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.18, 19 & 20/PN/2013
(Assessment Years : 2007-08, 2008-09 & 2009-10)

Shri Naresh T. Wadhwani,
10/10, PWD, Pimpri,
Pune – 411 017.

PAN : AABPW7203Q .... Appellant

Vs.

Dy. Commissioner of Income Tax,
Central Circle 1(2), Pune. .... Respondent

ITA Nos.60 & 61/PN/2013
(Assessment Years : 2007-08 & 2008-09)

Dy. Commissioner of Income Tax,
Central Circle 1(2), Pune. .... Appellant

Vs.

Shri Naresh Thakurdas Wadhwani,
Office No.9, Umed Bhavan,
Canara Bank Building, Pimpri,
Pune – 411 018.

PAN : AABPW7203Q .... Respondent

Assessee by	:	Mr. V. L. Jain
Department by	:	Mrs. M.S. Verma, CIT-DR
Date of hearing	:	05-09-2014
Date of pronouncement	:	28-10-2014

ORDER

PER G. S. PANNU, AM

These are five appeals, three appeals by the assessee and two appeals by the Revenue. Since all the appeals are relate to the same assessee and involve certain common issues, they have been clubbed a consolidated order is being passed for the sake of convenience and brevity.

2. First, we shall take-up the cross-appeals of the assessee and the Revenue vide ITA No.18/PN/2013 and ITA No.60/PN/2013 respectively which

pertain to the assessment year 2007-08. Both the appeals are directed against the order of the Commissioner of Income Tax (Appeals)-Central, Pune dated 31.10.2012 which, in turn, has arisen from an order dated 27.12.2010 passed by the Assessing Officer u/s 153A r.w.s. 143(3) of the Income-tax Act, 1961 (in short "the Act") pertaining to the assessment year 2007-08.

3. In the appeal of the assessee, the following Grounds of Appeal have been raised :-

> *"1. The learned CIT(A) has erred on facts and in law in confirming the disallowance of claim u/s 80IB(10) of Rs.1,04,36,500/- in relation to the Sai Nisarg Park – Mayureshwar Project on the grounds that 8 units of the Housing Project have a built-up area exceeding 1500 sq.ft. if the area of the terrace open to sky is included.*
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> *2. (a) The learned CIT(A) has further erred on facts and in law in considering the amount of Rs.60 lacs declared as undisclosed receipts against advances from bookings of a project qualifying u/s 80IB(10) as not constituting income eligible for a claim of deduction u/s 80IB(10).*
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> *(b) Without prejudice to the above, the learned CIT(A) has erred on facts and in law in treating the receipts as income without granting a deduction for the payments/expenditure, when both constituted data from the same seized material."*

4. The issue in Ground of Appeal No.1 relates to assessee's claim for deduction u/s 80IB(10) of the Act on account of the profits derived from Sai Nisarg Park - Mayureshwar Project amounting to Rs.1,39,50,823/-.

5. In brief, the relevant facts are that for the assessment year under consideration, assessee undertook a housing project, namely, 'Sai Nisarg Park – Mayureshwar' and in relation to the profits thereof, he claimed deduction u/s 80IB(10) of the Act amounting to Rs.1,39,50,823/-. The Assessing Officer examined the claim of the assessee with reference to the various conditions prescribed in section 80IB(10) of the Act. It was only in relation to the condition prescribed in clause (c) of section 80IB(10) of the Act that the project of the assessee was found to be violative of. The aforesaid stand of the Assessing Officer that the project of the assessee is violative of

the condition prescribed in clause (c) of section 80IB(10) of the Act, which is the subject-matter of controversy before us. Sub-clause (c) of section 80IB(10) of the Act requires that the residential units in the housing project undertaken by the assessee ought to have maximum built-up area of 1000 sq.ft., where such units are located within the city of Delhi and Mumbai and 1500 sq.ft. at any other place. For the purpose of present appeal, the limit on the built-up area prescribed in clause (c) of section 80IB(10) of the Act is 1500 sq.ft., as the project of the assessee is located in the city of Pune.

6. The housing project of the assessee was approved by the local authority on 29.07.2005, and as per the Assessing Officer six residential units i.e. six row houses No. 21, 24, 33, 35, 68 & 75 were having built-up area in excess of 1500 st.ft. as detailed below :-

Building/ Wing Unit Type	*Unit No.*	***Built-up area of the unit (sq.ft.)***	*Projected terrace (open to sky) sq.ft.*	*Total Built-up area*
ROW HOUSES	*21, 24*	***1484.45***	*66.52*	*1550.97*
ROW HOUSES	*33, 35*	***1432.68***	*77.50*	*1510.18*
ROW HOUSES	*68, 75*	***1429.02***	*82.10*	*1511.12*

7. The Assessing Officer computed the built-up area of the aforesaid residential units by invoking the definition of 'built-up area' contained in section 80IB(14)(a) of the Act, which reads as under :-

> *"(14) For the purposes of this section,—*
>
> *[(a) "built-up area" means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units;]"*

8. In terms of the aforesaid definition, the Assessing Officer took into consideration the area comprised of the projected terrace also for the purpose of computing the 'built-up area' prescribed in clause (c) of section 80IB(10) of the Act. The following discussion in the order of the Assessing Officer in para 7.2. is worthy of notice :-

"7.2 So far as the project of the assessee is concerned, the terraces which have been mentioned in the report are outside the building line, attached to respective floors. In that sense these terraces are a projection attached to the residential unit. There is also no room under the terrace. These terraces are usable exclusively from the relative flats. Hence, projected terrace becomes the part of the "Built-up area" of the respective flat. Therefore, the same is required to be taken for working out the "Built-up area" of the respective flats."

9. On the basis of the aforesaid, Assessing Officer concluded that the built-up area of the row houses No. 21, 24, 33, 35, 68 & 75 was in excess of the limit prescribed in clause (c) of section 80IB(10) of the Act. As a result, the Assessing Officer held that the project of the assessee violated the condition prescribed in clause (c) of section 80IB(10) of the Act, and accordingly, he denied the claim of the assessee for deduction u/s 80IB(10) of the Act amounting to Rs.1,39,50,823/-. The aforesaid issue was carried by the assessee in appeal before the CIT(A). The CIT(A) has upheld the stand of the Assessing Officer that the built-up area of the aforesaid six units was violative of the condition prescribed in clause (c) of section 80IB(10) of the Act. However, the CIT(A) held that the deduction u/s 80IB(10) of the Act cannot be denied in its entirety inasmuch as according to him, the profits relatable to the six residential units which violated the condition prescribed in section 80IB(10)(c) of the Act only shall be denied the benefit of section 80IB(10) of the Act. As a result, the CIT(A) while retaining the denial of deduction in relation to the aforesaid six units, allowed pro-rata deduction in respect of profits from the residential units of the project which complied with the requirements of section 80IB(10)(c) of the Act. Thus, assessee was allowed partial relief.

10. Not being satisfied with the order of the CIT(A), assessee as well as the Revenue are in appeal before us by way of the respective Grounds of Appeal. The assessee is in appeal canvassing that the income-tax authorities have wrongly computed the 'built-up area' for the six units in question thereby denying its claim of deduction u/s 80IB(10) of the Act whereas the Revenue in

its Cross-Ground of Appeal Nos. 1, 2 & 3 is aggrieved with the action of the CIT(A) in allowing pro-rata deduction u/s 80IB(10) of the Act in relation to the units which comply with the condition prescribed in clause (c) of section 80IB(10) of the Act. In this background, now we proceed to adjudicate the controversy in the respective appeals.

11. The first and foremost issue to be decided is as to whether the area of projected terrace (open to sky) is liable to be included within the meaning of expression "built-up area" contained in clause (c) of section 80IB(10) of the Act.

12. On this aspect, the stand of the assessee is that the word "terrace" is not includible in the meaning of expression "built-up area" even if one has to go by the definition of the built-up area prescribed in section 80IB(14)(a) of the Act. The learned counsel referred to the decision of the Ahmedabad Bench of the Tribunal in the case of Amaltas Associates vs. ITO, (2011) 131 ITD 142 for the proposition that open terrace, not being a balcony or verandah cannot be considered as a part of the 'built-up area' as defined in section 80IB(14)(a) of the Act. According to the learned counsel, the Ahmedabad Bench of the Tribunal was considering the stand of the Revenue that open terrace was to be considered a part of the 'built-up area'. According to him, the Ahmedabad Bench of the Tribunal considered the definition contained in section 80IB(14)(a) of the Act and opined that the definition of expression 'built-up area' includes a balcony which is not an open terrace. Further, it has also been submitted that a 'terrace' is not to be equated to a 'projection', which is one of the components finding place in the definition of the expression 'built-up area' as per section 80IB(14)(a) of the Act. The learned counsel further clarified that in so far as the present case is concerned, it is a case of terrace (open to sky) which is quite distinct from a balcony. It is asserted that the two terms are independent and for that matter a reference was also made to the

Development Control Rules of the local authority in question i.e. Pimpri Chinchwad Municipal Corporation (PCMC). Further, heavy reliance has also placed on an unreported judgement of the Hon'ble Madras High Court in the case of M/s Ceebros Hotels Private Limited vs. DCIT, vide Tax Case (Appeal) No. 581 of 2008 order dated 19.10.2012, a copy of which was placed on record. The judgement of the Hon'ble Madras High Court has been relied upon to support the proposition that the area of an open terrace is liable to be excluded from the working of the built-up area of the unit. It is also contended that the Hon'ble Madras High Court has further followed the aforesaid judgement in its latter judgement in the case of CIT vs. Sanghvi and Doshi Enterprise, (2013) 255 CTR 156 (Mad.).

13. On the other hand, the learned CIT-DR has vehemently submitted that open terrace which is a subject-matter of controversy was a private terrace which was available for use of the owner of the unit to the exclusion of others. The learned CIT-DR has emphasized that in the present case the housing project of the assessee is comprising of independent row houses built on a Duplex model and it is not a case of multi-storey building having independent flats. It was, therefore, contended that the aforesaid distinction has to be borne in mind while appreciating the meaning of expression 'built-up area' contained in section 80IB(14)(a) of the Act. Nevertheless, the learned CIT-DR has relied upon the following decisions : (i) Hyderabad Bench of the Tribunal in the case of Modi Builders & Realtors (P.) Ltd., (2011) 12 taxmann.com 129 (Hyd.); and, (ii) Mumbai Bench of the Tribunal in the case of Siddhivinayak Homes, Mumbai vs. Department of Income Tax on 28 September, 2012, vide ITA No.8726/Mum/2010 order dated 26.09.2012, for the proposition that all projections and elevations at the floor level are liable to be included in the definition of 'built-up area' for the purposes of examining the condition prescribed in clause (c) of section 80IB(10) of the Act. The learned CIT-DR also raised an issue that the built-up area for the purposes of clause (c) of

section 80IB(10) of the Act has to be understood in the light of what has been sold by the assessee builder to the respective customers. According to the learned CIT-DR, though the said aspect is not emerging from the orders of the authorities below, so however, the built-up area as understood for the purposes of sale-purchase between builder and the ultimate buyer can also be relevant factor to consider as to what all areas are to be considered as a part of the expression 'built-up area' contained in clause (c) of section 80IB(10) of the Act.

14. We have carefully considered the rival submissions. Section 80IB(10) provides for deduction in relation to profits derived from undertaking development and building of a housing project subject to certain conditions prescribed therein. One of the foremost condition is contained in clause (a) of section 80IB(10) of the Act which is to the effect that the housing project eligible for the claim of deduction shall be approved by the local authority. The assessee before us is a builder who has undertaken development and construction of a housing project, named, 'Sai Nisarg Park – Mayureshwar' and the said project has been approved by the concerned local authority i.e. PCMC on 29.07.2005 and undisputedly it complies with the requirement of clause (a) to section 80IB(10) of the Act. There are other conditions prescribed in section 80IB(10) by way of clauses (b) to (f) of the Act, so however, the only controversy before us revolves around the condition prescribed in clause (c) of section 80IB(10) of the Act. As per clause (c) of section 80IB(10) of the Act, the maximum built-up area of the residential units comprised in the eligible housing project shall not exceed 1000 sq.ft. where such units are situated within city of Delhi and Mumbai or within 25 km. from the Municipal limit of such cities and in other places the prescribed limit is 1500 sq.ft.. The housing project of the assessee before us is located within the Municipal limits of PCMC and therefore in terms of clause (c) of section 80IB(10) of the Act, the maximum built-up area of the residential unit is capped

at 1500 sq.ft.. The dispute before us is with regard to six residential units, which have been detailed by us earlier, wherein as per the Assessing Officer, the individual built-up area exceed 1500 sq.ft.. The working of built-up area done by the Assessing Officer is sought to be resisted by the assessee and the bone of contention is whether or not to include the area of projected terrace (open to sky) for computing the built-up area of the respective units.

15. The Finance (No.2) Act, 2004 inserted the definition of built-up area w.e.f. 01.04.2005 in terms of section 80IB(14)(a) of the Act. In terms of the said definition, built-up area means the inner measurement of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units. On the strength of the aforesaid definition, the claim of the Revenue is that the terraces in question are projections attached to the respective residential units and also that there is no room under the area of the terrace and such terraces are exclusively used by the respective unit owners. In other words, as per the Revenue the projected terrace falls within the meaning of words 'projections' and 'balconies' contained in section 80IB(14)(a) of the Act and the same is not a common area shared with other residential units and in this manner, in terms of section 80IB(14)(a) of the Act, such an area is liable to be included in the expression 'built-up area'.

16. In so far as the applicability of the definition of built-up area inserted by Finance (No.2) Act, 2004 w.e.f. 01.04.2005 is concerned, it is quite clear that the same is applicable for ascertaining the fulfillment of condition prescribed in clause (c) of the Act in relation to the present project, since the project of the assessee has been approved by the local authority on 29.07.2005 i.e. after the definition of built-up area contained in section 80IB(14)(a) of the Act came into force w.e.f. 01.04.2005. Therefore, in the present case, it is imperative that

the meaning of expression 'built-up area' is to be understood having regard to its definition contained in clause (a) of section 80IB(14) of the Act.

17. The Hon'ble Madras High Court in the case of M/s Ceebros Hotels Private Limited (supra) was considering the following question of law :-

> *"Whether on the facts and in the circumstances of the case, the Tribunal was correct in including the open space of the terrace of the 7th floor, within the meaning of the 'built-up area', which has been defined to include the inner measurements of the residential unit at the floor level including the projections and balconies as increased by the thickness of the walls but does not include the common areas shared with other residential units?"*

18. A bare perusal of the aforesaid question of law before the Hon'ble Madras High Court would reveal that the issue related to whether open space of the terrace would fall within the expression 'built-up area'. The facts before the Hon'ble High Court were that assessee had constructed various apartment blocks and each block had 64 apartments. The apartments located at first to sixth floor were of areas less than 1500 sq.ft.. However, the flats located on the 7th floor had the advantage of exclusive open terrace. While considering the relief u/s 80IB(10) of the Act, the Assessing Officer took into consideration the area of such exclusive/private open terrace as a part of the built-up area of the units located at the 7th floor. After considering the above aspect, the built-up area of the flats located at the 7th floor exceeded 1500 sq.ft. and hence the Assessing Officer held that the condition prescribed in clause (c) of section 80IB(10) of the Act was not fulfilled. The said position taken by the Assessing Officer was upheld right up to the Tribunal. However, the Hon'ble High Court disagreed with the stand of the Revenue and held that such open terrace would not be includible in the calculation of 'built-up area' for the purpose of examining the condition prescribed in clause (c) of section 80IB(10) of the Act. In this view of the matter, the aforesaid judgement of the Hon'ble Madras High Court and which has been further affirmed in a subsequent decision in the case of Sanghvi and Doshi Enterprise (supra), covers the issue before us.

19. However, in the course of hearing, the learned CIT-DR attempted to distinguish the judgement of the Hon'ble High Court by pointing out that the same related to assessment year 2003-04, a period during which the definition of 'built-up area' contained in section 80IB(14)(a) of the Act was not on the statute and also the fact that the housing project under consideration of the Hon'ble High Court was approved by the concerned local authority prior to 01.04.2005 i.e. prior to the date when the definition of 'built-up area' was brought on the statute by way of section 80IB(14)(a) of the Act.

20. We have carefully perused the judgement of the Hon'ble Madras High Court and find that though the Hon'ble High Court was considering a project approved prior to 01.04.2005 yet it has taken into consideration the definition of 'built-up area' contained in section 80IB(14)(a) of the Act, which was inserted w.e.f. 01.04.2005. As per the Hon'ble High Court even after assuming that such definition was to be retrospectively applied yet the area of open terrace would not fall within the meaning of the expression 'built-up area'. The Hon'ble High Court referred to the Indian Standard Method of Measurement of Plinth, Carpet and Rentable Areas of Buildings as issued of Bureau of Indian Standards and also the meaning of the aforesaid expression assigned as per the rules and regulations of the local authority and concluded that an open terrace could not be equated to a 'projection' or 'balcony' referred to in section 80IB(14)(a) of the Act. The relevant discussion in the order of the Hon'ble High Court is reproduced hereinafter :-

> *"31. As far as the introduction of definition portion in Section 80-IB(14) w.e.f. 01.04.2005 is concerned, even assuming that the definition Section has retrospective effect, we do not think that the definition given under Section 80-IB (14) would in any manner prejudice the claim of the assessee herein, for the definition given under Section 80-IB (14) does not appear to go against what has been defined to include the measurement of the plinth area of building under the Building Regulations and Indian Standard Method of Measurement of Plinth, Carpet and Rentable Areas of Buildings as issued by Bureau of Indian standard. Since, Clause 4.1.2 clearly excludes open terrace for plinth area and what is included in Clause 4.1.1. is as stated in Clause (d), which reads as under :*
>
> *"e) In case of open verandah with parapats:*

1) 100 percent areas for the portion protected by the projections above, and

2) 50 percent, area for the portion unprotected from above."

Revenue does not dispute the fact that the open terrace is not a project-ion like a balcony to fit in with the definition under Section 2.4 of Indian Standard Method of Measurement of Plinth, Carpet and Rentable Areas of Buildings as issued by Bureau of Indian Standard.

32. Thus, going by the definition under Indian standard Method of Measurement of Plinth, Carpet and Rentable Areas of Buildings, even by making a reference to the definition of "Built-up area" under Sub-Section 14 (a) as applicable to the year under Consideration, we do not find any justifiable ground for the Revenue to include the open terrace as part of the built-up area. This we say for the reason that as already pointed out, Sub-Section 10 of Section 80-IB of Income Tax Act contemplates grant of deduction only in respect of projects, which are approved by the Local Authority, in which event, an understanding that one has to give to the definition of "Built-up area" including the projections and balcony must, necessarily go along with the understanding placed on such expressions as per the relevant Regulation of the statutory authority under the Development Control Rules. In any event, even taking the definition as giving a different meaning, the same cannot control the substantive provision which contemplates deduction to projects approved by the Local Authority, the approval being as per the Regulations and Rules of the Local Authority. In such circumstances, we reject the contention of the Revenue and thereby, we agree with the view expressed by the assesses.

33. Learned Senior Counsel for the assessee placed reliance on the unreported decision of the Bombay High Court in Income Tax Appeal No.3315 of 2010 (The Commissioner of Income Tar, vs. M/s.Tinnwala Industries), dated 13.04.2012. A reading of the decision of the Bombay High Court shows that the issue raised therein related to the Assessment Year 2004-2005. Similar contention raised before the Court was taken before the Bombay High Court too. Holding the view that the expression "Built-up area" in a Housing Project approved by the Local Authority does not include the balcony area for the period prior to 1st April 2005, the Bombay High Court held that when the Legislature has introduced the definition of "Built-up area" by including the balcony area from a particular date, then, the same could not be applied retrospectively.

34. In the decision reported in [2012] 21 Taxmann.com 140 (Karnataka), Commissioner of Income Tax, Central circle vs. Anriya Project Management (Services) Private Limited, rendered by Karnataka High Court, a similar such question was considered. The Karnataka High Court pointed out that prior to 01.04.2005, open balcony area have to be excluded in calculating the built-up area. The Karnataka High Court further pointed out as the Project was approved by 14.06-2002 arid the balcony ware shown, but, were excluded in the built-up area, the Income Tax Authority cannot add Balcony as built-up area and deny the benefit to the assesses.

35. The Karnataka High Court further pointed out that as per Section 80-IB (10), the Housing project must be one approved by a local authority. In respect of the approval obtained prior to 01.04.2005, if Sub-Section 14 (a) of Section 80-IB has to be held applicable, then, the assesses has to necessarily seek for a modified plan. Once, a valid approval is obtained and the building is constructed in all respects prior to 01.04.2005, then, the

assesses would be entitled to the benefit of Section 80-IB. This is irrespective of the date of sale, that is, even if it is subsequent to 01.04.2005, the assesses has to have the benefit of Section 80-IB. As far as the introduction of definition of "Built-up area" in Subjection 14 {a) of Section 80-IB, under Finance (No.2) Act, 2004 is concerned, the Karnataka High Court held that having regard to the fact that they came into force from 01.04.2005, the same will have relevance to those Housing Projects, which were approved subsequent to 01.04.2005.

36. We agree with the views expressed in the unreported decision of Bombay High Court in Income Tax Appeal. No. 3315 of 2010 (The Commissioner of Income Tax vs. M/s.Tinnwala Industries), dated 13.04.2012 and the decision of Karnataka High Court reported in [2012] 21 Taxmann.com 140 (Karnataka), Commissioner of Income Tax, Central Circle vs. Anriya Project Management (Services) Private Limited, that Section 80-IB (14) defining 'Built-up area' will have relevance on and from 01.04.2005. Apart from this, we have also held in the preceding paragraphs that going by the substantive part of Section 80-IB (10), what is required for grant of deduction is a Housing Project approved by the Local Authority. That being the case, the definition of "Built-up area", has to have the same meaning as has been given in the Development Control Rules, Otherwise, the substantive part in Section 80-IB referring to the Approval by the Local Authority becomes meaningless for the purpose of deduction under Section 80-IB (10) and the approval for the purpose of Section 80-IB has to emanate from the Income Tax Act, We do not think the Act contemplates such exercise also by the Revenue. Given the fact that contemplation of deduction is to Housing Projects approved by the Local Authority, we hold that once the Local Authority have excluded open terrace from the working of Built-up area, it is not open to the Revenue to review the approval given by the competent authority to hold that terrace would also be included in the built-up area. As already held the definition also does not speak in different language from what is given in the measurement provision of Bureau of Indian Standard in the context of the definition of Balcony in the Indian Standard.

37. In the circumstances, we have no hesitation in allowing the assessee's appeal, by setting aside the order of the Tribunal. Thus, we hold that the assessee is entitled to deduction in respect of flats in the 7th floor, which do not exceed the required extent as per Section 80-IB (10)(c) that open terrace area, cannot form part of the built-up area."

21. Notably, the Hon'ble High Court also considered an argument from the side of the Revenue to the effect that the sale of the area of open terrace by the assessee to the respective purchaser would justify the inclusion of such terrace area into the calculation of 'built-up area'. Before us also, the learned CIT-DR has raised the said issue though she has fairly conceded that such a finding was not emerging from the orders of the lower authorities. Be that as it may, the Hon'ble High Court has noted and dealt with the said argument in the following words :-

"29. Thus, in the face of terrace being an open area, not being a projection and hence, not included in the plinth area, the question herein is as to whether the Tribunal is justified in confirming the order of assessment to include the terrace area into the built-up area solely by reason of the fact that the assessee had sold it to purchasers of the 7th floor as a private terrace.

30. We do not think, the Tribunal is justified in taking the view that open terrace would form part of the built-up area for the purpose of sub-clause (c) of section 80-IB(10). As already seen in the preceding paragraphs, an assessee having an Approved Plan project alone has the right to claim deduction under section 80-IB. Any project undertaken not approved by the Local Authority is outside the purview of the Act. Thus, when a Local Authority, endowed with the jurisdiction to grant the approval is guided in its approval by Regulation as to what constitutes the plinth area, which is the built-up area, it is difficult for us to agree with the contention of the Revenue as well as the reasoning of the Tribunal that for the purpose of considering the claim under section 80-IB, the built-up area would be different from what has been given approval by the Local Authority, on a building project. Given the fact that during 2003-04 there was no definition at all on what a built-up area is, the understanding of the Revenue, which is evidently contrary to the approval of the Local Authority based on the Rules and Regulations could not be sustained. Consequently, we have no hesitation in agreeing with the assessee's contention that open terrace area, even if be private terrace, cannot form part of the built-up area."

22. As per the Hon'ble High Court, terrace area would not form part of the built-up area by the reason of the fact that assessee sold it to the purchaser as a private terrace. At this stage, we may also point out that there is nothing in section 80IB(14)(a) of the Act to suggest that the factum of the terrace being available for exclusive use of the respective unit owner is a ground to consider it as a part of 'built-up area' for the purposes of clause (c) of section 80IB(10) of the Act. Thus, the argument of the learned CIT-DR is hereby rejected.

23. In view of the aforesaid judgement of the Hon'ble Madras High Court, we are unable to uphold the stand of the Assessing Officer to include area of terrace as a part of the 'built-up area' in a case where such terrace is a projection attached to the residential unit and there being no room under such terrace, even if the same is available exclusively for use of the respective unit-holders.

24. Before parting, we may also refer to the decisions of the Mumbai Bench of the Tribunal in the case of Siddhivinayak Homes, Mumbai (supra) and that

of the Hyderabad Bench of the Tribunal in the case of Modi Builders & Realtors (P.) Ltd. (supra) which have been relied upon by the learned CIT-DR in support of her submissions. The Mumbai Bench of the Tribunal was considering as to whether the projections/elevations which were at the floor level and could be utilized as a carpet area were to be considered for the purposes of computing built-up area or not. The Mumbai Bench of the Tribunal was considering a project which was approved on 19.07.2003, much before the insertion of section 80IB(14)(a) of the Act by the Finance (No.2) Act, 2004 w.e.f.01.04.2005. The following observations of the Tribunal have emphasized by the learned CIT-DR :-

> *"20. Now coming to the issue as to whether balconies and projections are to be included in the built-up area, we observe that the Ld. CIT(A) has rightly stated that when the projections/elevations are just have 4", 3", 5" and 7" of the floor level, they implies that there are extended area and can be utilized as carpet area. Not only this, Ld. CIT(A) has also stated that the booking confirmation/ particulars sheets that are made at the time of booking the flats give the exact area that is sold to the buyers and the books impounded and inventoried also give the picture to the actual area sold, and this includes all projections and other common areas. Therefore, we agree with Ld. CIT(A) that the said extended area of projections/elevations/balconies are to be included while measuring all the flats and, accordingly, Ld. CIT(A) has rightly held that area of some of the flats exceeded the prescribed limit of 1000 sq.ft.. We also agree that sub-section (14)(a) as inserted by Finance (No.2) Act, 2004 w.e.f. 01.04.2005 is only clarificatory in nature particularly the said definition will be applicable to the assessment year under consideration as the projects are admittedly completed in F.Y.2006-07, and, therefore, the cases cited by Ld. A.R. (supra) are not relevant to the facts of the case before us. Hence, we hold that authorities below have rightly held that assessee is not entitled for deduction in respect of the flats u/s 80IB of the Act."*

25. A perusal of the aforesaid would reveal that the Tribunal has considered the definition of built-up area inserted by the Finance (No.2) Act, 2004 w.e.f. 01.02.2005 on the ground that it is applicable to the assessment year before them which was 2007-08 because the project was completed during the said assessment year, even though the project was approved prior to 01.04.2005. Secondly, the Tribunal also noted that the disputed projections were considered as a saleable area when assessee sold the flats. In our considered opinion, the decision of the Mumbai Bench of the Tribunal has been rendered on its own peculiar facts. Apart therefrom, it

would be also worthwhile to note that the Hon'ble Madras High Court in the case of M/s Ceebros Hotels Private Limited (supra) followed a judgement of the Hon'ble Karnataka High Court in the case of CIT vs. Anriya Project Management (Services) Private Limited, (2012) 21 taxmann.com 140 (Karnataka) and held that the introduction of definition of 'built-up area' in section 80IB(14)(a) of the Act came into force from 01.04.2005 and *"the same will have relevance to those Housing Projects, which were approved subsequent to 01.04.2005"*. The aforesaid view rendered by the Hon'ble Madras and Karnataka High Courts is divergent to what has been concluded by the Mumbai Bench of the Tribunal to the effect that the definition contained in section 80IB(14)(a) of the Act is applicable to assessment year 2007-08 though the project was approved prior to 01.04.2005. In view of the ratio of the decision of the Mumbai Bench of the Tribunal being divergent to that held by the Hon'ble Madras High Court in the case of M/s Ceebros Hotels Private Limited (supra), we are unable to apply it in preference to that of the Hon'ble Madras High Court, which is a superior authority.

26. Secondly, reliance has been placed by the learned CIT-DR on the decision of the Hyderabad Bench of the Tribunal in the case of Modi Builders & Realtors (P.) Ltd. (supra) to submit that the 'built-up area' would include a portico and balcony. Factually speaking, the Hyderabad Bench of the Tribunal was considering the inclusion or otherwise of area comprised by balcony and portico which is quite distinct from the controversy before us. Moreover, in view of the judgement of the Hon'ble Madras High Court which is a superior authority than a Tribunal, the parity of reasoning laid down by the Hon'ble High Court is liable to be followed.

27. Considered in the above background, we conclude by holding that the Assessing Officer and thereafter the CIT(A) has erred in including the area of projected terrace (open to sky) for the purposes of computing 'built-up area'

while examining the condition prescribed in clause (c) of section 80IB(10) of the Act. Once the area of projected terrace (open to sky) is excluded then there is no dispute that the residual built-up area of six units in question falls within the prescribed limit of 1500 sq.ft.. As a result, we hold that assessee fulfills the condition prescribed in clause (c) of section 80IB(10) of the Act with regard to the six units in question. Therefore, we set-aside the order of the CIT(A) and direct the Assessing Officer to consider that the six units in question fulfill the condition prescribed in clause (c) of section 80IB(10) of the Act, and the assessee is entitled to the benefit of section 80IB(10) of the Act.

28. Thus, on this aspect, assessee succeeds in Ground of Appeal No.1. In so far as the cross-appeal of the Revenue is concerned by way of Ground of Appeal Nos. 1 to 3, Revenue has challenged the action of the CIT(A) in allowing pro-rata deduction u/s 80IB(10) of the Act in relation to the units which fulfilled the condition prescribed in clause (c) of section 80IB(10) of the Act.

29. Quite clearly in the assessee's appeal, we have considered the dispute regarding the inclusion of the open terrace into the working of the built-up area for the purposes of clause (c) of section 80IB(10) of the Act. The issue has been held in favour of the assessee and therefore it is no longer necessary for us to consider the issue arising in the appeal of the Revenue separately. Ostensibly, assessee has been found to have fulfilled the condition prescribed in clause (c) of section 80IB(10) of the Act even in relation to six units in question and therefore the entire project of the assessee is eligible for deduction u/s 80IB(10) of the Act. In such circumstances, we reject the Grounds of Appeal No.1 to 3 raised by the Revenue.

30. Now, we take-up the Ground of Appeal No.2 in the appeal of the assessee for assessment year 2007-08. The said Ground relates to

assessee's claim for deduction u/s 80IB(10) of the Act in respect of an income of Rs.60,00,000/- declared by the assessee in the course of search conducted u/s 132(1) of the Act.

31. The relevant facts in the context of the above controversy can be summarized as follows. The assessee individual is a part of Wadhwani group of cases, which was subject to a search and seizure action by the Department u/s 132 of the Act on 13.08.2008. In the course of search, certain incriminating material and information was found. Some of the entities in the group were also simultaneously covered by survey actions u/s 133A of the Act. The group was found to be dealing in purchase and sale of land, development of land, etc. on a very large scale basis. In the course of search and seizure action, undisclosed income amounting to Rs.7 crores was disclosed on account of unaccounted receipts and payments for the various real-estate projects undertaken by assessee and other group entities. In para 8.2 of the assessment order, the Assessing Officer has enumerated the details of the entities and the respective years for which the assessee group made the aforesaid declaration of undisclosed income of Rs.7 crores. For the present, we are concerned with the declaration of Rs.60,00,000/- made by the assessee for the assessment year under consideration in respect of the project, Sai Nisarg Park – Mayureshwar, which was undertaken by the assessee though his proprietary concern, M/s Mangalmurti Developers. The said undisclosed income was stated to be the amounts received from the customers on sale of flats in the housing project, Sai Nisarg Park - Mayureshwar, which was not recorded in the regular books of account. However, the Assessing Officer noted that such additional income of Rs.60,00,000/- declared in the course of search was not disclosed in the return of income filed. On being show-caused, assessee contended that such receipts were duly reflected in the return of income filed in response to notice issued u/s 153A(a) of the Act, as such undisclosed receipt were recognized as

income; and, since the income was relating to a housing project which was eligible for the claim of deduction u/s 80IB(10) of the Act, such additional income was also considered as exempt u/s 80IB(10) of the Act. In other words, the assessee claimed deduction u/s 80IB(10) of the Act even in relation to the additional income declared on account of the unaccounted receipts from the customers on sale of flats in Sai Nisarg Park - Mayureshwar undertaken by his proprietary concern, M/s Mangalmurti Developers. The Assessing Officer and thereafter the CIT(A) have denied the claim of deduction u/s 80IB(10) of the Act in relation to such income, which is a subject-matter of dispute before us.

32. In the course of hearing, the learned counsel for the assessee has emphasized the fact-position, which is to the effect that the additional income in question was on account of money received in cash against sale of flats in the housing project; and, thus it constituted profits of the housing project, which was eligible for section 80IB(10) benefits. In support of his assertions, a reference has been made to para 8.13 of the assessment order, wherein the Assessing Officer has tabulated the entries found noted in the seized material, which showed the respective projects and the amounts received from different customers. Furthermore, a reference has also been made to an order passed by the Assessing Officer for the impugned assessment year u/s 154 of the Act dated 18.04.2011, wherein the impugned sum of Rs.60,00,000/- has been accepted as undisclosed receipts from the customers on sale of flats relating to the housing project in question, a copy of the said order has been placed at pages 24 to 31 of the Paper Book. On the basis of the aforesaid fact-situation, the plea of the assessee is that the income in question was nothing but undisclosed sale proceeds received from customers of the Sai Nisarg Park - Mayureshwar; and, therefore the same was to be treated as 'business income' relating to the housing project, which is eligible for section 80IB(10) benefits. Thus, such additional income was also entitled to the benefits of section

80IB(10) of the Act. In support of his submissions, the learned counsel has relied upon the judgement of the Hon'ble Bombay High Court in the case of CIT vs. Sheth Developers (P) Ltd., 254 CTR 127 (Bom).

33. On the other hand, the learned CIT-DR has opposed the prayer of the assessee by pointing out that the impugned income was declared during the course of search as 'undisclosed income' and thus it was to be taxed as income from 'other sources', which is not eligible for section 80IB(10) benefits. Moreover, as per the learned CIT-DR, onus is on the assessee to establish that such undisclosed income was eligible for deduction u/s 80IB(10) of the Act, which the assessee has failed to do. In the course of her submissions, reliance has been placed on the decision of the Chandigarh Bench of the Tribunal in the case of Liberty Plywood (P.) Ltd. vs. ACIT, (2013) 140 ITD 490 (Chandigarh).

34. We have carefully considered the rival submissions. Factually speaking, it is quite evident that in the course of his deposition u/s 132(4) of the Act on 14.08.2008, assessee declared certain additional incomes for various assessment years, which were hitherto not forming part of the income declared in the regular books of account. The Assessing Officer has further noted that vide a written communication dated 23.09.2008, during post-search enquiries, assessee furnished a bifurcation of the additional income of Rs.7 crores, which was admitted by him in the statement recorded during the course of search u/s 132(4) of the Act on 14.08.2008. The details of such declaration has been tabulated in para 8.2 of the assessment order. A perusal of such details read alongwith the subsequent order passed u/s 154 of the Act dated 18.04.2011 by the Assessing Officer clearly reveals that various loose papers/diaries found and seized during the course of search indicated that assessee was indulging in accepting money in cash against sale of flats/shops in the project undertaken by him; and, such amounts were not reflected in the

regular books of account. Pertinently, it has been accepted by the Assessing Officer that the impugned sum of Rs.60,00,000/- comprises of undisclosed receipts received from customers against the sale of flats in the project, Sai Nisarg Park - Mayureshwar, which has been undertaken by assessee through his proprietary concern, M/s Mangalmurti Developers; and, that the receipts pertain to the assessment year under consideration. In-fact, the tabulation made by the Assessing Officer in para 8.13 of the assessment order which is stated to be based on the seized material, reveals the names of the customers, the date and the amounts received in relation to the housing project, Sai Nisarg Park - Mayureshwar undertaken by the proprietary concern, M/s Mangalmurti Developers. A copy of the deposition made by the assessee u/s 132(4) of the Act has also been placed in the Paper Book at pages 189 to 214, which also supports the aforesaid fact-situation. Therefore, considering the (i) material seized in the course of search; (ii) deposition made by the assessee in the course of search u/s 132(4) of the Act; and, (iii) findings of the Assessing Officer in the assessment order passed u/s 153A(a) r.w.s. 143(3) of the Act dated 27.10.2010 (especially paras 8.2, 8.4 and 8.13) read with order u/s 154 dated 18.04.2011 (supra), it would be appropriate to deduce that the source of the impugned additional income is the housing project, Sai Nisarg Park - Mayureshwar, which has been executed by the assessee in his proprietary concern, M/s Mangalmurti Developers. In other words, factually speaking, the income represented by the impugned sum of Rs.60,00,000/- has been earned by the assessee in the course of development and execution of housing project, Sai Nisarg Park - Mayureshwar, though such income was hitherto not reflected in the regular books of account. Further, there is no dispute to the fact-situation that the profits of the Sai Nisarg Park – Mayureshwar project undertaken by the assessee are entitled to the benefits of section 80IB(10) of the Act.

35. In the above background, the moot question is whether such additional income declared in the course of search is eligible for the benefits of section 80IB(10) of the Act, especially when the relevant project is otherwise eligible for the benefits of section 80IB(10) of the Act.

36. In this context, it was a common point between the parties that an identical controversy has been considered by the Pune Bench of the Tribunal in the case of M/s Malpani Estates vs. ACIT vide ITA Nos.2296 to 2298/PN/2012 vide order dated 30.01.2014. The relevant discussion in the order of the Tribunal dated 30.01.2014 (supra) is reproduced hereinafter to facilitate appreciation of reasoning that prevailed with the Tribunal to allow the claim of assessee therein :-

> *"10. In the present case, it is not in dispute that the assessee has derived income from undertaking a housing project, 'The Crest' at Pimple Saudagar, Pune, which is eligible for section 80IB(10) benefits. In the return of income originally filed u/s 139(1) of the Act, assessee had claimed deduction u/s 80IB(10) of the Act in relation to the profits derived from the said housing project and the same stands allowed even in the impugned assessment which has been made u/s 153A(1)(b) of the Act as a consequence of a search action u/s 132(1) of the Act.*
>
> *11. In the course of search, in a statement deposed u/s 132(4) of the Act, assessee declared certain additional income pertaining to the housing project in question. The additional income declared was on account of on-money received from the customers to whom flats were sold in the said project. At the time of hearing, learned counsel referred to the copy of statement recorded u/s 132(4) of the Act of Shri Rajesh Malpani, a partner of the assessee firm and also copies of some of the seized papers, which indicated receipt of on-money, and the same have placed in the Paper Book at pages 35 to 52. A perusal of the seized material shows that a complete detail of that on-money received is enumerated, viz. name of the customers, amount and the respective flat sold in the project. Even in the deposition made u/s 132(4) of the Act, the partner of the assessee firm made a yearwise detail of additional income declared on account of on-money received on sale of flats in the project. Accordingly, the impugned sum has been declared as unaccounted income from the housing project in question. In the return of income filed in response of notice issued u/s 153A(1)(a) of the Act, assessee has declared such additional income as income from housing project, 'The Crest' at Pimple Saudagar, Pune. The declaration made in the return of income has not been disputed by the Assessing Officer. The only dispute raised by the Assessing Officer is with regard to nature of such income, which according to the Assessing Officer "does not fall under of the any heads of income as described u/s 14 of the I.T. Act". In coming to such conclusion, he has disagreed with the stand of the assessee that such additional income was a 'business income' of the assessee relating to the housing project, 'The*

Crest' at Pimple Saudagar, Pune. However, as per the CIT(A), the income in question is assessable under the head 'income from other sources'. Ostensibly, the CIT(A) has not agreed with the inference of the Assessing Officer that the impugned income does not fall under any heads of income u/s 14 of the Act because according to her such income is liable to be assessed under the head 'income from other sources. Thus, as of now, before us the inference of the Assessing Officer does not survive any longer since the order of the Assessing Officer has merged in the order of the CIT(A) and in any case the Revenue is not in appeal on this aspect. Be that as it may, factually speaking, it cannot be denied that the additional income in question relates to the housing project, 'The Crest' at Pimple Saudagar, Pune undertaken by the assessee. The material seized in the course of search; the deposition made by the assessee's partner during search u/s 132(4) of the Act; and, also the return of income filed in response to notice issued u/s 153A(1)(a) of the Act after the search, clearly show that the source of impugned additional income is the housing project, 'The Crest' at Pimple Saudagar, Pune. The aforesaid material on record depicts that the impugned income is nothing but unaccounted money received by the assessee from customers on account of sale of flats of its housing project, 'The Crest' at Pimple Saudagar, Pune. Clearly, the source of the additional income is the sale of flats in the housing project, 'The Crest'. Therefore, once the source of income is established the assessability thereof has to follow. The nature of income, thus on facts, has to be treated as 'business income' albeit, the same was not accounted for in the account books. In this manner, we are unable to accept the stand of the Assessing Officer or of the CIT(A) that the said income is not liable to be taxed as 'business income'.

12. Now, coming to the point as to whether such 'business income' qualifies to be eligible for deduction u/s 80IB(10) of the Act in the course of an assessment made u/s 153A(1)(b) of the Act. On this aspect, the learned Departmental Representative submitted that the assessment in cases of search action or requisition are made u/s 153A or 153C of the Act in order to assess undeclared incomes and such provisions are for the benefit of the Revenue and therefore a claim u/s 80IB(10) of the Act cannot be considered in such proceedings, especially when such a claim was not made in the return of income originally filed under section 139 of the Act. In this regard, the learned Departmental Representative has referred to the judgment of the Hon'ble Supreme Court in the case of CIT vs. Sun Engineering Works Pvt. Ltd., 198 ITR 297 (SC) to point out that even in the cases of re-assessment u/s 147/148 of the Act fresh claims cannot be raised by the assessee. Secondly, it is pointed out by the learned Departmental Representative that even if the claim was to be considered then it was not allowable because the requisite condition that the return of income has to be accompanied by the prescribed audit report has not been complied with by the assessee. On the basis of aforesaid reasons, the claim of the assessee has been opposed.

13. Sections 153A to 153C of the Act contain provisions relating to assessments to be made in cases where search is initiated u/s 132 or a requisition is made u/s 132A of the Act after 31st May, 2003. Clause (b) of sub-section (1) of section 153A postulates assessment or re-assessment of total income of six assessment years preceding the assessment year relevant to the previous year in which such search is conduced or requisition is made. Shorn of other details, it would suffice for us to notice clause (i) of the Explanation below section 153A(2) of the Act, which reads as under :-

"Explanation. – For the removal of doubts, it is hereby declared that, -

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section."

14. In terms of the above referred clause (i) of the Explanation, it is evident that all the provisions of the Act shall apply to an assessment made u/s 153A of the Act save as otherwise provided in the said section, or in section 153B or section 153C of the Act. In the background of the expression "all other provisions of this Act shall apply" contained in Explanation (i) below section 153A of the Act, and in the context of the controversy before us, the moot point to be examined is as to whether or not deductions enumerated in Chapter VIA of the Act are to be considered in making an assessment made u/s 153A(1)(b) of the Act. Section 153A(1)(b) of the Act requires the Assessing Officer to assess or reassess the 'total income' of the assessment years specified therein. Ostensibly, section 80A(1) of the Act prescribes that in computing the 'total income' of an assessee, there shall be allowed from his 'total income' the deductions specified in Chapter VIA of the Act. The moot point is as to whether the aforestated position prevails in an assessment made u/s 153A(1)(b) or not? In our considered opinion, having regard to the expression "all other provisions of this Act shall apply to the assessment made under this section" in Explanation (i) of section 153A of the Act, it clearly implies that in assessing or reassessing the 'total income' for the assessment years specified in section 153A(1)(b) of the Act, the import of section 80A(1) of the Act comes into play, and there shall be allowed the deductions specified in Chapter VIA of the Act, of course subject to fulfillment of the respective conditions. Therefore, we are unable to subscribe to the stand of the CIT(A) to the effect that the benefits of Chapter VIA of the Act, which inter-alia include section 80IB(10) of the Act, are not applicable to an assessment made under sections 153A to 153C of the Act. In our considered opinion, the phraseology of section 153A r.w. Explanation (i) as noted above, does not support the premise arrived at by the CIT(A) and accordingly, the same is rejected. Therefore, assessee's claim for deduction u/s 80IB(10) of the Act even with regard to the enhanced income was well within the scope and ambit of an assessment u/s 153A(1)(b) of the Act and the Assessing Officer was obligated to consider the same as per law.

15. The other argument of the Ld. CIT-DR to the effect that the return of income was not accompanied by the prescribed audit report on the enhanced claim of deduction is too hyper-technical, and superficial. Pertinently, the Assessing Officer has not altogether denied the claim of deduction and in any case, the claim was initially made in the return originally filed, which was duly accompanied by the prescribed audit report.

16. The argument set-up by the learned Departmental Representative on the basis of the judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra), in our view, is also untenable having regard to the facts of the present case. No doubt the Hon'ble Supreme Court has observed that reopening of an assessment u/s 147/148 is for the benefit of the Revenue. In the case before the Hon'ble Supreme Court, assessee wanted to set-off loss against the escaped income which was taxed in the re-assessment proceedings and the claim of such set-off was not made in the return of income originally filed. According to the Hon'ble Supreme Court, the claim was not entertainable because the said claim not connected with the assessment of escaped income. In-fact, the judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra) is not an authority to say that assessee cannot raise a claim pertaining to an issue which is connected to the assessment of escaped income. In-fact, if a claim which is connected to the escaped income is set-up

before the Assessing Officer in the course of re-assessment proceedings, the same is liable to be considered and the judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra) only precludes such new claims by the assessee which are unconnected with the assessment of escaped income. In the present case, we are dealing with an assessment u/s 153A of the Act and the scope of such an assessment has already been examined by us in the context of the relevant specific provisions, which do not leave any scope for ambiguity. The judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra) has been rendered on a different footing and is strictly not applicable to the present proceedings. So, however, even if one were to import the reasoning raised by the learned Departmental Representative based on the judgment of the Hon'ble Supreme Court, to the present case, yet we do not find that it would debar the assessee from claiming deduction u/s 80IB(10) of the Act on the impugned additional income declared in the return filed in response to notice u/s 153A(1)(a) of the Act. In the present case, the claim of deduction u/s 80IB(10) of the Act was made in the return of income originally filed and in the return filed in pursuance to the notice u/s 153A(1)(a) of the Act, the claim u/s 80IB(10) of the Act is only enhanced and therefore, it is not a fresh claim. Therefore, in our view, the judgment of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt. Ltd. (supra) does not help the Revenue in the present case.

17. In-fact, the Hon'ble Bombay High Court in the case of Sheth Developers (P) Ltd. (supra) was considering the claim of deduction u/s 80IB(10) of the Act in relation to the undisclosed income declared consequent to the search action. In the case before the Hon'ble High Court, it was factually emerging that undisclosed income was earned by the assessee in the course of carrying on his business activity of a 'builder' and the same was accepted by the Department, but the claim of the deduction u/s 80IB(10) was denied in relation to such income. However, the claim was upheld by the Hon'ble Bombay High Court. In the present case, factually, there is no material to negate the assertion of the assessee, which are borne out of the material on record, that the additional income in question has been received in the course of carrying on its business activity of developing the housing project, 'The Crest' at Pimple Saudagar, Pune, which is eligible for section 80IB(10) benefits. Therefore, in terms of the parity of reasoning laid down by the Hon'ble Bombay High Court in the case of Sheth Developers (P) Ltd. (supra), the claim of the assessee is justified.

18. In-fact, once it is factually explicit that the additional income in question is derived from the housing project, 'The Crest' at Pimple Saudagar, Pune, which is eligible for section 80IB(10) benefits, such an income merely goes to enhance the 'business income' derived from the eligible housing project and shall be entitled for section 80IB(10) benefits, even as per the ratio of the judgment of the Hon'ble Bombay High Court in the case of Gem Plus Jewellery India Ltd. (supra).

19. In the result, on the basis of the aforesaid legal position and the material and evidence on record, assessee is eligible for deduction u/s 80IB(10) of the Act in relation to impugned additional income offered in a statement u/s 132(4) of the Act in the course of search and subsequently declared in the return filed in response to notice u/s 153A(1)(a) of the Act. In the result, appeal of the assessee for assessment year 2008-09 is allowed."

37. In view of the legal position explained in the above precedent and the material and evidence on record, assessee is eligible for deduction u/s

80IB(10) of the Act even in relation to impugned additional income offered in a statement deposed u/s 132(4) of the Act during the course of search and subsequently declared in the return of income filed in response to notice u/s 153A(1)(a) of the Act. Thus, assessee's claim for deduction u/s 80IB(10) of the Act in relation to the impugned additional income of Rs.60,00,000/- is liable to be upheld.

38. Before parting, we may refer to the decision of the Chandigarh Bench of the Tribunal in the case of Liberty Plywood (P.) Ltd. (supra) relied upon by the learned CIT-DR, for the proposition that income surrendered during the course of a survey action was to be assessed separately as 'deemed income'. On the basis of the said proposition, the Chandigarh Bench of the Tribunal denied the claim of the assessee to set-off business losses against such surrendered income, in the context of sections 70 and 71 of the Act. By drawing an analogy from the said precedent, it is canvassed by the Revenue that the impugned additional income is not eligible for the benefits of section 80IB(10) of the Act.

39. We have carefully perused the fact-situation in the case before the Chandigarh Bench of the Tribunal and find that the ratio of the said decision has to be understood with reference to peculiar facts of the case. In the case before the Chandigarh Bench of the Tribunal, the undisclosed income surrendered by the assessee in the course of search was in the shape of unaccounted cash, investments etc. and the material seized did not show the sources of acquisition of the undisclosed income reflected by such unaccounted cash, etc.. So however, in the present case, it is factually clear that the impugned additional income is nothing but monies received by the assessee from customers against sale of flats in its housing project, Sai Nisarg Park - Mayureshwar, which was not recorded in the regular account books. Clearly, in the case before us, source of additional income is the execution of

the housing project and once the source of income is established, the assessability has to follow. The said fact-position is quite different and distinct from what was before the Chandigarh Bench of the Tribunal and therefore the proposition laid down by the Chandigarh Bench of the Tribunal is not applicable to the present fact-situation. Hence, reliance placed by the learned CIT-DR on the said decision does not help the case of the Revenue.

40. In the result, we set-aside the order of the CIT(A) and direct the Assessing Officer to allow the deduction u/s 80IB(10) of the Act even in relation to the income surrendered during the course of survey on account of the undisclosed receipts from the housing project, Sai Nisarg Park - Mayureshwar amounting to Rs.60,00,000/-. Thus, on this Ground assessee succeeds.

41. In the cross-appeal of the Revenue for assessment year 2007-08, Ground of Appeal No.4 relates to the action of the CIT(A) deleting an addition of Rs.7,95,200/- which was made by the Assessing Officer for peak negative balance in the cash book prepared on the basis of seized diaries.

42. In the course of search certain diaries were seized on the basis of which assessee prepared a cash book which was scrutinized by the Assessing Officer during the assessment proceedings. The Assessing Officer observed that there was a peak negative cash balance of Rs.7,95,200/- for the period under consideration which was added to the returned income. The assessee asserted that the addition was not justified because the negative cash balance of Rs.7,92,500/- was in any case, more than the amount of undisclosed receipts/additional income declared in the course of search. By considering the aforesaid plea the CIT(A) has deleted the addition made by the Assessing Officer. Against such action of the CIT(A), Revenue is in appeal before us.

43. In our considered opinion, the CIT(A) made no mistake in deleting the addition because the quantum of undisclosed income offered by the assessee in the course of search as additional income is more than the impugned addition sought to be made by the Assessing Officer on account of peak negative balance in the cash book. The CIT(A) has rightly observed that if the aforesaid addition was to be sustained in addition to the undisclosed income already declared, it would amount to double addition. We hereby affirm the action of the CIT(A) and accordingly, Revenue fails on this Ground also.

44. Resultantly, in so far as the assessment year 2007-08 is concerned, the appeal of the assessee is allowed, that of the Revenue is dismissed.

45. Now, for assessment year 2008-09, it was a common point between the parties that the issues involved in the cross-appeals of the assessee (i.e. ITA No.19/PN/2013) and the Revenue (i.e. ITA No.61/PN/2013) are similar to those considered by us in the cross-appeals for assessment year 2007-08 in the earlier paragraphs. Therefore, our decision in the respective cross-appeals for assessment year 2007-08 (supra) would apply *mutatis-mutandis* in the cross-appeals for assessment year 2008-09 also. Accordingly, whereas the appeal of the assessee for assessment year 2008-09 is allowed, that of the Revenue is dismissed.

46. ITA No.20/PN/2013 is an appeal preferred by the assessee for assessment year 2009-10, which is directed against the order of the Commissioner of Income Tax (Appeals)-Central, Pune dated 31.10.2012 which, in turn, has arisen from an order dated 27.12.2010 passed by the Assessing Officer u/s 143(3) of the Act.

47. The only issue in this appeal relates to assessee's claim for deduction u/s 80IB(10) of the Act in relation to additional income declared in the course

of a deposition made u/s 132(4) of the Act at the time of search. It was common a point between the parties that the facts and circumstances of the dispute are identical to the dispute considered by us, by way of Ground of Appeal No.2 in the appeal of the assessee for assessment year 2007-08 in the earlier paras. Therefore, our decision in Ground of Appeal No.2 for assessment year 2007-08 shall apply *mutatis-mutandis* on this aspect also. Thus, the Ground raised by the assessee is allowed. Thus, appeal of the assessee for assessment year 2009-10 is allowed.

48. Resultantly, whereas the captioned appeals of the assessee are allowed, those of the Revenue are dismissed.

Order pronounced in the open Court on 28th October, 2014.

Sd/-	**Sd/-**
(R.S. PADVEKAR)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Pune, Dated: 28th October, 2014.

Sujeet

Copy of the order is forwarded to: -

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

By Order

//True Copy//

Assistant Registrar
I.T.A.T., Pune