

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI SHAILENDRA KUMAR YADAV,
JUDICIAL MEMBER, AND
SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA Nos.126 and 127/PN/2013
(A.Ys.2003-04 and 2005-06)

DCIT, Central Circle 1(1), Pune

Appellant

Vs.

M/s. Suyog Development Corporation
Unit-9, Suyog Chambers,
Shukrawar Peth,
Pune - 411002

PAN: AAOFS6122M

Respondent

CO No.7/PN/2014
(Arising out of ITA No.126/PN/2013)
(A.Y.2003-04)

M/s. Suyog Development Corporation
Unit-9, Suyog Chambers,
Shukrawar Peth,
Pune - 411002

PAN: AAOFS6122M

Cross Objector

Vs.

DCIT, Central Circle 1(1), Pune

Appellant

Assessee by : S/Shri Mahendra Mehta
Bharat A Shah
Department by: Shri Mukesh Verma, CIT
Date of Hearing : 18.02.2014
Date of order : 28.02.2014

ORDER

PER BENCH:

These two appeals filed by revenue and one Cross Objection filed by assessee are arising from respective two orders of CIT(A)-I, Pune pertaining to the same assessee on almost similar issues. So these were heard together and are being disposed off by this consolidated order for the sake of convenience.

2. In ITA No.126/PN/2012 for A.Y. 2003-04, the revenue has filed the appeal on the following grounds:

a) The Ld. Commissioner of Income-tax (Appeals), Pune grossly erred in holding that the project of the assessee is not an integrated project ignoring the facts and in circumstances of the case.

b) The Ld. Commissioner of Income-tax (Appeals), Pune grossly erred in holding that the project of the assessee was eligible for deduction u/s 80IB(10) of the Act without appreciating the fact that it has commercial area and it exceeded 2000 sq. ft.

c) The Ld. Commissioner of Income-tax (Appeals), Pune grossly erred in accepting the assessee's plea that the definition of built up area brought on statue w.e. from A.Y.2005-06 will not be applicable in A.Y. 2003-04, although the same is clarificatory in nature and has retrospective effect.

d) The Ld. Commissioner of Income-tax (Appeals), Pune grossly erred in holding that pro-rata claim u/s. 80IB (10) with reference to residential units of the housing project, built up area of which does not exceed 1500 sq ft. may be allowed, although the same is in contravention of decision of the Hon'ble Bombay High Court in the case of Bramha Associates [333 ITR 289].

e) The Ld. Commissioner of Income-tax (Appeals), Pune grossly erred in holding that pro-rata claim u/s. 80IB (10) with reference to residential units of the housing project, built up area of which does not exceed 1500 sq ft. may be allowed, even though there is no such provision in section 80IB(10) of the Act.

3. The primary issue involved in both the appeals is denial of deductions claimed u/s.80IB(10) from the impugned housing projects developed by the assessee in Mukund Nagar commonly known as "Sujay Garden". The assessee is a partnership firm engaged in the business of real estate development. Return of

income for the assessment year was filed on 28.11.2003 on a total income of ₹ 14,68,130/- after claiming deduction u/s.80IB(10) of ₹ 6,23,63,174/-, which was accepted by the Assessing Officer in an order passed u/s.143(3) before the search operation was carried out in this group on 08.08.2007. As per the impugned assessment order several documents were seized and also the claim of deduction made u/s.80IB(10) on different tenaments constructed by the assessee in the project 'Sujay Garden' was verified. After search notice u/s.153A was issued and the matter was further examined by the Assessing Officer and after examining the materials available before the Assessing Officer the assessment was completed, in which the deduction originally allowed u/s.80IB(10) was disallowed. In this proceedings, the Assessing Officer has observed that the project 'Sujay Garden' is one integrated project having bungalow plot schemes, commercial complex and residential buildings, sanctioned in a common layout approved in final plot No.410 at S.No.706 A & B, having the area of 4H and 63 R. After arriving at this finding the Assessing Officer verified the conditions laid down in sec.80IB(10) and held that the condition prescribed in clause (c) relating to size of flats, and (d) relating to restriction on building commercial users are violated and hence deduction could not be allowed. For concluding this the Assessing Officer relied on various evidences and statement on oath of one of the partners, Shri Bharat K. Shah, recorded during search u/s.132(4) of the I.T. Act, who was confronted with various facts during search. The statement of oath of certain flat owners who had purchased flats in project of assessee were also quoted to bring on record the fact that the assessee has sold the flats of more than 1500 sq. ft. These have been quoted in para 3 of the assessment order.

4. The Assessing Officer after giving extracts of statements on oath recorded during search of Shri Bharat K. Shah, concluded in the assessment order that the deduction u/s.80IB(10) is not allowable to

the assessee in this assessment year for the reasons discussed above. The Assessing Officer relied on certain other information gathered by him. It has mainly been the contention of the Assessing Officer that the entire plots and buildings including commercial tenements constructed in 4H & 63R of land is part of the same project and the conditions prescribed in sec.80IB(10) has to be tested on that proposition. The Assessing Officer also concluded that many of the tenements though on paper were of the size of less than 1500 sq.ft. but were in reality larger in size. For this, the Assessing Officer placed reliance on the statements of Shri Bharat K, Shah, when he was confronted with these facts as well as that of certain flat purchasers recorded in the post search inquiry.

5. Having observed as above, the Assessing Officer discussed various facts regarding inadmissibility of deduction u/s.80IB(10) including the inflation of deduction by a sum of ₹ 92,96,169/- on the ground that the commercial FSI was sold to the sister concern at less than cost price. The Assessing Officer in para 10 of assessment order has thereafter quoted the detailed show cause notice issued to the assessee during assessment which was based on material available with him. The reply of same was given by the assessee vide letter dt. 04.12.2009 in response to the aforesaid show cause notice was made part of annexure 'A' to the assessment order and after considering the same, the Assessing Officer stated as to why the claim deduction made by the assessee was not acceptable.

6. In appeal, revised their grounds relating to ground No.1 as discussed in para below. The relevant portion of submission made by the assessee as per revised ground vide their letter dt. 09.09.2011 is reproduced as under:

"In continuation to our submissions vide our letter dated January 18, 2011 we would like to submit as under :

As per the assessment order the reason for disallowance of claim u/s 80IB(10) is that we have, allegedly, grossly violated the provisions of section 80IB(10) and such violations are mentioned in Para 13 A & B of the assessment order.

Though the reasons for disallowance have been stated in Para 13 A & D of the assessment order, there are certain observations made in the assessment order. Though these observations are not necessarily a reason for disallowance of deduction u/s 80IB(10) the observations are factually incorrect.

The assessee also raised its ground and made a detailed factual and legal submissions before CIT(A).

In sum and substance, the stand of assessee has been that the firm has completed a separately identifiable housing project on Plot No. 64 and has also complied with all the stipulated conditions as prescribed by section 80IB(10) viz. :

- i. The size of the plot of land on which Housing Project is constructed is more than one acre.
- ii. The development and. construction of Housing Project commenced after 1st October, 1998 and completed before 31st March, 2008
- iii. The built - up area of each residential unit is less than 1.500 sq. ft.
- iv. There are no shops and other commercial establishments in the Housing Project.

It is therefore requested that deduction claimed u/s 80 IB(10) may kindly be allowed. "

7. The CIT(A) after having considered the case and law on the issue, observed that the assessee is a partnership firm which acquired development rights in respect of a land admeasuring 4H 63R (45,137 sq. mtrs.) situated at Final plot No. 410 of S.No.706A and B from Kirloskar Brothers Ltd. vide Development Agreement dated 11.12.2000 for a consideration of ₹ 23,50,00,000/-. As per

assessee, the aforesaid land was having an industrial user, which was granted permission of residential user by Pune Municipal Corporation vide order dated 22.11.2000 which is not in dispute. The assessee thereafter claims to have got a layout approved, as per which the aforesaid land area was divided into plots bearing numbers 1 to 11, 14 to 61, 63, 64 and 65 along with internal roads, space for common amenities etc. It has been stated that no plots were existing at Nos.12, 13, and 62. As per assessee, all the aforesaid plots except, plot No.63, 64 and 65 were sold as bungalow plots to different persons and the respective owners have constructed the bungalows themselves. As per assessee, the various permissions from PMC etc. for construction of bungalows were taken by the respective plot owners. The profit from the sale of bungalow plots have been claimed to have been offered to tax in A.Y. 2001-02 and A.Y. 2002-03 without claiming any deduction u/s.80IB(10). It was further stated on behalf of assessee that the area of all the three remaining plots i.e. plot Nos.63, 64 and 65 were in excess of one acre separately. The multi storied residential and residential cum commercial buildings have been constructed in these plots on which deduction u/s.80IB(10) has been claimed in AY 2003-04 and AY 2005-06. In A.Y. 2003-04 which is first year of appeal where, claim u/s.80IB(10) has been made for buildings A, B and C constructed in plot No.64. As per the materials available on record the aforesaid claim of assessee was initially accepted by the Assessing Officer u/s 143(3) before search, which has been denied in the assessment order passed u/s.143(3) r.w.s.153A on 31.12.2009, which was subject matter of appeal before CIT(A). Deduction u/s.80IB(10) has also been claimed in respect of buildings constructed in plot No.63 and 65 in A.Y. 2005-06. This claim has also not been allowed by the Assessing Officer for more or less similar reasons. But CIT(A) noted that the commercial user has been constructed in certain buildings at ground and stilt floor of the buildings constructed in plot Nos.63 and 65 only which is subject matter of appeal in AY 2006-06. The

Assessing Officer has commonly discussed the issue in both these assessment years.

7.1 The CIT(A) observed that all the buildings and the plots of land sold for bungalow constructions etc. are part of one project called Sujay Garden and therefore, as per the Assessing Officer the conditions prescribed in sec. 80IB(10) has to be tested on this proposition. The assessee objected the same and asserted that the project developed in different plots are separate from each other and the buildings constructed in one plot should be treated as one project and the conditions prescribed u/s.80IB(10) should be tested on this proposition, therefore, on Assessing Officer's proposition that even the commercial users constructed in plot No.63 and 65, will be required to be considered to be considered as part of project, while deciding the claim u/s.80IB(10) made in A.Y. 2003-04 on buildings A, B and C constructed in plot No.64, having only the residential users. On the issue of commercial user, it was observed that the assessee to have not made any claim u/s.80IB(10) in respect of profits earned from the sale of commercial portion of the buildings constructed in plot No.63 and 65. It has been stated that the FSI relating to the commercial users have been sold at cost to the associate company called "Sujay Construction Pvt Ltd." and the profit has been shown by the said company on the sale of commercial portion without any claim for deduction u/s.80IB(10). The Assessing Officer has not disputed any of the above factual metrics available on record, only the interpretation part is in dispute, which are as

- (a) Sujay Garden as a whole is one project,
- (b) commercial area even if sold will be part of the same project,
- (c) deduction u/s 80IB(10) has been inflated by transferring the commercial FSI at cost not computed properly, and
- (d) conditions prescribed in sec. 80IB(10) stands violated etc.

7.2 The CIT(A) observed that the grounds raised by the assessee originally in Form No. 35 that the assessee has raised only four grounds of appeal and only Ground No.1 was the main ground wherein it was claimed that the Assessing Officer has erred in not allowing the deduction u/s.80IB(10) of ₹ 6,21,63,174/-. The Assessing Officer finally concluded in para 13 of the assessment order that the deduction is denied for (a) inclusion of commercial space of 5730 sq. mtrs. (61,677 sq.ft), which is more than 2000 sq.ft or 5% of the built up area of the project and (b) certain residential units are more than 1500 sq.ft in size, for certain reasons, the assessee sought revision of grounds raised before CIT(A) and the same was allowed. The revised grounds have been dealt by CIT(A) as under:

7.3 First issue relates to whether 'Sujay Garden' as a whole comprising of different plots on which bungalows were constructed by the buyers themselves and other plots where multi storied residential cum commercial tenements developed thereon would constitute as one project as held by the Assessing Officer or separate projects as claimed the assessee. As discussed above, the entire land of 4H 63R was acquired from Kirlosker Brothers to construct residential, commercial, industrial tenements and buildings in accordance with the approved scheme by the competent authority i.e. PMC. The development agreement empowers the assessee to divide the properties into various sub-plots, roads, etc. and sell them with or without buildings. The entire land was divided into sub-plots bearing Nos. 1 -11, 14-61, 63, 64 & 65 as discussed above. All plots were claimed to have been sold as bungalow plots except Plot No.63, 64 & 65 and all of those three plots are in excess of one acre in size independently. As discussed above, the bungalows were claimed to have been constructed by the plot purchasers themselves after getting the plans approved from the PMC. In view of the above the

claim has been made that the layout plan was only for the purpose of overall orientation of the buildings in the land and it is not correct to treat it as a project in terms of the meaning as is envisaged in sec.80IB(10) for augmentation of supply of the residential flats for the middle class and lower middle class. The layout plan is different from building plan. One layout plan can have different project subject to fulfilling other conditions of sec. 80IB(10) of Act. The building plans for different plots were separately approved by the PMC. The word 'housing project' is not defined in this section. Therefore the claim of the assessee that the housing project is not the lay out approved on a large piece of land but are projects independently developed on plots delineated after the approval of lay out. The main stand of the Assessing Officer has been that the common layout, having common facility for all the plots, like road, club house, etc. should be treated as one project. Such interpretations have not been approved by the various judicial pronouncements. The provision of sec. 80IB(10) being beneficial provision should be treated liberally. ITAT Pune in the case of Shri Subhash F. Bafna in ITA No.533/PN/2007 for A.Y. 2003-04 has held as under:

"as regards question whether the entire housing project consists of one more built up block is to be considered in entirety or whether those buildings or blocks can be considered separately, this issue is also settled in favour of the assessee by series of orders of this Tribunal including in the case of Saroj Sales Organization vs. 1TO (2008) TTJ(Mum) 485 and Dy.CIT vs. Brigade Enterprises Pvt. Ltd. (2008) 119 TTJ (Bang) 269. The coordinate benches have held that as long as those blocks satisfy the conditions of sec.80IB(10) on stand alone basis, the deduction u/s 80IB(10) of the Act will be admissible on the said blocks. "

7.4 Similar view has been taken by the 'A' Bench of Pune ITAT in Apoorva Properties & Estate Pvt. Ltd. vs. Dy.CIT, Cir.1(1) in ITA No.113/PN/2007 A.Y. 2003-04 wherein it was held that a project

could be a group of buildings or each building fulfilling conditions separately where the commencement certificates are separate. In the case before us, the lay out plan has divided the entire land of 4H 63R into various plots with location and 'number along with road, space for common facilities, etc. Most of the plots have been sold as it is to respective buyers, who have obtained the approvals independently from the PMC. The plots designated as 63, 64 & 65 of the lay out have been used by the assessee for constructing different multistoried buildings and buildings developed in each plot has been claimed by the assessee to be a separate project. It was demonstrated that the building commencement certificate and building plan approval for each plot has been separately taken and the completion certificates have also been obtained separately. This has not been disputed by revenue. Therefore in the interpretation given to the project by the various judicial pronouncements, the claim of the assessee has to be admitted.

7.5 We find that the Hon'ble Bombay High Court in the case of CIT vs. Vandana Properties (2012) 206 Taxman 584 (Bom) has affirmed this view taken on behalf of assessee. The relevant portion of the said order is reproduced as under:

“20. The question, then, to be considered is, whether construction of E building is an independent housing project or extension of the housing project already existing on the plot in question. It is the contention of the Revenue that since the approval for construction of 'E' building was granted by the local authority subject to the conditions set out in the first approval granted on 12th May 1993 for construction of A and B building, construction of 'E' building must be considered to be the extension of the earlier housing project for which approval was granted prior to 1st October 1998 and, therefore, the benefit of Section 80IB(10) cannot be granted. There is no merit in the above argument, because, when the plans for A, B, C and D buildings were approved during the period from 1993 to 1996, construction of 'E' building was not even contemplated on the plot in question. It is only in the year 2001 when the status of the land was converted from surplus vacant land into within the ceiling limit land by the State Government, an

additional building could be constructed on the plot in question and accordingly building plan for construction of 'E' building was submitted and the same was approved by the local authority on 11th October 2002.

21. The fact that the local authority, namely the Municipal Corporation approved the building plan for 'E' building on the condition that all the objections raised in the Intimation of Disapproval dated 12th May 1993 relating to the earlier housing project on the same plot of land shall be applicable and should be complied with, cannot be a ground to hold that 'E' building is extension of the earlier housing project because the earlier housing project was completed prior to 1st October 1998 and the housing project for construction of 'E' building was approved for the first time on 11th October 2002. Nowhere in the Intimation for Disapproval granted for construction of 'E' building on 11th October 2002, it is stated that building 'E' constitutes extension of the earlier housing project which is already completed. The fact that the objections raised while approving the earlier housing project on the same plot of land were made applicable to the housing project in question, it cannot be inferred that the housing project in question constitutes extension of the earlier housing project. Therefore, in the facts of the present case, where, neither the assessee had sought approval of the building plan for construction of 'E' building as extension of the earlier housing project, nor the Municipal Corporation has granted approval for the housing project consisting of 'E' building as extension of the earlier housing project, it is not open to the income tax authorities to contend that approval to the housing project granted by the Municipal Corporation on 11th October 2002 constitutes extension of the housing project which was approved in the year 1993.

22. Reliance placed by the Revenue on the Explanation to Section 80IB (10)(a) which was introduced with effect from 1st April 2005 is also misplaced. What the said Explanation contemplates is that where the approval in respect of a housing project is granted more than once, then, that 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. For example, in respect of a housing project, the assessee may seek amendment of the building plan at several stages of the construction and the same may be approved. In such a case, the explanation provides that for the purposes of Section 80IB (10) the housing project shall be deemed to have been approved on the date on which the first approval was granted by the local authority. Thus, the Explanation to Section 80IB (10)(a) refers to the approval granted to the same housing project more than once and the

said Explanation would not apply where the approval is granted to different housing projects. In the present case, as noted earlier, construction of 'E' building constitutes an independent housing project and, therefore, the date on which the earlier housing project had commenced construction could not be applied to the housing project consisting of 'E' building merely because the conditions set out while granting approval to the earlier housing project have also been made applicable to the housing project in question.

23. The next argument of the Revenue is that to avail the deduction under Section 80IB (10), the housing project must be on the size of a vacant plot of land which has minimum area of one acre. In the present case, there are five buildings (A, B, C, D and E) on a plot admeasuring 2.36 acres, hence, the proportionate area for each building would be less than one acre and, therefore, the benefit of Section 80IB (10) could not be granted in respect of the housing project consisting 'E' building.

24. As rightly contended by the counsel for the assessee and the interveners, Section 80IB (10)(b) specifies the size of the plot of land but not the size of the housing project. The size of the plot of land as per Section 80IB(10) must have minimum area of one acre. The Section does not laid down that the plot having minimum area of one acre must be a vacant plot.

25. The question, therefore, to be considered is, whether the Revenue is justified in reading the expression 'plot of land' in Section 80IB (10)(b) as 'vacant plot of land' ?

26. The object of Section 80IB (10) in granting deduction equal to one hundred per cent of the profits of an undertaking arising from developing and constructing a housing project is with a view to boost the stock of houses for lower and middle income groups subject to fulfilling the specified conditions. The fact that the maximum size of the residential unit in a housing project situated, within the city of Mumbai and Delhi is restricted to 1000 square feet clearly shows that the intention of the legislature is to make available large number of medium size residential units for the benefit of the common man. However, in the absence of defining the expression 'housing project' and in the absence of specifying the size or the number of housing projects required to be constructed on a plot of land having minimum area of one acre, even one housing project containing multiple residential units of a size not exceeding 1000 square feet constructed on a plot of land having minimum area of one acre would be eligible for Section 80IB (10) deduction. If the construction of Section 80IB (10) put forth by

the Revenue is accepted, it would, mean, that if on a vacant plot of land, one housing project fulfilling all conditions is undertaken, then deduction would be available to that housing project and if thereafter several other housing projects are undertaken on the very same plot of land,, the deduction would not be available to those housing projects as the plot ceases to be a vacant plot after the construction of the first housing project. Such a construction if accepted would defeat the object with which Section 80IB (10) was enacted.

27. Moreover, plain reading of Section 80IB (10) does not even remotely suggest that the plot of land having minimum area of one acre must be vacant. The said Section allows deduction to a housing project (subject to fulfilling all other conditions) constructed on a plot of land having minimum area of one acre and it is immaterial as to whether any other housing projects are existing on the said plot of land or not. In these circumstances, construing the provisions of Section 80IB (10) by adding words to the statute is wholly unwarranted and such a construction which defeats the object with which the Section was enacted must be rejected.

28. Apart from the above, the Central Board of Direct Taxes (CBDT) by its letter dated 4th May 2001 addressed to the Maharashtra Chamber of Housing Industry has stated thus:

"The undersigned is directed to refer to your letter No.MCHI:RSA:m:388/19799/3 dated 1st January 2001 and to state that the additional housing project on existing housing project site can qualify as infrastructure facility under Section 10(23G) and 80IB (10) provided it is taken up by a separate undertaking, having separate books of accounts, so as to ensure that correct profits can be ascertained for the purpose of Section 80IB and also to identify receipts and repayments of long term finances under the provisions of Section 10(23G), separately financing arrangements and also, if it separately fulfills all other statutory conditions listed in Sections 10(23G) and 80IB(10). With regard to your query regarding the definition of Housing Project, it is clarified that any project which has been approved by a local authority as a housing project should be considered adequate for the purpose of Section 10(23G) and 80IB (10)."

29. From the aforesaid letter of CBDT, it is clear that for the purposes of Section 80IB (10) it is not the mandate of the Section that the housing project must be on a vacant plot of land having minimum area of one acre and that where a new housing project is constructed on a plot of land having minimum area of one acre but with existing housing projects

would qualify for Section 80IB (10) deduction. Even otherwise, the argument of the Revenue does not stand to reason because, in the city of Mumbai where there is acute space crunch, it is difficult to find a vacant plot having minimum area of one acre and even if few such plots are existing it cannot be said that Section 80IB (10) deduction was intended to give benefit only to the undertakings who construct housing projects on those few plots. Therefore, it is clear that on a plot of land having minimum area of one acre, there can be any number of housing projects and so long as those housing projects are approved by the local authority and fulfill the conditions set out under Section 80IB (10), the deduction thereunder cannot be denied to all those housing projects. Section 80IB (10) while specifying the size of the plot of land, does not specify the size or the number of housing projects that are required to be undertaken on a plot having minimum area of one acre. As a result, significance of the size of the plot of land is lost and, therefore, the assessee subject to fulfilling other conditions becomes entitled to Section 80IB (10) deduction on construction of a housing project on a plot having area of one acre, irrespective of the fact that there exist other housing projects or not. In these circumstances, the decision of the Tribunal in rejecting the contention of the Revenue regarding the size of the plot cannot be faulted."

We find that the ratio laid down by the Jurisdictional High Court in Vandana Properties (supra) help the fact of assessee to claim deduction u/s.80IB(10) of Act.

7.6 We also find that ITAT, Pune Bench in the case of Rahul Construction Co. Vs. ITO in ITA No.1250/PN/09 & 707/PN/2010 has observed as under:

"10. In view of above discussion, we come to the conclusion that for verification of eligibility of benefit claimed u/s. 80 IB (10) of the Act by the assessee on buildings A1 to A5 in "Atul Nagar" and buildings B1 to B6 in "Rahul Nisarg Co-Operative Housing Society Ltd.", the assessing authority has to verify as to when the building plans for these buildings were firstly approved by the local authority and taking the said date of approval a starting point, he has to verify as to whether these buildings were completed within the prescribed time limit i.e. 31st March 2008 on the basis of the Completion Certificate in respect of such housing project issued by the PMC. When we examine the facts of the present case under the above

background, we find that the authorities below have not disputed the fact furnished in this regard by the assessee that under the project "Atul Nagar" consisting of buildings A1 to A5, the first building plan for A type was approved by the PMC on 29.4.2003 vide Commencement Certificate No. 4269 (page No. 4 of the paper book). However, actual construction of A type building was executed as per the revised plan vide No. C.C. 4101/27/6/2003 (PAGE No. 5 of the paper book). The size of the plot on which the A type building i.e. A1 to A6 have been constructed is 1,39,466 sq.ft. The project A type building i.e. A1 to A5 consists of 360 residential units and the construction has been completed between 10.1.2005 to 31.8.2003 (page Nos. 6 to 9 of paper book). The authorities below have also not disputed this material fact that residential units has a maximum built up area of 1500 sq.ft. Likewise, these material facts that B Group buildings in "Rahul Nisarg Cooperative Housing Society Ltd.," have been constructed on land area of 138203 sq.ft., has not been denied by the authorities below. They have also not denied these material facts that the first building plan was sanctioned on 29.4.2003 vide Commencement Certificate No. 4269 issued by the PMC (Page-No. 16 of the Paper Book). The other material facts like actual construction was executed as per the revised plan sanction on 20th March 2004 vide CC No. 2225 (page No.17), the project consists of 396 flats and construction of these flats have been completed on 14.7.2006 as per the Completion Certificate issued by the PMC (Page Nos. 13 to 18 of paper book) are not in dispute. The authorities below have also not denied that built up area of each of these flats does not exceed 1500 sq.ft. It is also not in dispute that both the projects are entirely a residential project and there is no commercial area therein. Under the above circumstances, we are of the view that the assessee is very much entitled to the claimed deduction u/s. 80 IB (10) of the Act on the buildings A1 to A5 in "Atul Nagar " and buildings B1 to B6 in "Rahul Nisarg Cooperative Housing Society Lid." The issue is therefore decided in favour of the assessee. We thus while setting aside the orders of the authorities below on the issue, direct the A.O to allow the claimed deduction u/s. 80IB(10) in question. The related grounds are accordingly allowed.

11. In result, appeal is allowed."

Nothing contrary was brought to our knowledge on behalf of revenue. In view of above, we find that the claim of the assessee has been that buildings constructed in plot No.63, 64 & 65, having

separate approval of building plans from the competent authority and separate completion certificates, have to be treated as separate and independent housing projects. Accordingly, the claim of assessee was rightly allowed under the provisions of section 80IB(10) of Act on this account.

7.7 Apart from the issue with regard to the building constructed in plot Nos.63 & 65 will constitute separate projects independent of each other, there is issue of commercial area. This issue has been decided in favour of assessee by the order of Jurisdictional Bombay High Court in the case of Brahma Associates (2011) 333 ITR 289 (Bom), wherein it has been held as under:

“30. In the result, the questions raised in the appeal are answered thus :

(a) Up to March 31, 2005 (subject to fulfilling other conditions), deduction under section 80-IB(10) is allowable to housing projects approved by the local authority having residential units with commercial user to the extent permitted under the Development Control Rules/ Regulations framed by the respective local authority.

(b) In such a case, where the commercial user permitted by the local authority is within the limits prescribed under the Development Control Rules/Regulation, the deduction under section 80-IB(10) up to March 31, 2005 would be allowable irrespective of the fact that the project is approved as "housing project" or "residential plus commercial".

(c) In the absence of any provisions under the Income-tax Act, the Tribunal was not justified in holding that up to March 31, 2005 deduction under section 80-IB(10) would be allowable to projects approved by the local authority having residential building with commercial user up to 10 per cent. of the total built-up area of the plot.

(d) Since the deduction under section 80-IB(10) is on the profits derived from the housing projects approved by the local authority as a whole, the Tribunal was not justified in restricting the section 80-IB(10) deduction only to a part of the project. However, in the present case, since the assessee has accepted the decision of the Tribunal in allowing section

80-IB(10) deduction to a part of the project, we do not disturb the findings of the Tribunal in that behalf.

(e) Clause (d) inserted to section 80-IB(10) with effect from April 1, 2005 is prospective and not retrospective and hence cannot be applied for the period prior to April 1, 2005.

The appeal is disposed of accordingly with no order as to costs”.

Accordingly, we hold that the assessee's claim has rightly been allowed on the point of commercial area by CIT(A). We uphold the same.

7.8 The Assessing Officer also disallowed the claim on the ground of excess area of certain tenements. In appeal various contentions were raised on behalf of assessee. Having considered the same, the CIT(A) directed the Assessing Officer to verify this from the relevant rules of the PMC to arrive at the correct definition of built up area and directed that the combined area has to be tested on the basis of the definition available in PMC Rules. If the claim of the assessee is correct that the built up area of combined flats as per the definition available in PMC Rules, is less than 1500 sq.ft. then it will not be correct to hold that clause (c) is violated. From the report of the Valuer quoted in the assessment order, wherein the calculation of building 'B' has been given, the claim of the assessee prima facie looks correct. However, since this aspect was apparently not examined by the Assessing Officer, the Assessing Officer was directed to verify this claim and if it is found that the area of the combined flats is less than 1500 sq.ft. as per the definition of built up area available in the PMC Rules, clause (c) has to be treated as complied. However from the materials available on records one residential unit which has been reported to be a duplex made out of three flats can still be in excess of 1500 sq.ft. The AO was also directed to verify this aspect and arrive at the conclusion whether the housing project developed in plot No.64 is complying to

the clause (c) or not. Thus, this ground was statistically allowed by CIT(A). This reasoned directions of CIT(A) need no interference from our side. We uphold the same.

7.9 Without prejudice to the assessee's claim that even if certain flats were in excess of clause (c) i.e. of the area of 1500 sq.ft., the AO ought to have granted prorata deduction u/s, 80IB(10) in respect of residential units which are complying to clause (c). The Assessing Officer has not allowed this claim. The deduction has been allowed on prorata basis by CIT(A) by following the decision of ITAT Pune in the case of M/s Tushar Developers vs. ITO, Wd.5(3). In the present case, it is to be noted that the housing project developed by the assessee in plot No.64 comprising of 101 flats as per plans in buildings 'A', 'B' & 'C', no dispute exists in respect of compliance of clause (c) in buildings 'A' & 'C'. , In respect of building 'B' also apparently if the claim of the assessee is found to be correct by the Assessing Officer as discussed above that even the combined flats are of the area of less than 1500 sq.ft. as per the definition of built up area to be applied in this year i.e. as per the rules of the PMC, then most of the units will be found to be eligible for deduction. Without prejudice to the above, the assessee will have to be allowed the proportionate deduction in respect of units which are complying to clause (c). Accordingly, the Assessing Officer was rightly directed. So, issues in ITA No.127/PN/2013 are similar of issues in ITA No.126/PN/2013 which are also decided accordingly. In result, both the revenue's appeals are dismissed.

8. The cross objection No.07/PN/2014 filed by the assessee was not pressed on behalf of assessee, so same is dismissed as not pressed.

9. In result, the revenue's appeals as well as cross objection filed by the assessee are dismissed.

Pronounced in the open Court on this the 28th day of February, 2014.

Sd/-
(R.K. PANDA)
Accountant Member

Sd/-
(SHAILENDRA KUMAR YADAV)
Judicial Member

Pune, Dated: 28th February, 2014
GCVSR

Copy to:-

1. Department
2. Assessee
3. The CIT(A)-I, Pune
4. The CIT-I, Pune
5. The DR, "A" Bench, I.T.A.T., Pune.
6. Guard File

//True Copy//

By Order

Senior Private Secretary,
I.T.A.T., Pune