

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

**BEFORE: SHRI G. S. PANNU, ACCOUNTANT MEMBER
AND
SHRI R.S. PADVEKAR, JUDICIAL MEMBER**

ITA Nos. 1769 to 1771/PN/2012

Assessment Years : 2005-06, 2006-07 & 2007-08

**Asstt. Commissioner of
Income-tax, Central Circle,
Aurangabad**

(Appellant)

**M/s. Kasliwal Ranwara,
215-216, 1st Floor, Bldg. No.
3, Apna Bazar, Jalna Road,
Aurangabad**

Vs.

(Respondent)

PAN No.AAGFK7169N

CO Nos. 50 to 52/PN/2013

(Arising out of ITA Nos. 1769 to 1771/PN/2012)

Assessment Years : 2005-06, 2006-07 & 2007-08

**M/s. Kasliwal Ranwara,
215-216, 1st Floor, Bldg. No.
3, Apna Bazar, Jalna Road,
Aurangabad**

(Cross Objector)

PAN No.AAGFK7169N

**Asstt. Commissioner of
Income-tax, Central Circle,
Aurangabad**

Vs.

(Respondent)

ITA Nos. 1776 to 1779/PN/2012

Assessment Years : 2005-06, 2006-07, 2007-08 & 2008-09

**Asstt. Commissioner of
Income-tax, Central Circle,
Aurangabad**

(Appellant)

**M/s. Kasliwal Suvarnyog,
215-216, 1st Floor, Bldg. No.
3, Apna Bazar, Jalna Road,
Aurangabad**

Vs.

(Respondent)

PAN No.AAGFK7168P

Revenue By: **Smt. M.S. Verma**

Assessee By: **Shri S.N. Puranik**

Date of hearing : **03-01-2014**

Date of pronouncement : **31-01-2014**

ORDER

PER R.S. PADVEKAR, JM:-

In this batch of seven appeals and three Cross Objections, the issues arising from these appeals are also identical i.e. deduction u/s. 80IB(10) of the Income-tax Act. Hence, these appeals and Cross Objections are disposed of by this consolidated order for the sake of convenience.

2. We first take the appeals in the case of M/s. Kasliwal Ranwara being ITA Nos. 1769 to 1771/PN/2012. These appeals are filed by the Revenue and the Revenue has taken the following grounds which are verbatim in all the appeals save the quantum of deduction mentioned in Ground No. 1 as under:

- 1. On the facts and in the circumstances of the case, the learned CIT(A) has erred in deleting the addition of Rs.48,88,758/- made on account of disallowance of deduction claimed by the assessee under section 80IB(10) of the Act.*
- 2. On the facts and in the circumstances of the case, the learned CIT(A) has erred in holding that the project of the assessee firm was eligible for deduction under section 80IB(10) of the Act, without appreciating the fact that at time of commencement, the area of the land was less than 1 acre and therefore the assessee has not fulfilled the conditions laid down in section 80IB(10) of the Act.*
- 3. On the facts and in the circumstances of the case, the learned CIT(A) has erred in holding the assessment as 'bad in law' as no incriminating material belonged to the assessee was seized, contrary to the provision of section 153C of the Act and also well settled position laid down by the Hon'ble Delhi High Court in the case of SSP Aviation Ltd. Vs. DCIT (WPA No. 309 of 2011) dt. 29/03/2012 & in the case of CIT Vs. Anil Kumar Bhatia dt. 07/08/2012. .*

3. The facts which revealed from the record are as under. The assessee is a partnership firm engaged in the business of builders and developers. A search and seizure action u/s. 132 has been carried out in the cases of Tapadiya, Khinvasara & Pawar Group on 19/01/2010. During the course of search and seizure operation, various registers and documents etc. were seized including the following documents belonging to the assessee firm:

- (a) KG Box File Sr. No. 34 (pages 1 to 307)
- (b) KG Box File Sr. No. 49 (pages 1 to 261)
- (c) Mayur Box File Sr. No. 51 (pages 203 to 286)
- (d) Prime Delux Long Book Sr. No. 71 (pages 1 to 11)

3.1 The Assessing Officer issued the notices u/s. 153C of the Act to the assessee for filing the returns of income for the A.Ys. 2005-06, 2006-07 and 2007-08. The assessee also made the compliance by filing the returns of income in response to notice issued u/s. 153C of the Act. The assessee has claimed the deduction u/s. 80IB(10) in respect of the housing project developed by it. While completing the assessment, the Assessing Officer has disallowed the deduction u/s. 80IB(10) claimed by the assessee which details are as under:

Sl. No.	A.Y.	Disallowance of deduction u/s. 80IB(10)
1	2005-06	Rs.48,88,758/-
2	2006-07	Rs.38,65,967/-
3	2007-08	Rs.4,14,955/-

4. The Assessing Officer has observed that on verification of the seized records, it was found that the size of the plot on which the assessee has developed the housing scheme found apparently to be less than 1 acre. The Assessing Officer issued the show-cause notice to the assessee that why the deduction should not be disallowed pointing out the following discrepancies:

- A. Land less than 1 Acre.
- B. Permission for commencement is in the name other than the assessee.
- C. The construction is made on plots amalgamated.
- D. The occupancy certificate is in the other name.

5. The assessee filed the reply which is reproduced in the assessment order by the Assessing Officer. It appears that the Assessing Officer was only concerned with the area of the plot which was according to him is less than 1 acre for disallowing the deduction to the assessee. He mainly pointed out the discrepancy which is in respect of the area of the plot. The assessee submitted before the Assessing Officer that the area of the

landed property acquired for the project is 40.5 ares i.e. 1 acre only and that is clear from the development agreement, building permission commencement certificate and Revenue record in the form of 7/12 extracts etc. The assessee contended that as per the rules of Aurangabad Municipal Corporation (AMC), the assessee had to handover the land for the road and open space by way of relinquishment and accordingly the same was done by executing the deed of relinquishment on 09-07-2004 and thereafter only the assessee could get the building permission for its housing project. The assessee also contended that every sanctioned plan and permission clearly states that the area of the plot on which the housing project has been executed is 4048.32 Sq. Mtrs. which is more than 1 acre. The reasons given by the Assessing Officer for arriving at the conclusion that the assessee is not entitled for deduction u/s. 80IB(10) as in his opinion the area of the plot of land is less than 1 acre are as under:

“14. Contentions of the assessee have been considered. It is however noticed that even before the land was purchased by Shri Sanjay Muthiyan, the land when belonged to Mrs. Nath, it had road passing through the lay-out of plots. This sanctioned lay out was cancelled & the land in 1 piece of 1 acre was purchased by Shri Sanjay Muthiyan as stated. However, the fact remains that the land purchased by Shri Sanjay Muthiyan had a sanctioned road passing through it. Ownership of such road always remains with Local Authority i.e. AMC.

15. Further, part of the land admeasuring 1100 sq. mtrs was surrendered before the commencement of the project. This date of approval of the project is very crucial for allowing deduction u/s 80IB in the sense that the date/year of completion of the project is reckoned from the same. Also all other regulations come into scene only on sanctioning the plan. However, for the reasons mentioned above, on the date of sanction of the plan, the land for the project admeasured less than 1 acre. Therefore, the basic condition for allowing the deduction u/s 80IB that the project should be on a plot of size 1 acre or more does not get fulfilled.

16. As mentioned earlier that the area of the landed property was in deed 40.5 R which is verifiable from commencement and occupancy certificate. It is, however, seen that none of these certificates mentioned that the project was on the area of land of 1 acre or more.

17. The assessee has mentioned that the land had to be relinquished in compliance to the condition put forth by the Aurangabad Municipal Corporation. However, there is no mention of such condition in the permission i.e. commencement certificate granted by the Aurangabad Municipal Corporation. -In this respect, pages at SI.No.210 to 215 of file 49C are referred to, which is a copy of the relinquishment deed executed between the Aurangabad Municipal Corporation and Sri.Sanjay Muthiyan, partner of the firm. In para 2 of the deed, there is mention of letter of Aurangabad Municipal Corporation dt.08/07/2004, which has sanctioned the layout. However, the conditions put forth by the Aurangabad Municipal Corporation, while sanctioning the layout have not been given. Also none of the paragraphs of the relinquishment deed mentions about any condition put forth by [the Aurangabad Municipal Corporation for sanctioning the lay-out.

18. On page number 21 of file A-49, the Lay out plan is available. It is seen that area covered by the road and open space is on the lateral sides of the plot i.e. the open space is on the East side of the plot and the road on the North side of the plot. Therefore, after the relinquishment of these portions, obviously, the size of the plot has been reduced by 1100 sq. mtrs. In other words, the plot no longer remains of the size of 1 acre.

19. As per clause (b) of provisions of section 80IB(10), the project has to be on the size of plot of land, which has minimum area of 1 acre. Therefore, it is clear that the size of the plot used for construction should be 1 acre and it should not include any approaching road. For the reasons mentioned above, the road and the open space found out to be on the lateral side of the plot and by no stretch of imagination, it can be considered as part of the project.

20. In this context, pages of file No. A49 sl. No. 171 to 195 are also referred to. This is actually a declaration deed under section 2 of Apartment Ownership Act, 1970 executed between Sri Sanjay Muthiyan and the assessee. In this deed, amenities, units, flats, bye-laws of the prospective society etc. have been mentioned. Under the head open space available and to be used by row houses and duplex and flat owners is mentioned. However, no where this deed refers to the open space which has been relinquished to the Aurangabad Municipal Corporation. Thus, the plea of the assessee that open place is part of the project only is incorrect and appears to be an afterthought only.

21. The completion certificate issued by the Aurangabad Municipal Corporation on 18/09/2006 appearing on page 254 of the file A-49 is also gone through. No where this certificate says that the project is completed on land of 4048.32 Sq. Mtrs. It appears that the assessee is referring to the map appearing on page No 261 of file A-49. As per this map, the area statement is given. As per the area statement, total plot area is mentioned at 1 acre and area 4048.32 sq. mtrs. It has however been mentioned that the total plot area is as per 7/12 extract. It has not mentioned the date of this 7/12 extract. It is a fact that after relinquishing the land admeasuring 1100 sq. mtrs., the plot no longer remained of the size 4048.32 sq. mtrs. Secondly, the open space on this map is clearly marked using green color lines. The legend in the map does not mention any thing about the area marked by this green color.

22. Independently, this file also contains an application of the resident of the said project dt. 29/05/2007 appearing at pages 44 and 45. These pages are actually, a letter written to Shri Sanjay Kasliwal, partner of the firm by the firm by the unit owner of the scheme. As per para 4 of the said letter, the flat owners have alleged that the area mentioned in the agreement differs from the actual area and that the firm has not provided basic amenities like drinking water, electrical fittings, etc. From this letter, it can be inferred that, because of the smaller area of land that remained after relinquishment, the constructed area of flats handed over to the owners reduced in size considerably.

23. *In view of the above said discussion, it is held that the plot on which the assessee constructed the project was of the size less than 1 acre, therefore, the assessee does not fulfill the condition required to claim the deduction under section 80IB(10) of the Act. The claim of the assessee for all relevant assessment years is hereby disallowed.”*

6. The assessee carried the matter before the Ld. CIT(A). The assessee also filed the additional evidence in the form of letter from Aurangabad Municipal Corporation (AMC) dated 22-05-2012 but the Assessing Officer raised the objection and hence, the Ld. CIT(A) did not admit the said additional evidence. The assessee also contended that the housing project is sanctioned on plot of land admeasuring 4048.32 Sq. Mtrs. and the conclusion of the Assessing Officer that the project was on the land admeasuring 2498.32 Sq. Mtrs. was not correct. It appears that the Ld. CIT(A) called for the report of the Assessing Officer on the submissions made by the assessee. The Ld. CIT(A) accepted the contention of the assessee that the area of the 1100 Sq. Mtrs. which was handed over by the assessee to the AMC before the commencement of the project for the amenities, road and open space cannot be separated as it is the part of the plot of land on which the housing project is executed. The Ld. CIT(A) allowed the deduction to the assessee and also gave the break-up of the total area as well as the area under road and open space. The operative part of the order of the Ld. CIT(A) is as under:

“5.3. I have carefully considered the facts of the case and rival contentions.

The additional evidence filed by the appellant in the form of letter from Aurangabad Municipal Corporation dated 22/05/2012 has not been admitted in view of the objection raised by the A.O. as the said evidence is not considered necessary to decide the issue under appeal. On perusal of the other contention of the appellant and the A.O., it has been noticed that the A.O. has disallowed the deduction u/s 80IB(10) holding that the size of the plot on which the housing project is constructed is less than one acre. The A.O. has

noticed that the land admeasuring 1100 sq. mtrs. was surrendered before the commencement of the project to the Municipal Corporation by the owner of the land for roads and for open space. The A.O. was, therefore, of the opinion that the area of land on which project is situated is not 4048.32 sq. mtrs., but is only 2948.32 sq. mtrs. after reducing the area for open space and roads handed over to the Municipal Corporation. In this regard, the appellant has pointed out that the total area of land as per 7/12 extract is one acre, the total area of land is 4048.32 sq. mtrs. as per sanctioned plan and also as per completion certificate. The appellant claimed that the area of land handed over to the Municipal Corporation for roads and open space is part and parcel of the housing project and hence the said area cannot be reduced for considering the total area utilized for housing project. In this regard, CBDT's Circular No. 5/2005 is relevant and the relevant portion of the same is extracted below –

“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 site on which the housing project is constructed and not with reference to the demarcation of the land done by the Development Authority.”

The contention of the appellant is supported by the above mentioned CBDT circular.

The contention of the appellant is also supported by the decision of Hon'ble ITAT, Pune in the case of Bunt Builders Vs. ITO (2011) 56 DRT 300 (Pune). In this case, the details of the land for the project are as under -

<i>Area of land as per 7/12 extract</i>	<i>4,600 sq. mtrs.</i>
<i>Area considered for lay out plan</i>	<i>4,600 sq. mtrs.</i>
<i>Road widening area</i>	<i>105 sq. mtrs.</i>
<i>Net area</i>	<i>4495 sq. mtrs.</i>
<i>Open space</i>	<i>460.09 sq. mtrs.</i>
<i>Amenity space</i>	<i>499.70 sq. mtrs.</i>

<i>Area under internal road</i>	<i>431.15 sq. mtrs.</i>
<i>Transformer</i>	<i>25 sq. mtrs.</i>
<i>Net area</i>	<i>2923.25 sq. mtrs.</i>

The Hon'ble ITAT, Pune has referred to and relied on the CBDT Circular No. 5/2005 and held that the area of land of the housing project in the said case is to be considered at 4600 sq. mtrs. which is more than one acre and hence the assessee is eligible for deduction u/s 80IB(10). The concluding para-9 of the said decision is reproduced below -

“9. This circular thus gives a clear indication that through the section does 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 constitutes 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 recognized 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 hypothetication. Therefore, 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 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 statutes is that the general words must receive a general construction unless there is something otherwise expressly proved 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 cl. (b) of s. 80-IB(10) of I.T. 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 land 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 purpose 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 4,600 sq. mtrs. That is more than 1 acre (4.046 sq. mtrs.) therefore the appellant is entitled for the claim of deduction under s. 80-IB(10)(b) on this portion of land. We hold accordingly."

In the case under appeal, the A.O. has reduced the area of amenities and roads handed over by the appellant to the Municipal Corporation to the extent of 1100 sq. mtrs. the said area cannot be reduced in view of the CBDT Circular and the decision of the Hon'ble ITAT, Pune referred to above. In view of the above fact and discussion and ratio laid down by the above decision of Hon'ble Jurisdictional ITAT, Pune I hold that the land utilized by the appellant for housing project is to be considered at 4048.32 sq. mtrs. which is more than 1 acre. The A.O. is, therefore, not justified

in disallowing deduction claimed by the appellant u/s 80IB(10) of the Act. The additions made by the A.O. amounting to Rs.48,88,758/- Rs.38,65,967/- and Rs.4,14,955/- for A.Ys. 2005-06, 2006-07 & 2007-08 respectively are deleted. Ground Nos. 2 to 3 are allowed.”

Now the Revenue is in appeal before us.

7. We have heard the parties and perused the record. We find that nowhere it is controverted before us that the gross area of the plot which has been considered in the lay-out plan is 4048.32 Sq. Mtrs. and the allowable FSI as per Rule is 75%. So the assessee got the permission to carry out the construction @ 75% of gross area of the plot i.e. 4048.32 Sq. Mtrs. The assessee surrendered 1100 Sq. Mtrs. as per the rules of the local body. Now the short issue before us is the area which has been surrendered by the assessee as per the local corporation rules for the open space, roads and amenities can be excluded to say that the assessee has less than 1 acre of the area. We find that the Ld. CIT(A) has relied on the decision of the ITAT, Pune in the case of *Bunty Builders Vs. ITO (2011) 56 DTR 300 (Pune)* and issue stands fully covered in favour of the assessee.

8. In our opinion, the approach of the Assessing Officer is totally erroneous and the Ld. CIT(A) has rightly allowed the claim of the assessee as admittedly the gross area of the land before relinquishment of the part of the land for open space, roads etc. is more than 1 acre. We find no reasons to interfere with the order of the Ld. CIT(A). Accordingly, Ground Nos. 1 and 2 are dismissed. So far as Ground No. 3 is concerned, the Revenue has challenged the observation of the Ld. CIT(A). In our opinion as the assessee has succeeded on the merits itself the Ground No. 3 taken by the Revenue is merely academic.

9. In the result, all the three appeals of the Revenue are dismissed.

10. Now we take up the Cross Objections being CO Nos. 50 to 52/PN/2013 filed by the assessee. The assessee has taken the Ground Nos. 1 to 4 which are common in all the Cross Objections:

1. *Respondent prays to confirm the CIT(A) decision on both the issues.*
 - i. *Assessment u/s 143(3) r.w.s 153C is bad in law.*
 - ii. *Disallowance u/s 80 IB (10) made by Assessing Officer is not sustainable on merits, as Project is sanctioned on plot of land more than one Acre.*
2. *It may be held / confirmed that in the absence of incriminating material, disallowance u/s 80IB (10) is not sustainable.*
3. *Without prejudice to above lower Authorities have erred in not considering the letter dated 22.05.2012 by Aurangabad Municipal Corporation that Project is sanction on Plot of land more than an Acre - Same may please be considered.*
4. *Without prejudice to above, if for any reason disallowance by Assessing Officer is confirmed, it may be declared that, still interest u/s 234B is not chargeable in views of Sec. 234B(3).*

11. We have heard the parties. The Ld. Counsel submits that as an abundant precautions, the cross objections are filed in all the three years otherwise the said cross objections support the order of the Ld. CIT(A). In our opinion, the Cross Objections filed by the assessee become infructuous as no specific grievance is raised by the assessee and these Cross Objections merely support of the order of the Ld. CIT(A). In the result, all the three Cross Objections are dismissed.

12. Now we take up another batch of appeals in the case of M/s. Kasliwal Suvarnyog being ITA Nos. 1776 to 1779/PN/2012. These appeals are filed by the Revenue challenging the respective impugned orders of the Ld. CIT(A), Aurangabad dated 08-06-2012 and the assessment years involved are A.Ys. 2005-06 to 2008-09. The Revenue

has taken the following grounds in the appeal which are verbatim in all the assessment years save the quantum of additions/deduction u/s. 80IB(10) as under:

1. *On the facts and in the circumstances of the case, the learned CIT(A) has erred in deleting the addition of Rs.1,51,02,524/- made of account of disallowance of deduction claimed by the assessee under section 80IB(10) of the Act.*
2. *On the facts and in the circumstances of the case, the learned CIT(A) has erred in holding that the project of the assessee firm was eligible for deduction under section 80IB(10) of the Act, without appreciating the fact that the commercial area of the project exceeded 2000 sq. ft. & therefore the assessee was not entitled for the deduction under section 80IB(10) for Assessment Year 2005-06 onwards since the conditions laid down in the statute have not been fulfilled.*
3. *On the facts and in the circumstances of the case, the learned CIT(A) has erred in not appreciating the plea that as per decision of the Hon'ble Bombay High Court in the case of Bramha Associates [333 ITR 289], such deduction will not be available for Assessment Year 2005-06 onwards and also erred in relying on the another decisions of the ITAT, Pune bench which has not followed the ratio laid down by the jurisdictional High Court in the case mentioned supra.*
4. *On the facts and in the circumstances of the case, the learned CIT(A) has erred in holding the assessment as 'bad in law' as no incriminating material belonged to the assessee was seized, contrary to the provision of section 153C of the Act and also well settled position laid down by the Hon'ble Delhi High Court in the case of SSP Aviation Ltd. Vs. DCIT (WPA No. 309 of 2011) dt. 29/03/2012 & in the case of CIT Vs. Anil Kumar Bhatia dt. 07/08/2012.*

13. The briefly stated facts are as under. The assessee is a partnership firm engaged in the business of builders and developers. A search and seizure action u/s. 132 has been carried out in the cases of Tapadiya, Khinvasara & Pawar Group on 19/01/2010. As noted by the Assessing Officer, during the course of search and seizure operation

various registers and documents were seized including the following documents belonging to the assessee firm:

- (a) KG Box File Sr. No. 44 (pages 1 to 322)
- (b) Jagruti Register Sr. No. 45 (pages 1 to 123)
- (c) Mayur Box File Sr. No. 51 (pages 1 to 49)
- (d) Bhavna Box File Sr. No. 54 (pages 323 to 605)

13.1 The Assessing Officer issued the notices u/s. 153C of the Act to the assessee and in response to the said notices, the assessee filed the returns of income for all the four years on 04-07-2011. The assessee had claimed the deduction u/s. 80IB(10) in respect of the housing project developed by it. The Assessing Officer has disallowed the said deduction claimed by the assessee firm. So far as the issue before us is concerned, it is in respect of the disallowance of the claim of deduction u/s. 80IB(10) of the Act which details are as under:

Sl. No.	A.Y.	Disallowance of deduction u/s. 80IB(10)
1	2005-06	Rs.1,51,02,524/-
2	2006-07	Rs.28,59,025/-
3	2007-08	Rs.15,32,202/-
4	2008-09	Rs.18,76,460/-

14. During the course of assessment proceedings, the Assessing Officer has pointed out discrepancies such as the permission for commencement is in the name other than the assessee, permission for commencement received prior to date of inception of firm, the construction is made on plots amalgamated, the occupancy certificate is in the other name, project not completed within 4 years and the commercial area is more than 2000 Sq. ft. The assessee has filed reply to the Assessing Officer in respect of the above mentioned discrepancies pointed out. The Assessing Officer was, however, not convinced by the said reply in respect of the discrepancy pointed out by him that the commercial area in the project is more than 2000 sq. ft. The Assessing

Officer has disallowed the deduction considering the facts that undisputedly commercial area constructed by the assessee is more than 2000 sq. ft. and as per the amendment to Sec. 80IB(10) by Finance Act, 2004 from A.Y. 2005-06 by insertion of clause (d), the permissible commercial area for an eligible housing project should not exceed 5% of the aggregate built-up area of the housing project or 2000 sq. ft. whichever is least. The Assessing Officer has relied on the decision of Hon'ble Bombay High Court in the case of CIT Vs. Brahma Associates. The Assessing Officer has held that as per the said decision, the amendment is applicable from A.Y. 2005-06 and hence, in view of the fact that the assessee has constructed commercial area of more than 2000 sq. ft. it is not eligible for deduction u/s 80IB(10) for A.Y. 2005-06 & onwards. The Assessing Officer has further pointed out that the whole project has been approved by Municipal Corporation and the same has not been sanctioned in two parts i.e. residential & commercial separately. The Assessing Officer has accordingly held that the project is a composite project and hence, deduction u/s 80IB(10) cannot be allowed in respect of residential project separately. The Assessing Officer has further pointed out that the limit of commercial construction has been increased to 3% of the aggregate built-up area or 5000 sq. ft. whichever is higher by finance Act, 2010 from A.Y. 2010-11 which is independent of the date of approval of the project. The Assessing Officer concluded that the limit of commercial area for eligible projects is to be considered as applicable to the each assessment year as per the provisions of the Income Tax Act i.e. up to 2004-05 no specific limit, A.Y. 2004-05 to 2009-10, 5% of the built-up area of the project or 2000 sq. ft. whichever is less, A.Y. 2010-11 and onwards 3% of the built-up area of the project or 5000 sq. ft. whichever is higher. The Assessing Officer has accordingly concluded that the commercial construction in the project of the assessee is much more than the limit specified in Sec. 80IB(10) for

the years under appeal and hence the assessee is not eligible for deduction u/s. 80IB(10) of the Act. Accordingly, the Assessing Officer disallowed the claim to the assessee. The assessee carried the issue before the Ld. CIT(A) and Ld. CIT(A) allowed the claim of the assessee. Now the Revenue is in appeal before us.

15. We have heard the parties. The identical issue has come before us in the case of another group company of the assessee i.e. M/s. Kasliwal Developers being ITA Nos. 1767 & 1768/PN/2012 order dated 31-10-2013. The Tribunal has allowed the claim of the assessee by following the decision of the Hon'ble High Court of Gujarat in the case of Manan Corporation Vs. ACIT, 255 CTR (Guj) 415. The operative part of the findings of the Tribunal in the case of Manan Corporation (supra) is as under:

“4. We have heard the parties and perused the record. In this case, there is no dispute that the housing project of the assessee has been approved by the Aurangabad Municipal Corporation on 30-03-2001. Now the legal issue before us is whether clause (d) to section 80IB(10) which has been brought on statute book w.e.f. 01-04-2005 is applicable to the housing projects which have been approved prior to 01-04-2005. As per the Clause(d) to Sec. 80IB(10), the ceiling on the maximum commercial area in the housing project is restricted to 2000 Sq. ft.. The applicability of Clause (d) to Sec. 80IB(10) has come for judicial scrutiny before the Hon'ble High Court of Gujarat in the case of Manan Corporation Vs. ACIT, 255 CTR (Guj) 415. The Hon'ble High Court has referred to the decision of the Hon'ble High Court of Bombay in the case of Brahma Associates Vs. JCIT 333 ITR 289 (Bom.) and has held as under:

19. Before the Bombay High Court the housing project was approved by the competent - authority before 31.3.2005 and the assessment year concerned was 2003-2004.

In the instant case, heavy reliance is again placed on the judgment Brahma Associates (supra) by the Tribunal and relying upon the said decision, it chose not to avail the benefit

of deduction of the profit to the appellant assessee. As far as question of violation of clause (d) of Section 80IB(10) of the Act is concerned, it noted that one of the questions raised before the Bombay High Court was whether clause (d) of Section 80IB(10) of the Act was applicable for assessment year 2005-2006 or whether it applied retrospectively and it noted thus:-

"Under these facts, it was held by Hon'ble Bombay High Court that with effect from 01-04-2005, deduction u/s. 80IB(10) would be subject to the restriction set out in clause-(d) of Section 80IB(10). The relevant para of this judgment of Hon'ble Bombay High Court i.e. para-25 is reproduced as under:-

"25. The above conclusion is further fortified by Clause(d) to Section 80IB(10) inserted with effect from 1/4/2005. Clause (d) to Section 80IB(10) inserted w.e.f. 1/4/2005 provides that even though shops and commercial establishments are included in the housing project, deduction under section 80IB(10) with effect from 1/4/2005 would be allowable where such commercial user does not exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet whichever is lower. By Finance Act, 2010, clause (d) is amended to the effect that the commercial user should not exceed three per cent of the aggregate built-area of the housing project or five thousand square feet whichever is higher. The expression 'included' in clause (d) makes it amply clear that commercial user is an integral part of a housing project. Thus, by inserting clause (d) to Section 80IB(10), the legislature has made it clear that though the housing projects approved by the local authorities with commercial user to the extent permissible under the DC Rules/ Regulation were entitled to Section 80IB(10) deduction, with effect from 1/4/2005 such deduction would be subject to the restriction set out in clause (d) of Section 80IB(10). Therefore, the argument of the revenue that with effect from 1/4/2005 the legislature for the first time allowed Section 80IB(10) deduction to housing projects having commercial user cannot be accepted."

12. From the above para of judgment of Hon'ble Bombay High Court, it is seen that it is not held by Hon'ble Bombay High Court that clause (d) of Section 80iB(10) is applicable to those

projects which are approved on or after 01-04-2005. But it is held that from 01-04-2005, deduction u/s.80IB(10) would be subject to the restriction set out in clause-(d) of Section 80IB (10). In our humble understanding, this judgment of Hon'ble Bombay High Court covers this issue against the assessee and therefore, the various decisions of coordinate Bench of this Tribunal cited by Ld. Counsel for the assessee are of no use in the light of this judgment of Hon'ble Bombay High Court. We respectfully follow this judgment of Hon'ble Bombay High Court in preference to various decisions of co-ordinate Bench of this Tribunal."

20. In our opinion, the Tribunal has misdirected itself in interpreting paragraph 25 of the said judgment and thereby denying the benefit of Section 80IB(10) to the appellant herein in as much as before the Bombay High Court it was Revenue's case that residential project having commercial construction cannot be held entitled to the benefit under Section 80IB(10) of the Act and for supporting its version, reliance was placed on inclusion of clause (d) of Section 80IB (10) from 1.4.2005, which restricts area of commercial construction in residential project.

It was a project of residential housing with commercial user for assessment year 2003-2004 as noted above.

In this backdrop, the Court rejected/ refuted such version and for fortifying its denial, it mentioned inclusion of clause(d) from 1.4.2005 by holding that by insertion of clause(d) of Section 80IB(10) of the Act, Legislature made it clear that though the housing project approved by local authority with commercial user to the extent permissible under the rules and regulations were entitled to Section 80IB(10) deduction, such deduction would be subject to the restriction set out in clause (d) of section 80IB(10) from 1.4.2005. In our opinion, Tribunal has quoted the judgment out of context to deny the said benefit to the appellant erroneously.

21. Neither the assessee nor local authority responsible to approve the construction projects are expected to contemplate future amendment in the statute and approve and/or carry out constructions maintaining the ratio of residential housing and commercial construction as provided by the amended Act being 3 percent of the total built up area or 5000 sq.feet which

ever is higher (now in post 2010 period) or 5 percent of the aggregate built up area or 2000 sq. feet whichever is less. Revenue is also in error to suggest that even if such conditions are onerous, they are required to be fulfilled. The entire object of such deduction is to facilitate the construction of residential housing project and while approving such project when initially there was no such restriction in taxing statute and the permissible ratio for commercial user made 5 percent to the total built up area by way of amendment and reduction of which by further amendment to 3 percent of the total built up area, has to be necessarily construed on prospective basis.

22. As is very apparent from the record, there was no criteria for making commercial construction prior to the amended Section and the plans are approved as housing projects by the local authority for both the projects of the appellant. Permission for construction of shops has been allowed by the local authority in accordance with rules and regulations, keeping in mind presumably the requirement of large townships. However, the projects essentially remained residential housing projects and that is also quite apparent from the certificates issued by the local authority and, therefore neither on the ground of absence of such provision of commercial shops nor on account of such commercial construction having exceeded the area contemplated in the prospective amendment can be made applicable to the appellant assessee whose plans are sanctioned as per the prevalent rules and regulations by the local authority for denying the benefit of deduction of profit derived in the previous year relevant to the assessment year as made available otherwise under the statute.

23. It would be worthwhile to note at this stage that even though the facts before the Bombay High Court were different than those emerging from the present case, Revenue's submissions before the Bombay High Court that the amendment of Section 80IB(10) and the insertion of clause (d) with effect from 1.4.2005 should be applied retrospectively was held to be without any merit in following words, in paragraph 32 of the Bombay High Court, which is reproduced as under:-

"Lastly, the argument of the Revenue that section 80-16(10) as amended by inserting clause (d) with effect from April 1, 2005 should be applied retrospectively is also without any merit, because, firstly, clause (d) is specifically inserted with effect from April 1, 2005 and, therefore, that clause (d) seeks to deny section 80-16(10) deduction to projects having commercial user beyond the limit prescribed under clause (d), even though such commercial user is approved by the local authority. Therefore, the restriction imposed under the Act for the first time with effect from April 1, 2005 cannot be applied retrospectively. Thirdly, it is not open to the Revenue to contend on the one hand that section 80-16(10) as it stood prior to April 1, 2005 did not permit commercial user in housing projects and on the other hand contend that the restriction on commercial user introduced with effect from April 1, 2005 should be applied retrospectively. The argument of the Revenue is mutually contradictory and hence liable to be rejected. Thus, in our opinion, the Tribunal was justified in holding that clause (d) inserted to Section 80-16(10) with effect from April 1, 2005 is prospective and not retrospective and hence cannot be applied to the period prior to April 1, 2005."

24. Karnataka High Court in the case of Commissioner of Income-Tax, Central Circle vs. Anriya Project Management Services (P.) Ltd. was also examining this provision where the question was whether the definition of 'built-up area' inserted by Finance (No.2) Act, which became effective from 1.4.2005 is prospective or retrospective in nature and it held that the same to be prospective in nature. It held that amendment provision would have no application to housing projects, which were approved by the local authority prior to 1.4.2005 in calculating 1500 sq. feet of residential unit and it further held that once such housing project of assessee is approved by local authority prior to 1.4.2005, it would be entitled to 100 percent benefit of Section 80IB(10). While so holding, it relied on the judgment of the Karnataka High Court in the case of CIT vs. G.R. Developers [IT Appeal No.355 of 2009].

25. Corollary to this is one more aspect that requires reference here. The Government of India Ministry of Finance, Department of Revenue to all Chief Commissioners of Income-

Tax and all Director Generals of Income-Tax issued Instruction No.4 of 2009 dated 30.6.2009 in respect of Section 80IB(10) of the Act would be available on year to year basis where the assessee is showing profit on partial completion or the same would be available on the year of completion of the project, which is clarified as under:-

"3. The above issue has been considered by the Board and it is clarified as under: -

(a) The deduction can be claimed on a year to year basis where the assessee is showing profit from partial completion of the project in every year.

(b) In a case it is late, found that the condition of completing the project within the specified time limit of 4 years as started in section 80-16(10) has not been satisfied, the deduction granted to the assessee in the earlier years should be withdrawn."

26. From the reading of the above instruction, it can be also said that the Government being aware of both the accounting methods has expected either of them to be followed in cases of individual assessee. However, in post amendment period, strict adherence to completion period of four years is insisted upon where project completion method is followed. This limitation of period did not exist prior to the amendment, what is vital to draw from this is that the amendment cannot discriminate those following project completion method if in the interregnum period, amendment is brought in the statute. The say of the assessee therefore gets further fortified when it says that only because it chose to follow the method of accounting of project completion basis, whose completion date falls after 1.4.2005, they can be denied the deduction on profits derived and those assessee who claim deduction on work-in-progress basis, they would be entitled to such deduction. However, it necessitated strict compliance of the provisions and completion of the same within the stipulated time period.

27. The entire object of such deduction is to facilitate construction of residential housing project and while approving such project when initially there was no restriction and by amendment as stated permissible ratio for construction is 5 percent of the total built up area, reduction of

this ratio to 3 percent of the total built up area has to be necessarily on prospective basis.

28. It would be apt to consider ratio of retrospectivity at this stage. In the case of Commissioner of Income-Tax vs. Gold Coin Health Food P. Ltd. reported in 304 ITR 308, the Hon'ble Supreme Court of India has held as under :

In Zile Singh v. State of Haryana (2004) 8 SCC 1, it was observed as follows:

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only - 'nova constitutio futuris formam imponere debet non praeteritis' - a new law ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G. P. Singh, 9th Edn., 2004 at page 438.) It is not necessary that an express provision be made to make a statute retrospective and the presumption against a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole, (ibid., page 440).

14. The presumption against retrospective operation is not applicable to declaratory statutes... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain'¹ an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well-settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pages 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to

Craies (Statute Law, 7th Edn.), it is open for the Legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the Legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the Legislature had sufficiently expressed that intention giving the statute retrospectively. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the Legislature contemplated (page 388). The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right (page 392)."

29. *In the case of Commissioner of Income-Tax vs. TVS Lean Logistics Ltd. reported in (2007) 293 ITR 432(Mad), the Hon'ble Madras High Court has held as under:*

"In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner only because of harsh consequences arising therefrom. The court cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous, cannot add or subtract words to a statute or read something into it which is not there and cannot rewrite or recast legislation. The language employed in a statute is the determination factor of the legislature event and even assuming there is a defect or any omission in the words used in the legislation, the court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result and any interpretation which is not permissible and which would be destruction of judicial discipline."

30. *In the case of National Agricultural Co-operative Marketing Federation of India Ltd. and another, vs. Union of India and others reported in AIR 2003 SC 1329, the Hon'ble Supreme Court has held in paragraphs 15, 16 and 17 as under :*

"15. The legislative power either to introduce enactments for the first time or to amend the enacted law with retrospective effect, is not only subject to the question of competence but is also subject to the question of competence but is also subject to several judicially recognized limitations with some of which we are at present concerned. The first is the requirement that the words used must expressly provide or clearly imply retrospective operation. The second is that the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional. The third is apposite where the legislation is introduced to overcome a judicial decision. Here the power cannot be used to subvert the decision without removing the statutory basis of the decision."

16. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment."Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by reenacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the reenacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon Courts. The Legislature may follow anyone method or all of them.

17. A validating clause coupled with a substantive statutory change is therefore only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent."

As mentioned hereinabove criterias to hold this amendment retrospective are absent as there is no as explicit and specific wording expressing retrospectivity and even if it is assumed for the sake of arguments that the same is to be read by implication the same does not appear to be reasonable but, in fact emerges to be harsh and unreasonable when it comes to implementation.

31. Again, as held in case of CIT vs. J.H. Gotla(supra) by the Apex Court such strict construction of the statute if leads to

absurd interpretation the same may not subserve the intent and object of legislation.

32. Again, as held in the case of Mysore Minerals Ltd. vs. Commission of Income-Tax reported in 239 ITR 775, Apex Court with two possibilities of interpretation of a taxing statute, one which is favourable to the assessee should be always preferred.

33. As also laid down in the case of Bajaj Tempo Ltd. vs. Commissioner of Income-Tax reported in 196 ITR 188 (SC), taxing statute granting incentives for promoting economic growth and development should be liberally construed to facilitate and advance the objectives of the provision.

34. Above discussion cumulatively when examined with the objectives and intent it sought to achieve in bringing about the said provision of Section 80IB(10), this amended taxing statute requires to be interpreted in favour of the assessee rather than insisting upon strict compliance leading to absurdity.

35. It can be also held that this being a substantive amendment and not a clarificatory amendment, the amendment of this nature cannot have retrospective effect.

36. Resultantly, we answer the questions raised before us in favour of the assessee and against the Revenue.

37. Resultantly, the appeal is allowed. Impugned judgment of the Tribunal is reversed to the above extent.

5. The applicability of Clause (d) to Sec. 80IB(10) is again considered by the ITAT, Mumbai in the case of Hiranandani Akruti JV Vs. DCIT 39 SOT 498 (Mum). The Tribunal has held as under:

26. There is truth in the plea of hardship put forth on behalf of the assessee. Let us assume an assessee applies and obtains approval of a local authority for building a housing project in the previous year relevant to asst. yr. 2002-03. As per the law as it stood in the previous year relevant to asst. yr. 2002-03 up to 2004-05, there was no time-limit within which the construction has to be completed or any restriction regarding commercial area that can be built in a housing project. Let us assume that the assessee complies with all the conditions for

allowing relief under s. 80-16(10), i.e., it is approved as a housing project by the local authority but the area of commercial space as approved by the local authority is more than 2,000 sq. ft. The assessee commences the project but is able to complete only in the previous year relevant to asst. yr. 2005-06. As per the change in law from asst. yr. 2005-06 with regard to the area of commercial space in a housing project the assessee would lose his eligibility to claim deduction. In such cases, there is definitely grave hardship to the assessee. The interpretation sought to be canvassed by the learned Departmental Representative will also lead to absurd situation. Let us assume an assessee obtains approval of a housing project prior to 1st April, 2005 say in previous year relevant to asst. yr. 2002-03. He builds commercial space in excess of 2,000 sq. ft. in the housing project. He follows percentage completion method of accounting and offers profits in asst. yrs. 2002-03 to 2004-05, claims exemption under s. 80-16(10) and is allowed exemption. On the same project in asst. yr. 2005-06, the assessee would not get the benefit of s. 80-16(10). We, therefore, find no grounds to take a view different from the one taken by the Co-ordinate Bench of the Tribunal in the case of Saroj Sales Organisation (supra).

27. We are of the view that we are not supplying any words to the "statute but are only holding that the law as it existed in the asst. yr. 2004-05 when the assessee submitted its proposal for slum rehabilitation and the permission for carrying out the development was accorded on 17th Nov., 2003 and when the assessee commenced development is to be applied. Therefore, the submissions of the learned Departmental Representative in this regard cannot be accepted. We are of the view that the legislature would not have intended to take away a vested right without clear words to that effect in the provisions of s. 80-16(10) as amended by the Finance Act, 2005, w.e.f. 1st April, 2005. We, therefore, hold following the decision in the case of Saroj Sales Organisation (supra) that the law as it existed in the asst. yr. 2004-05 when the assessee submitted its proposal for slum rehabilitation and the permission for carrying out the

development was accorded on 17th Nov., 2003 and when the assessee commenced

28. We have already held that on the issue on what is a housing project and whether -commercial area can be constructed in a housing project and if so constructed whether the assessee would loose exemption under the law as applicable up to asst. yr. 2004-05 has been settled by the Special Bench of Tribunal in the case of Brahma Associates (supra). The AO held the law as amended by the Finance Act, 2005 w.e.f. 1st April, 2005 whereby it was laid down that the built-up area of the shops and commercial establishment included in the housing project should not be more than 5 per cent of the total built-up are of the project or 2,000 sq. ft. whichever is less will apply and, therefore, he had no occasion to apply the test as laid down by the Special Bench referred to above. Since we have held that the law as it existed in the asst. yr. 2004-05 when the assessee submitted its proposal for slum rehabilitation and the permission for carrying out the development was accorded on 17th Nov., 2003 and when the assessee commenced development is to be applied, the assessee to claim deduction under s. 80-IB(10) of the Act has to pass the test laid down by the Special Bench as above. We, therefore, set aside the order of the CIT(A) and remand the issue to the AO for the limited purpose of satisfying himself as to whether the assessee would be entitled to deduction on the profits derived on developing and building housing projects as per the ratio laid down by the Special Bench referred to above, while computing total income and if so to what extent. For statistical purposes, the appeal is treated as allowed.

6. In this case, admittedly the assessee's housing project has been approved prior to 01-04-2005 and hence, clause (d) to sec. 80IB(10) putting the ceiling on the built up commercial area will not apply to the assessee's housing project. We find no reason to interfere with the order of the Ld. CIT(A) on this legal issue giving relief to the assessee and we accordingly, hold that Clause (d) to Sec. 80IB(10) will not apply if the housing project has been sanctioned/approved prior to 01-04-2005 accordingly Ground Nos. 1, 2 & 3 in all the appeals are dismissed."

16. As the facts are identical in this case we, therefore, following the decision in one of the group entities M/s. Kasliwal Developers (supra) confirm the order of the Ld. CIT(A) and Ground Nos. 1 to 3 in all the appeals are dismissed.

17. So far as ground No. 4 is concerned the department has relied on the decision of Hon'ble High Court of Delhi in the case of SSP Aviation Ltd. Vs. DCIT 346 ITR 177 (Del) raising the grievance against the finding of Ld. CIT(A) that as no incriminating material belonged to the assessee was seized hence, the assessment is bad in law. In our opinion, the said ground remained only academic as on merit itself, the law is interpreted in favour of the assessee, more particularly clause (d) to section 80IB(10) which was inserted w.e.f. 01.04.2005. As the assessee has succeeded for getting the relief on merit, the ground No.4 is taken by the revenue is merely academic now and accordingly we dismiss the same.

18. In the result, all the four appeals of the Revenue are dismissed.

Pronounced in the open Court on **31-01-2014**

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Sd/-
(R.S. PADVEKAR)
JUDICIAL MEMBER

RK/PS
Pune, Dated: 31st January, 2014

Copy to

- 1 Assessee
 - 2 Department
 - 3 The CIT(A), Aurangabad
 - 4 The CIT, Aurangabad
 - 5 The DR, ITAT, "A" Bench, Pune.
 - 6 Guard file.
- //True Copy//

By Order

Private Secretary
Income Tax Appellate Tribunal
Pune