आयकर अपीलीय अधिकरण “ए” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, PUNE

BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI PARTHA SARATHI CHAUDHURY, JM

<u>आयकर अपील सं. / ITA No. 443/PUN/2016</u>

<u>निर्धारण वर्ष / Assessment Year : 2008-09</u>

The Deputy Commissioner of Income Tax,
Circle-3, Pune.

.......अपीलार्थी / Appellant

बनाम / V/s.

M/s. Shewale & Sons.
S. No.10/7, Shahu Colony,
Maharshi Karve Nagar,
Pune- 411 052
PAN: ABGFS0958L

......प्रत्यर्थी / Respondent

<u>आयकर अपील सं. / ITA No. 602/PUN/2016</u>

<u>निर्धारण वर्ष / Assessment Year : 2008-09</u>

M/s. Shewale & Sons.
S. No.10/7, Shahu Colony,
Maharshi Karve Nagar,
Pune- 411 052
PAN: ABGFS0958L

.......अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward 3(4), Pune.

......प्रत्यर्थी / Respondent

Assessee by	:	Shri Kishor Phadke
Revenue by	:	Shri Alok Malviya

सुनवाई की तारीख / Date of Hearing : 11.03.2020
घोषणा की तारीख / Date of Pronouncement : 12.03.2020

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

These cross appeals preferred by the Revenue and the assessee emanates from the common order of the Ld. CIT(Appeals)-3, Pune dated 08.12.2015 for the assessment year 2008-09 as per the grounds of appeal filed by the Revenue and the assessee.

2. In **ITA No.443/PUN/2016**, the Revenue has raised following grounds of appeal:

> *"1. The order of the Ld. CIT(A) is contrary to law and to the facts and circumstances of the case.*
>
> *2. The learned Commissioner of Income Tax (Appeals) erred in allowing the deduction u/s.80IB(10) of the Act, when the assessee has not fulfilled the conditions laid down in Section 80IB(10) of the Act.*
>
> *3. The learned Commissioner of Income Tax (Appeals) erred in holding that the D.P Road passing through the plot is to be considered as part of area of the plot for claiming deduction u/s.80IB(10) of the Income Tax Act, 1961.*
>
> *4. The learned Commissioner of Income Tax (Appeals) erred in allowing assessee's claim of deduction u/s.80IB(10) of the Act when the assessee had not completed the project within the time stipulated thus violating the provisions of section 80IB(10) of the Act.*
>
> *5. The appellant craves leave to add, alter or amend any or all the grounds of appeal".*

3. In **ITA No.602/PUN/2016**, the assessee has raised following grounds of appeal:

> *"1.The Ld. CIT(A)-3, Pune erred in law and on facts in sustaining disallowance of deduction u/s.80IB(10) of the IT Act, 1961 to 20% (proportion of 12 flats to total 60 flats) of Rs.2,36,87,505/- i.e.*

Rs.47,37,501/- without considering the factual matrix of the case, case laws produced and submission made.

2. The Ld. CIT(A)-3, Pune erred in law and on facts in not appreciating that 12 flats on the fifth floor were also completed and possession of all these 12 flats were handed over before the stipulated date and as such appellant was entitled for the deduction u/s.80IB(10) on these 12 flats also.

3. The Ld. CIT(A)-3, Pune erred in law on not appreciating the fact that the appellant had applied for the completion certificate of 5th floor before the competent authority well within the stipulated time limit however, delay in issue of completion certificate by competent authority could not be attributable to the appellant and as such, there is no lacuna on the part of appellant and on this basis deduction u/s.80IB(10) could not be denied.

4. The appellant craves leave to add/alter/amend and delete all or any of the grounds of the appeal."

4. Both the parties at the very outset appraised the Bench that facts and circumstances in respect of these cross appeals are absolutely similar and issues common. Therefore, these cases were heard together and disposed of vide this consolidated order.

First, we would take up assessee's appeal in ITA No.602/PUN/2016 for adjudication.

ITA No.602/PUN/2016 (By Assessee)
A.Y.2008-09

5. In assessee's appeal crux of the grievance of the assessee is that the Ld. CIT(Appeals) disallowed deduction u/s.80IB(10) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') to 20% in respect of the 12 flats out of the total 60 flats i.e. Rs.47,37,501/- since for these 12 flats, completion certificate was not received.

6. The brief facts on the issue are that the assessee had permission to commence construction in respect of 60 flats, the PMC granted completion certificates only in respect of 48 flats. The assessee has himself submitted

before the Revenue Authorities that completion certificates for the balance 12 flats are yet to be received from the PMC and that the PMC has withheld the completion certificate pending the surrender of the area of the D.P Road. The Assessing Officer held that the initial permission being given to the 60 flats the assessee has, therefore, failed to complete the project within 4 years from the ends of the financial year in which the project was approved i.e.31.03.2009. Therefore, deduction u/s.80IB (10) of the Act is also not admissible to the assessee for not having completed the project during the eligible period. The assessee on the other hand states that even though the occupancy certificate for these 12 flats have not been granted by PMC, in fact, these 12 flats are constructed and completed as per approved building plan. The assessee has placed on record electricity bills and property tax payment challens for these 12 flats and has placed reliance on the decision of the Hon'ble Bombay High Court in the case of **CIT Vs. Hindustan Samuh Awas Ltd. (2015) 377 ITR 150 (Bom.)** for the proposition that where the application was filed in time the delay in obtaining the completion certificate was not attributable to the assessee and he cannot be penalized.

7. The Ld. CIT(Appeals) observed that the facts of the instant case are distinguishable from those before the Hon'ble High Court in as much as here though the application was made in time the Municipal Corporation knowingly did not grant completion for 12 flats on which it had some objection. It is quite clear from the scheme of the section as well as the various High Court pronouncements and also the recent decision of the Hon'ble Supreme Court in the case of **CIT Vs. Sarkar Builders, CA No.4476 of 2015** that the project has to commence as certified by the local Municipal Authorities and its completion also has to be certified by the same authority.

The Ld. CIT(Appeals) after considering the assessment order, submissions of the assessee and facts of the case has held as follows:

> "*4.6.1 Reference is again made on this issue to the decision of ITO Vs. Satyanarayan Ramswaroop Agarawal (2014) 50 taxmann.com 111 Pune which has very similar facts. The operative portion of the order is reproduced below:*
>
> > *"next issue is with regard to non-completion of housing project. The Assessing Officer stated that the assessee has commenced the construction of third building in the year 2010- 11 and it clearly shows that the assessee has not completed the housing project within prescribed four years from the date of first approval of housing project. The Assessing Officer observed that if at all the assessee wanted he could have completed the total housing project except the so called 189 sq. mtrs. of land under road widening. The action of assessee proves that he had partially completed the construction of building and carried out on the same till 2010-11 by which, it is proved beyond doubt that he had not completed housing project within the prescribed period of four years. The matter was carried before first appellate authority, wherein the various contentions were raised on behalf of assessee and having considered the same, the CIT(A) granted relief to the assessee on this account as well. The same has been opposed before us on behalf of revenue. On the other hand, the learned Authorized Representative has supported the order of CIT(A) on the issue.*
> >
> > *8.1 After going through the rival submissions and material on record, we find that the issue before us is with regard to prorata deduction u/s.80IB(10). On the issue of prorata deduction, the ITAT Pune Bench has allowed prorata deduction u/s.80IB(10) in the case of Ramsukh Properties Vs. DCIT, Circle 1, Pune in ITA No.84/PN/2011 vide its order dated 25.07.2012. For the convenience, the relevant portion of the order reads as under:*
> >
> > > *"We agree to proposition put forward by Ld. Departmental Representative that plain reading of section 80IB(10) of the Act suggests about only completion of construction and no adjective should be used along with the word completion. This strict interpretation should be given in normal circumstances. However, in case before us, assessee was prevented by reasonable cause to complete construction in time due to intervention of CID action on account of violation of provisions of Urban Land Ceiling Act applicable to land in question. Assessee was incapacitated to complete the same in time due to reasons beyond his control. Assessee should not suffer for same. The revision of plan is vested right of assessee which cannot be taken away by strict provisions of statute. The taxing statute granting incentives for promotion of growth and development should be construed liberally and that provision for promoting economic growth has to be interpreted liberally. At the same time, restriction thereon too/ has to be construed strictly so as to advance the object of provision and not to frustrate the same. The provisions of taxing statute should be construed harmoniously with the*

object of statute to effectuate the legislative intention. In view of above facts and circumstances, we hold that assessee is entitled for benefit u/s 80IB(10) of the Act in respect of 173 flats completed before prescribed limit. The Assessing Officer is directed accordingly."

8.2 In view of above, it is clear that assessee received approval for C building from PMC vide certificate dated 03.02.2005 but work on C building could not start since additional FSI in lieu of road widening was not received from PMC. The assessee could not plan the work for C building since engineers and architects could not design the structure of building in the absence of FSI. The details of follow up done by assessee with PMC have been duly appreciated by CIT(A). The legislative intent read that the clear provisions of the requisite section, do not permit any proportionate deduction u/s. 80IB(10) of Act. However, in view of the decision in Ramsukh Properties (supra) as discussed above, the CIT(A) rightly allowed the proportionate deduction in respect of project completed during the impugned assessment year. The provisions of taxing statute should be construed harmoniously with the object of statute to effectuate the legislative intention. Under the circumstances, proportionate deduction u/s.80IB(10) of the Act is justified. Accordingly, the order of CIT(A) on this issue needs no interference from our side. We uphold the same."

Therefore, respectfully following the decision of the ITAT, Pune the appellant is allowed deduction only in respect of 48 flats out of the 60 flats. Thus, the deduction should be restrained to 80% out of the total deduction claimed."

Therefore, the Ld. CIT(Appeals) allowed deduction in respect of 48 flats out of 60 flats and for the balance 12 flats regarding whom completion certificate was not obtained by the assessee, deduction u/s.80IB(10) of the Act was disallowed.

8. We have perused the case records and heard the rival contentions. We have also analyzed the facts and circumstances in this case. We observe that it is settled position of law that within stipulated time, application has to be made before the concerned authority and again within specified time, the project has to be completed and after completion, the Municipal Authority/local authority has to give a completion certificate only then the deduction u/s.80IB(10) of the Act is justified.

8.1 In this case, the Ld. CIT(Appeals) in his order relying on the decision of the Co-ordinate Bench of the Tribunal, Pune (supra.) has given deduction in respect of those flats for which the essential ingredients of Section 80IB(10) of the Act has been complied with by the assessee specially completion certificate. However, regarding balance 12 flats, there was no completion certificate obtained from the concerned authority and therefore, the deduction u/s.80IB(10) of the Act has been rightly denied in respect of those 12 flats. The facts further demonstrate that the assessee has accepted disallowance made by the Assessing Officer for assessment year 2009-10 and paid the entire demand and has not filed an appeal against that order.

The Explanation of the provision clearly states 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.*" This signifies that in order to get deduction under the relevant provision, after completion of the project, completion certificate has to be obtained from the concerned authority i.e. Municipal Corporation etc. which cannot be done away with. This becomes the fundamental requirement of this provision since prior to receiving the completion certificate whatever work is done, it cannot be said that the project has been completed and there has to be some authoritative check and finding about the completion of the project which is thereafter fit for residing etc. Therefore, we do not find any infirmity with the findings of the Ld. CIT(Appeals) and the same is hereby upheld. Thus, **grounds raised in appeal by the assessee are dismissed**.

ITA No.443/PUN/2016 (By Revenue)
A.Y.2008-09

9. In Revenue's appeal **Ground No. 1 and 2**, the grievance of the Revenue is with regard to granting of deduction in respect of those 48 flats for which the assessee has already got completion certificate. We have already adjudicated this issue in assessee' appeal in ITA No.602/PUN/2016 and since facts and circumstances are similar, our decision on this issue rendered in ITA No.602/PUN/2016 shall **mutatis-mutandis apply** to ground No.1 and 2 in Revenue's appeal. Therefore, **ground No. 1 and 2 in relation to this issue in Revenue's appeal are dismissed**.

10. In **Ground No. 3 and 4**, the Revenue's grievance is based on the requirement of Section 80IB(10)(b) of the Act which states "*the project is on the size of the plot of land which has a minimum area of one acre"*. It is the contention of the Revenue that after deducting the D.P Road, the total area of the plot which remains is only 3994.25 sq.mts which is less than one acre. The Assessing Officer held that the permissible area for an eligible project has to be not less than one acre and therefore, deduction u/s.80IB(10) of the Act should not be allowed as the assessee has not fulfilled the basic condition for eligibility. The assessee submitted before the ld. CIT(Appeals) that for the purpose of ascertaining area of the project, the area of the plot should be taken without demarcation as per Municipal Authorities. According to the assessee, it is only by reducing the D.P. Road area that the balance area of the plot is erroneously restricted to less than an acre. It is the contention of the assessee that in order to determine the requirement of one acre of land, it should include all amenities as required to be provided as per norms of concerned Municipal Corporation or local body and even if such D.P. Road is

acquired by the Municipal Corporation, the determination of the area of the land of the project has to be after inclusion of such D.P Road and it cannot be deducted from the total area. For this proposition, the assessee relied on the decision of the Co-ordinate Bench of the Tribunal, Pune in the case of **Bunty Builders Vs. ITO (2011) 127 ITD 286** wherein it has held as follows:

> *"we are not in agreement with such an approach of the revenue authorities. To give strength to our reasons for such disagree- ment we hereby refer one of the point as explained in the CBDT circular cited in 276 ITR 170 (statute), wherein the guidelines issued were as follows :*
>
> > *"Extension of the time-limit for obtaining approval of housing projects for the purpose of tax holiday under section 80-IB, and allowing deduction for re-development or reconstruction of existing building in slum areas.*
>
> *This section does not specifically provide area limit for the garden, the development plan roads, internal means of access, etc., in the housing project. Therefore, the same should conform to the project plan approved by the local authority in accordance with the regulations in force. Also, the area limit of the plot has to be construed with reference to the area of the site on which the housing project is constructed and not with reference to the demarcation of land done by the land development authority."*
>
> *9. This circular thus gives a clear indication that though the section do not specifically provide for the Development Plan Roads or grant of other facilities etc., in a housing project but the same should conform to the project plan approved by the local authority. Our next reasoning is on the basis of above discussion that the limit of the plot has to be construed with reference to the area available on the site on which the housing project is to be constructed and not with reference to the demarcation of land. Meaning thereby the housing project thus constitute Development Plan Roads and grant of other facilities, therefore those areas should exist within the prescribed limits and to be considered as part and parcel of the project. Even in the present case the facts have revealed that the plan would not have been approved if the assessee would not have made 15 per cent amenity space available to the corporation. Though amenity space was stated to be surrendered to the corporation but such sacrifice of the builder was duly recognised and compensated by granting additional FSI for the said project. If we accept the proposition of the revenue Department that the area which was directly under the building construction should only be held as the project for construction then a builder has to acquire a land more than 1 acre of land. Then only after the set-apart of the amenity space he could be left with the balance 1 acre for project development. But such a proposition was not intended in the Legislature. The language of the section did not prescribe such hypothecation. Therefore an another reasoning of our rejection of such a proposition of the revenue Department is that it would be illogical to expect from a builder to have excess land area than 1 acre, at least 15*

per cent excessive area applicable for Pune Corporation, so that after setting apart 15 per cent area the balance should remain 1 acre for the purpose of construction. This suggestion or approach of interpretation of a statute is not idealistic because we cannot read beyond the scope of the statute. Normal rule of interpretation of statues is that the general words must receive a general construction unless there is something otherwise expressly provided in the statute. General words have ordinarily a general meaning then the first task in interpretation is to give the words their plain and ordinary meaning. This is what we have gathered from the books available on this subject with an attempt to subscribe a simple and realistic meaning to the clause (b) to section 80-IB(10) of Income-tax Act. Nothing more can be added hence we have to restrict the interpretation that the area of 1 acre should be available for the housing project inclusive of amenities required to be set apart as per the norms of a Corporation. Therefore a justifiable conclusion is that when there is no doubt more so it is not in dispute that a portion of the land, in the present case it is 15 per cent, to be earmarked or set-apart or reserved or segregated out of the total and in question, minimum 1 acre, meant for the purpose of project in terms of rules/regulation of a local body, i.e., Pune Municipal Corporation, and without that segregation the project could not be sanctioned then that portion being mandatory for amenity purposes has to be taken as a part and parcel of the land available for the project. In the present case since the area available for the housing project was 4600 sq. mtr. that is more than 1 acre (4046 sq. mtr.) therefore the appellant is entitled for the claim of deduction under section 80-IB(10)(b) on this portion of land. We hold accordingly."

The judgment quotes the CBDT Circular which states that –

"This section does not specifically provide area limit for the garden, the development plan roads, internal means of access, etc., in the housing project. Therefore, the same should conform to the project plan approved by the local authority in accordance with the regulations in force. Also, the area limit of the plot has to be construed with reference to the area of the site on which the housing project is constructed and not with reference to the demarcation of land done by the land development authority."

The First Appellate Authority has opined that what CBDT circular directed is that the area limit of the plot has to be understood with reference to the area of the site and not with reference to the demarcation done by the Municipal Authorities. The issue in the instant case is precisely the same that the D.P. Road is not to be reduced from the operative area of the site.

11. The Assessing Officer's argument for not accepting the decision is that the Department had filed appeal against the decision in the case of Bunty

Builders with the Hon'ble Bombay High Court. Further, the Ld. CIT(Appeals) on the issue has held as follows:

> *"4.3 The issue of the D.P Road has been discussed in various cases before the Tribunals and it has been held that whatever land is being acquired for the D.P Road, the plot area of one acre should be available for housing project inclusive of amenities required to be set apart as per norms of concerned municipal corporation or local body, the area of the plot should be inclusive of the land compulsorily acquired by the Municipal Corporation. Reference is also made to the ITO Vs. Satyanarayan Ramswaroop Agarawal (2014) 50 taxmann.com 111 Pune where it was held that plot area of one acre means plot area of one acre available for housing project inclusive of amenities required to be provided as per norms of concerned municipal corporation or local body. Therefore, respectfully following the decision of the higher authorities the eligibility of the appellant for Section 80IB(10) is upheld."*

12. We have perused the case records and heard the rival contentions. We have also given considerable thought to the findings arrived at by the Ld. CIT(Appeals). It is settled legal position that area of land has to be determined including the D.P Road also procured by the Municipal Corporation since the area or size of the land for the project is rightly to be understood considering all amenities which are to be provided to the assessee. Such D.P. Road acquired by the Municipal Corporation cannot be reduced from the total land area of the project. This is moreso in terms with principles of equity and fairplay since the local authority or the Municipal Corporation has to work under certain set of rules and regulations but those set of rules and regulations should not restrict the right of the assessee. The project size has to be looked into in totality with all amenities which is already there even before such D.P. Road is acquired by the Municipal Authority. Therefore, such D.P. Road cannot be alienated or separated from main portion of the land and the area of the plot should be inclusive of the land acquired by the Municipal Corporation as D.P Road. Therefore, we do not find any infirmity with the findings of the Ld. CIT(Appeals) and relief provided to the assessee on this issue is hereby sustained.

13. Ground No. 5 of the Revenue's appeal is general in nature and no adjudication is required.

14. In the result, **appeal of the Revenue in ITA No.443/PUN/2016 is dismissed.**

15. In the combined result, **appeal of the Revenue in ITA No.443/PUN/2016 and appeal of the assessee in ITA No.602/PUN/2016 are dismissed**.

Order pronounced on 12th day of March, 2020.

Sd/-	Sd/-
D. KARUNAKARA RAO	**PARTHA SARATHI CHAUDHURY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 12th March, 2020.
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-3, Pune.
4. The Pr. CIT-2, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "**ए**" बेंच, पुणे / DR, ITAT, "**A**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	11.03.2020	Sr.PS/PS
2	Draft placed before author	12.03.2020	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		