disapproval (IOD) and had applied for completion certificate well in time before the Municipal Authority, therefore, the delay in issuing project completion certificate cannot be attributable to the assessee, whereas in the present case, the Municipal Corporation of Greater Mumbai (MCGM) had not issued completion certificate to the assessee as the assessee had not fulfilled in all the norms of IOD at the time of applying for completion certificate. Thus, the assessee is wholly and exclusively responsible for this delay. Hence, the case law relied upon by the Ld. CIT(A) is not applicable to this case.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying upon the decision in the case of M/s Ekta Sankalp Developers, Mumbai, when the facts of the case are different in as much as M/s Ekta Sankalp Developers had complied with all other eligible conditions of Sec. 80IB(10) & the only dispute was in respect of 80IB(10)(c), whereas in the instant matter the eligibility conditions of Sec. 80IB(10(a)(iii) are not satisfied and therefore, the decision of M/s Ekta Sankalp Developers is not directly applicable. Further, the Revenue is also contesting the decision in the case of M/s Ekta Sankalp Developers before the Hon'ble Bombay High Court.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing proportionate deduction under section 80IB(10) of the Act to the assessee when provisions of section 80IB(10) of the Act allow deduction only upon completion of the entire project and not on part project or on part fulfilment of the requirements stated in the provisions of the section.

7. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing proportionate deduction under section 80IB(10) of the Act to the assessee on those flats which were less than 1000 sq. ft in size and disallowed the deduction in respect of flats which were more than 1000 sq. ft. In size, when provisions of section 80IB(1) of the Act allow deduction only upon completion of the entire project and not on part project or on part fulfilment of the requirements stated in the provisions of the section.

8. The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the A.O be restored.

9. The appellant craves leave to amend or alter any ground or add a new ground. "

27. Briefly stated, the assessee firm had e-filed its return of income for A.Y 2012-13 on 29.09.2012, declaring its total income at Rs. Nil. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act. In the course of the assessment proceedings, it was observed by the A.O that the assessee had in its return of income claimed deduction of Rs. 19,20,04,491/- u/s 80IB(10) of the Act in respect of a housing project, viz. "Adityavardhan " that was developed by it at 186-B, Saki Vihar Road, Andheri (East), Mumbai.

28. In the course of the assessment proceedings it was observed by the A.O that the assessee had failed to comply with the requisite conditions envisaged in Sec. 80IB(10) of the Act. As per the details gathered by the A.O in the course of the assessment proceedings, it stood revealed viz. (a). that the assessee had not completed its housing project viz. "Adityavardhan " within the stipulated period contemplated in Sec. 80IB(10)(a)(iii) of the Act; and (b). that the built up area of all 3 BHK flats in the said project was more than 1000 sq. ft. which was in violation of the conditions specified in Sec. 80IB(10)(c) of the Act. In the backdrop of the aforesaid facts, the A.O holding a conviction that the assessee had failed to comply with the provisions of Sec. 80IB(10)(a) and Sec. 80IB(10)(c) of the Act, disallowed its claim for deduction of Rs. 19,20,04,491/- raised u/s 80IB(10) of the Act.

Aggrieved, the assessee assailed the assessment order before the CIT(A). As regards the declining of the assessee's claim for deduction u/s 80IB(10) by the A.O, for the reason, that as the "Building Completion Certificate " and "Occupation Certificate " was not obtained by the assessee from MCGM, therefore, the project viz. "Adityavardhan " could not be held to have been completed within the stipulated time period as envisaged in Sec. 80IB(10)(a)(iii) i.e latest by 31.03.2012, the same did not find favour with the CIT(A). It was observed by the CIT(A) that the withholding of the aforesaid certificates by the local authority was because the assessee which as per the approved plan was mandated to construct and hand over a 18.3 mtr wide DP road on the South side of the plot had failed to comply with the said requirement. On a perusal of the facts borne from the records, it was observed

by the CIT(A) that the construction of the aforesaid road was being obstructed by a power pylon transmission line belonging to Tata Electric Company, which had to be relocated before the road could be constructed. It was further observed by the CIT(A) that despite persuasion by the assessee the aforesaid power company had refused to relocate or shift the power pylon. After deliberating at length on the facts attending to the issue under consideration, it was observed by the CIT(A) that as it was impossible on the part of the assessee to remove the hill for constructing the road, therefore, for the said reason it had failed to comply with the said condition in the IOD/CC. In the backdrop of the aforesaid facts, the CIT(A) was of the view that the assessee should not have been denied deduction under Sec. 80IB(10) for not performing of an act which was impossible of performance, and that the Building Completion Certificate/Occupation Certificate could not be obtained for reasons beyond its control. The CIT(A) further drawing support from the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Hindustan Samuh Awas Ltd. (2015) 62 taxmann.com 175 (Bom), therein observed that the facts borne from the records viz. purchasers of the flats had taken possession and were residing in the said flats; approvals were obtained by the assessee from the Fire Brigade authority, Lift Inspector, Asst. Engineer MCGM for drainage works etc., evidenced that the assessee had completed the physical construction of the project. Accordingly, the CIT(A) holding a conviction that the assessee had completed its project viz. "Adityavardhan " within the time allowed u/s 80IB(10)(a)(iii), therein vacated the adverse inferences that were drawn by the A.O.

29. As regards the view of the A.O that the area of certain flats in the project of the assessee exceeded the prescribed limit of 1000 sq. ft, it was observed by the CIT(A) that the judicial pronouncements relied upon by the assessee being distinguishable on facts would not assist the case of the assessee. Observing, that the issue involved in the present appeal was squarely covered by the order of the ITAT, Mumbai in the case of ITAT, Mumbai in the case of ITO Vs. Siddhivinayak Homes, ITA No. 8726/Mum/2010, A.Y 2007-08 & ITA No. 5986/Mum/2011, A.Y 2008-09, the CIT(A) concluded that the "dry balcony " area of the flats would form part of the "built-up area " of the respective flats.

As regard the claim of the assessee that the exceeding of the "built-up area " of 3 BHK flats could not be extrapolated to the whole of the project and the same could not lead to disallowance of the entire claim of deduction raised by the assessee u/s 80IB of the Act, the same did find favour with the CIT(A). Observing, that the issue was covered by the order of the ITAT, Mumbai in the case of ACIT Vs. Ekta Sankalp Developers (2015) 152 ITD 805 (Mum), the CIT(A) was of the view that the deduction u/s 80IB(10) was qua the residential units and not qua the project. Accordingly, it was observed by the CIT(A) that only the residential units which exceeded the prescribed "built-up area " would not be eligible for deduction u/s 80IB(10) of the Act. Observing, that the "dry balcony " area of 30 sq. ft was to be included in the "built-up area " of the residential units, the CIT(A) on the basis of details gathered noticed that only flats nos. 1, 2 & 7 on each of the 10 floors of the project exceeded the limit of 1000 sq. ft. (if the "dry balcony " area of 30 sq. ft was added). Accordingly, it was observed by the CIT(A) that a total of 30 flats out of the total 108 flats exceeded the prescribed area limit. As regards quantification of the assessee's claim of deduction u/s 80IB(10), in so far the same pertained to the residential units whose "built-up area " exceeded the prescribed area of 1000 sq. ft, the CIT(A) called for the details such as the total area sold and the A.Ys in which the profits from the sale were recognized, which were furnished by the assessee as under:

Assessment Year	B/U Area Sold During the Year (Sq/ft)	B/U Area in respect of Flat No. 1, 2 & 7 (Sq. ft) (Sq/ft)	(A) - (B) Sq/ft
2011-12	49347.88	13956.28	35391.60
2012-13	**33782.71**	**7969.56**	**25,813.15**

2013-14	10277.36	4985.13	5292.23
2014-14	5642.06	2995.73	2646.33
Total	99050.01	29906.70	69143.31

On the basis of the aforesaid facts and figures provided by the assessee, the CIT(A) observed that the "built-up area " of 7969.56 of flats Nos. 1,2 & 7 was ineligible for deduction u/s 80IB of the Act. Accordingly, the CIT(A) disallowed the assessee's pro-rata claim for deduction of Rs. 4,52,95,102/- u/s 80IB on the said residential units.

Both the assessee and the revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We shall first deal with the grievance of the assessee. The assessee has assailed the order of the CIT(A), for the reason, that he had erred in disallowing the assesses claim for deduction of Rs. 4,52,95,102/- u/s 80IB(10) in respect of flat nos. 1,2 and 7 on each floor of the building. The genesis of the controversy involved pertains to the construing of the term "built-up area " by the CIT(A), who as per the assessee had erred in concurring with the A.O that the area of the "dry balcony " is to be included for the purpose of calculating the "built-up area " of the flats within the meaning of Sec. 80IB(14)(a) of the Act. As observed by us hereinabove, it is only pursuant to inclusion of the area of "dry balcony " (30 sq. ft), that the "built-up area " of the flat nos. 1, 2 and 7 on each floor of the building is found to have exceeded the prescribed limit of 1000 sq.ft. As such, the disallowance of the assesse's claim for deduction of Rs. 4,52,95,102/- pertains to the flat nos. 1,2 and 7 on each floor of the building in the assessee's project. We find that the construing of the term "built-up area " as envisaged in Sec. 80IB(14)(a) by the A.O had been assailed by the revenue in its appeal in the assessee's own case for the immediately preceding year i.e A.Y 2011-12 in ITA No. 5912/Mum/2017. In the preceding year, the CIT(A) finding favour with the claim of the assessee that the "dry balcony " was not to be included while calculating the "built-up area " of the flats in the assessee's project, had concluded, that the area of all the flats was well within the prescribed limit of 1000 sq.ft. As we have after exhaustive deliberations not found favour with the manner as per which the CIT(A) had construed the term "built-up area " which stands defined in Sec. 80IB(14)(a), therefore, with specific directions we have restored the matter to the file of the A.O for fresh adjudication. Accordingly, we are of the considered view that on the same terms the matter in the present appeal also requires to be restored to the file of the A.O, who is directed to adjudicate the issue afresh considering our observations/directions recorded while disposing off the **Grounds of appeal Nos. 2 & 5** in ITA No. 5912/Mum/2017 raised in the revenue's appeal in the assessee's own case for the immediately preceding year i.e A.Y 2011-12. On the same terms, we may herein observe that in case the flat purchasers are de facto in exclusive possession/enjoyment of the "dry balcony " attached with the flat, then the area of the same shall be included while computing the "built-up area " of such flat. However, if such projection is either in the nature of a service projection to be used for servicing the building or carrying out repairs of the building, or a common area shared with the other residential units, then the same would not be included in the "built-up area " of the flat. The **Grounds of appeal No. 1 to 3** are allowed for statistical purposes.

30. Resultantly, the appeal of the assessee is allowed for statistical purposes in terms of our aforesaid observations.

ITA No. 5523/Mum/2016 A.Y 2011-12

(Revenue's appeal)

31. We shall now take up the appeal of the revenue. On a perusal of the grounds of appeal, we find that the revenue has assailed the order of the CIT(A) on three grounds viz. (i). that the CIT(A) had erred in allowing assessee's claim of deduction u/s 80IB(10), despite the fact that it had failed to complete the

project within the prescribed time contemplated in Sec. 80IB(10)(a)(ii) of the Act; (ii). that the CIT(A) had erred in allowing pro rata deduction u/s 80IB(10), failing to appreciate that the provisions of Sec. 80IB(10) allowed deduction only upon completion of the entire project and not on part project or on part fulfilment of the requirements stated in the provisions of the section; and (iii). that the CIT(A) had erred in relying on the order of the tribunal in the case of M/s Ekta Sankalp Developers, Mumbai, as the same was distinguishable on facts.

32. We shall first advert to the claim of the revenue that the CIT(A) had erred in concluding that the assessee had duly complied with the provisions of Sec. 80IB(10)(a)(iii) of the Act, and completed the construction of its housing project within the prescribed limit. As the facts and the issue involved in the present appeal of the assessee in context of the issue under consideration remains the same as were there before us in the appeal of the revenue in the assessee's own case for the immediately preceding year i.e A.Y 2011-12, in ITA No. 5912/Mum/2017, therefore, our order therein passed while disposing off the Grounds of appeal No. 1 & 4 in the said appeal, shall apply mutatis mutandis for the purpose of disposal of Grounds of appeal Nos. 2, 3 & 4 of the present appeal of the revenue for A.Y 2012-13, ITA No. 5523/Mum/2016. Accordingly, the **Grounds of appeal Nos. 2,3 and 4** raised by the revenue are allowed in terms of our aforesaid observations.

33. We shall now take up the claim of the revenue that the CIT(A) had erred in allowing pro rata deduction u/s 80IB(10) to the assessee as regards the residential units whose "built-up area " did not exceed the prescribed limit of 1000 sq. ft. As the said issue had been adjudicated by us in the appeal filed by the revenue in the case of the assessee for the immediately preceding year i.e A.Y 2011-12 in ITA No. 5912/Mum/2017, therefore, our order passed while disposing off the Ground of appeal No. 5 in revenue's appeal in the assessee's own case for A.Y 2011-12, ITA No. 5912/Mum/2017, shall apply mutatis mutandis for the purpose of disposing off the Grounds of appeal Nos. 6 & 7 of the present appeal of the revenue for A.Y 2012-13. Accordingly, the **Grounds of appeal No. 6 & 7** raised by the revenue are on the same terms dismissed.

We shall now advert to the claim of the revenue that the CIT(A) had erred in relying on the order of the ITAT, Mumbai in the case of ACIT Vs. Ekta Sankalp Developers (2015) 152 ITD 805 (Mum), while deciding the issue as regards pro-rata allowing of deduction u/s 80IB(10) to the assessee as regards its eligible residential units. It is the claim of the revenue that unlike the case of the present assessee who had failed to comply with the provisions of Sec. 80IB(10)(a)(iii) and also Sec. 80IB(10)(c), in the case of Ekta Sankalp Developers(supra) the only non-compliance was as regards the provisions of Sec. 80IB(10)(c) of the Act. In so far the CIT(A) is concerned, as observed by us hereinabove, he had while disposing off the appeal held that the assessee had completed the construction of the housing project within the time limit contemplated in Sec. 80IB(10)(a)(iii)of the Act. Accordingly, the said distinguishing factor brought to our notice cannot be acceped. At the same time, we may herein clarify that though we have principally upheld the entitlement of the assessee towards pro rata claim of deduction u/s 80IB(10), i.e as regards the residential units whose "built-up area " is found to be within the prescribed limit of 1000 sq. feet, but then, as we have held that the assessee had failed to complete the construction of the housing project within the meaning of Sec. 80IB(10)(a)(iii), therefore, its claim for deduction u/s 80IB would fail on the said count itself. The **Ground of appeal No. 5** is disposed off in terms of our aforesaid observations.

34. We shall now advert to the grievance of the revenue that the CIT(A) has erred in allowing deduction u/s 80IB(10) of the Act, despite the fact that the assessee had claimed high gross profit of 61.99%. As the said issue had been adjudicated by us in the appeal filed by the revenue in the case of the assessee for the immediately preceding year i.e A.Y 2011- 12 in ITA No. 5912/Mum/2017, therefore, our order passed while disposing off the Ground of appeal No. 3 in revenue's appeal in the assessee's own case for A.Y 2011-12, ITA No. 5912/Mum/2017 shall apply mutatis mutandis for the

purpose of disposing off the Ground of appeal No. 1 of the present appeal of the revenue for A.Y 2012-13. Accordingly, the **Ground of appeal No. 1** raised by the revenue are on the same terms dismissed.

35. Resultantly, the appeal of the revenue is partly allowed in terms of our aforesaid observations.

A.Y 2013-14

ITA 5913/Mum/2017

[Revenue's appeal]

36. We shall now advert to the appeal filed by the revenue for A.Y 2013-14 wherein the impugned order has been assailed on the following effective grounds of appeal before us:

> "1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 80IB(10) of the IT Act, 1961 to the assessee when the assessee failed to produce the Building Completing Certificate and the Occupation Certificate as required u/80IB(10)(a)(iii) r.w explanation (ii) of the IT Act, 1961.
>
> 2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 80IB(10) of the IT Act, 1961 to the assessee in spite of fact that the assessee did not fulfil the conditions laid down under the section 80IB(10)(c) of IT Act, as some of the flats were more than the prescribed area.
>
> Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 80IB(1) of the IT Act, 1961 to the assessee in spite of the fact that the assessee has claimed high gross profit of 63.08% when the assessee had not fulfilled all the conditions laid down in the provisions of the Act.
>
> 3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying upon the judgment of Hon'ble Bombay High Court decision in the case of CIT Vs. Hindustan Samuh Awas Ltd. (2015) 62 Taxmann.com 175 (Bom) without appreciating that the facts of the present case are totally different from the facts of the case in the above decision. In Hindustan Samuh Awas Ltd. (supra), the Hon'ble High Cout held that since the assessee had complied with all the norms of Intimation of disapproval (IOD) and had applied for completion certificate well in time before the Municipal Authority, therefore, the delay in issuing project completion certificate cannot be attributable to the assessee, whereas in the present case, the Municipal Corporation of Greater Mumbai (MCGM) had not issued completion certificate to the assessee as the assessee had not fulfilled in all the norms of IOD at the time of applying for completion certificate. Thus, the assessee is wholly and exclusively responsible for this delay. Hence, the case law relied upon by the Ld. CIT(A) is not applicable in this case.
>
> 4. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing deduction u/s 80IB(10) of the IT Act, 1961 to the assessee on those flats which were less than 1000 sq. feet in size, when the provisions of section 80IB(10) of the Act allow deduction only upon completion of the entire project and not on part project or on part fulfilment of the requirements stated in the provisions of the section. "

37. Briefly stated, the assessee firm had e-filed its return of income for A.Y 2013-14 on 28.09.2013, declaring its total income at Rs. Nil. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act. In the course of the assessment proceedings, it was observed by the A.O that the assessee had in its return of income claimed deduction of Rs. 7,85,16,411/- u/s 80IB(10)

of the Act in respect of a housing project "Adityavardhan " that was developed by it at 186-B, Saki Vihar Road, Andheri (East), Mumbai.

In the course of the assessment proceedings it was observed by the A.O that the assessee had failed to comply with the requisite conditions envisaged in Sec. 80IB(10) of the Act. It was observed by the A.O that details gathered in the course of the assessment proceedings for the immediately preceding year i.e A.Y 2012-13, therein revealed viz. (a). that the assessee had not completed its housing project viz. "Adityavardhan " within the stipulated period contemplated in Sec. 80IB(10)(a)(iii) of the Act; and (b). that the built up area of all 3 BHK flats in the said project was more than 1000 sq. ft. which was in violation of the conditions specified in Sec. 80IB(10)(c) of the Act. In the backdrop of the aforesaid facts, the A.O holding a conviction that the assessee had failed to comply with the provisions of Sec. 80IB(10)(a) and Sec. 80IB(10)(c) of the Act, disallowed its claim for deduction of Rs. 7,85,16,411/- raised u/s 80IB(10) of the Act.

Aggrieved, the assessee assailed the assessment order before the CIT(A). As regards the declining of the assessee's claim for deduction u/s 80IB(10) by the A.O, for the reason, that as the "Building Completion Certificate " and "Occupation Certificate " was not obtained by the assessee from MCGM, therefore, the project viz. "Adityavardhan " could not be held to have been completed within the stipulated time period as envisaged in Sec. 80IB(10)(a)(iii) i.e latest by 31.03.2012, the same did not find favour with the CIT(A). It was observed by the CIT(A) that the withholding of the aforesaid certificates by the local authority was because the assessee which as per the approved plan was mandated to construct and hand over a 18.3 mtr wide DP road on the South side of the plot had failed to comply with the said requirement. On a perusal of the facts borne from the records, it was observed by the CIT(A) that the construction of the aforesaid road was being obstructed by a power pylon transmission line belonging to Tata Electric Company, which had to be relocated before the road could be constructed. It was further observed by the CIT(A) that despite persuasion by the assessee the aforesaid power company had refused to relocate or shift the power pylon. After deliberating at length on the facts attending to the issue under consideration, it was observed by the CIT(A) that as it was impossible on the part of the assessee to remove the hill for constructing the road, therefore, for the said reason it had failed to comply with the said condition in the IOD/CC. In the backdrop of the aforesaid facts, the CIT(A) was of the view that the assessee should not have been denied deduction under Sec. 80IB(10) for not performing of an act which was impossible of performance, and that the Building Completion Certificate/Occupation Certificate could not be obtained for reasons beyond its control. The CIT(A) further drawing support from the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Hindustan Samuh Awas Ltd. (2015) 62 taxmann.com 175 (Bom), therein observed that the facts borne from the records viz. purchasers of the flats had taken possession and were residing in the said flats; approvals were obtained by the assessee from the Fire Brigade authority, Lift Inspector, Asst. Engineer MCGM for drainage works etc., evidenced that the assessee had completed the physical construction of the project. Accordingly, the CIT(A) holding a conviction that the assessee had completed its project viz. "Adityavardhan " within the time allowed u/s 80IB(10)(a)(iii), therein vacated the adverse inferences that were drawn by the A.O.

38. As regards the view of the A.O that the area of certain flats in the project of the assessee exceeded the prescribed limit of 1000 sq. ft, it was observed by the CIT(A) that the assessee had not sold the 'dry balcony area' to the purchasers and the same represented service projections. It was further observed by him that MCGM had considered the built-up area of the residential flats in the building for the purpose of approving the building plan. Further, it was noticed by the CIT(A) that the assessee's architect had also certified that the built-up area of each flat did not exceed 1000 sq. ft. In the backdrop of his aforesaid observations the CIT(A) concluded that there was no violation of Sec. 80IB(10)(c) as was alleged by the A.O.

39. Accordingly, on the basis of his aforesaid deliberations the CIT(A) allowed the appeal of the assessee.

The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We shall first advert to the claim of the revenue that the CIT(A) had erred in concluding that the assessee had duly complied with the provisions of Sec. 80IB(10)(a)(iii) of the Act, and completed the construction of its housing project within the prescribed limit. As the facts and the issue involved in the present appeal of the assessee in context of the issue under consideration remains the same as were there before us in the appeal of the revenue in the assessee's own case for the preceding year i.e A.Y 2011-12, in ITA No. 5912/Mum/2017, therefore, our order therein passed while disposing off the Grounds of appeal No. 1 & 4 in the said appeal, shall apply mutatis mutandis for the purpose of disposal of Grounds of appeal Nos. 1 & 4 of the present appeal of the revenue for A.Y 2012-13, ITA No. 5523/Mum/2016. Accordingly, the **Grounds of appeal Nos. 1 and 4** raised by the revenue are allowed in terms of our aforesaid observations.

40. We shall now take up the claim of the revenue that the CIT(A) had erred in allowing deduction u/s 80IB(10) to the assessee despite the fact that the assessee did not fulfil the conditions laid down under Sec. 80IB(10)(c) of the Act, as some of the area of some of the residential units was more than the prescribed limit. The genesis of the controversy involved pertains to the construing of the term "built-up area " by the CIT(A), who as per the ld. D.R had erred in accepting the claim of the assessee that the area of the "dry balcony " is not to be included for the purpose of calculating the "built-up area " of the flats within the meaning of Sec. 80IB(14)(a) of the Act. We find that the construing of the term "built-up area " as envisaged in Sec. 80IB(14)(a) by the CIT(A), had been assailed by the revenue in its appeal in the assessee's own case for the preceding year i.e A.Y 2011-12 in ITA No. 5912/Mum/2017. As in year under consideration, in A.Y 2011-12 also the CIT(A) had found favour with the claim of the assessee that the area of "dry balcony " was not to be included while calculating the "built-up area " of the flats in the assessee's project. As such, on the basis of his said observations, the CIT(A) while disposing off the appeal for A.Y 2011-12, had concluded, that the area of all the residential units was well within the prescribed limit of 1000 sq.ft. As we have after exhaustive deliberations not found favour with the manner as per which the CIT(A) had construed the term "built-up area " which stands defined in Sec. 80IB(14)(a), therefore, with specific directions we have restored the matter to the file of the A.O. for fresh adjudication. Accordingly, we are of the considered view that on the same terms the matter in the present appeal also requires to be restored to the file of the A.O, who is directed to adjudicate the issue afresh considering our observations/directions recorded while disposing off the **Grounds of appeal Nos. 2 & 5** in ITA No. 5912/Mum/2017 raised in the revenue's appeal in the assessee's own case for the preceding year i.e A.Y 2011-12. In case, the flat purchaser is de facto in exclusive possession/enjoyment of the "dry balcony " attached with the flat, then the area of the same shall be included while computing the "built-up area " of such flat. However, if such projection is either in the nature of a service projection to be used for servicing the building or carrying out repairs of the building, or a common area shared with the other residential units, then the same would not be included in the "built-up area " of the flat. The **Grounds of appeal No. 2 and 5** are allowed for statistical purposes.

41. We shall now advert to the grievance of the revenue that the CIT(A) has erred in allowing deduction u/s 80IB(10) of the Act, despite the fact that the assessee had claimed high gross profit of 63.08%. As the said issue had been adjudicated by us in the appeal filed by the revenue in the case of the assessee for the preceding year i.e A.Y 2011-12 in ITA No. 5912/Mum/2017, therefore, our order passed while disposing off the Ground of appeal No. 3 in revenue's appeal in the assessee's own case for A.Y 2011-12, ITA No. 5912/Mum/2017, shall apply mutatis mutandis for the purpose of disposing off the Ground of appeal No. 3 of the present appeal of the revenue for A.Y 2012-13. Accordingly, the **Ground of appeal No. 3** raised by the revenue are on the same terms dismissed.

Before parting, we may herein deal with a procedural issue that though the hearing of the captioned appeal was concluded on 19.02.2020, however, this order is being pronounced much after the expiry of 90 days from the date of conclusion of hearing. We find that Rule 34(5) of the Income-tax Appellate Tribunal Rules, 1962, which envisages the procedure for pronouncement of orders, provides as

follows: (5) The pronouncement may be in any of the following manners:— (a) The Bench may pronounce the order immediately upon the conclusion of the hearing. (b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement. In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board. As such, "ordinarily " the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily " has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble High Court in the case of Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)] wherein it was inter alia, observed as under:

> "We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment " .
>
> In the rule so framed, as a result of these directions, the expression "ordinarily " has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether or not the passing of this order, beyond a period of ninety days in the case before us was necessitated by any "extraordinary " circumstances.

42. We find that the aforesaid issue after exhaustive deliberations had been answered by a coordinate bench of the Tribunal viz. ITAT, Mumbai 'F' Bench in DCIT, Central Circle- 3(2), Mumbai Vs. JSW Limited & Ors. [ITA No. 6264/Mum/18; dated 14/05/2020, wherein it was observed as under:

> "Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. The epidemic situation being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown " . Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly " , and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020 " . It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the

stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure… " . The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary " period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made time bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly " . The extraordinary steps taken suo motu by the Hon'ble High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily " , in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. "

We have given a thoughtful consideration to the aforesaid observations of the tribunal and finding ourselves to be in agreement with the same, therein respectfully follow the same. As such, we are of the considered view that the period during which the lockdown was in force shall stand excluded for the purpose of working out the time limit for pronouncement orders, as envisaged in Rule 34(5) of the Appellate Tribunal Rules, 1963.

43. Resultantly, the appeals of the assessee for A.Y 2011-12 in ITA No. 5225/Mum/2017 is dismissed, and the appeal of the assessee for A.Y 2012-13 is allowed for statistical purposes. On the other hand, the appeals of the revenue for A.Y 2011-12 in ITA No. 5912/Mum/2017, A.Y 2012-13 in ITA No.5523/Mum/2016 and A.Y 2013-14 in ITA No. 5913/Mum/2014 are partly allowed in terms of our aforesaid observations.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

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Customized Notes