IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 1053 of 2011

MANAN CORPORATION - Appellant(s)
Versus
ASSTT COMMISSIONER OF INCOME TAX, CIRCLE-5, - Opponent(s)

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Appearance :
MR RK PATEL for Appellant(s) : 1,
MR MR BHATT, SR. ADV. with MRS MAUNA BHATT for Respondent

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS JUSTICE SONIA GOKANI

Date : 3/09/2012
CAV JUDGMENT
(Per : HONOURABLE MS JUSTICE SONIA GOKANI)

1. Present appeal of the assessment year 2006-07 arises from the order of the Income-Tax Appellate Tribunal passed on 13.5.2011 raising certain questions of law for determination. Considering that such questions are likely to be repetitive, at the request of the counsel, the Appeal is admitted and taken up for hearing.

Following factual details would be necessary for the purpose of appreciating the law point involved in this appeal.

1.1 Assessing Officer while assessing the return of the income of the appellant herein noted the claim of deduction under Section 80IB (10) of the Act for two projects, namely, Krishna Park and Prashiddhi Project, respectively for the sum of Rs.1,80,25,587/- and Rs.5,2,28,874/- totalling the sum of Rs.6,84,44,461/-. On two counts, namely, that the assessee failed to carry out its obligation necessary for claiming such deduction so also on the ground that the assessee violated the condition laid down under the said provision, such claim was rejected. The principal objection is of non-fulfillment of the condition of limitation for built up area being more than 1500 sq.feet and its ratio to commercial shops being more than 5% of the created built up area of housing project or 2000 sq feet which ever is less, according to the Assessing Officer, such assessee would not be eligible for the deduction.

2. It is the say of the assessee appellant that condition of limiting the commercial establishment/ shop to 2000 sq.feet came in force with effect from 1.4.2005 and, therefore, the same would be applicable for the projects approved on or after 1.4.2005 and as the approval of both these projects was prior to 31.3.2005 i.e. 28.12.2004 for Krishna Park project and 18.1.2003 for Prashiddhi Project, the amended provision would have no application for these projects. Such contentions was not accepted and after

completing the assessment, claim of appellant regarding the deduction under Section 80IB(10) was disallowed.

3. When questioned before CIT(Appeals), the CIT(Appeals) favoured the assessee following the decision of the Special Bench of Tribunal and allowed the deduction in case of ***Brahma Associates vs. JCIT*** reported in **119 ITD 255(PUNE) (SB)**. Revenue appealed against the said order of CIT(Appeals) where heavy reliance was placed on the judgment of Bombay High Court rendered in the case of ***Brahma Associates vs. JCIT*** reported in**[2011] 333 ITR 289(Bom.)** on the count that such amendment can not be not respected in absence of explicit provision and should be held to have effect retrospectively as were argued before the Tribunal for and on behalf of the assessee that neither the Bombay High Court nor the Special Bench has held that clause (d) of Section 80IB(10) is applicable to those projects, which were approved on or before 31st March, 2005. Both the decisions have held that amendment of Section 80IB(10) is applicable prospectively.

The Tribunal, after discussing the case laws on the subject, concluded that the assessee is not eligible for deduction under Section 80IB (10) because it did not comply with the requirement of Clause (d) of Section 80IB(10), which is applicable from 1.4.2005 regardless of date of approval. It was further stated that this would be applicable to all those projects, which were approved by the competent authority. In respect of even those housing projects approved before 31.3.2005, as no explanation has been carved out by specifying that the amended provisions are applicable in respect of those projects which are approved on or after 1.4.2005 but before 31.3.2008. It denied such benefit to the applicant by further holding that the Legislature if wanted to exempt old projects from the operation of clause(d) then, it could have been specified by making a specific provision or new provision being applicable to only those housing projects, which are approved on or after 31.3.2005 but before 31.3.2008 and since that was not the case, the same was denied.

4. Aggrieved by such decision, the present appeal is preferred raising various averments and contentions and further substantiated the same with the authorities on the subject.

5. Learned advocate Mr. R.K. Patel appearing for the appellant assessee has fervently submitted the the decision of the appellate authority is contrary to the spirit of the very provision. He urged that when these projects were approved by the competent authority, clause(d) of Section 80IB(10) was not on the statute book and only requirement expected from the assessee was the compliance of clause(a),(b) and (c) of Section 80IB(10) and, therefore, clause (d) inserted by Finance (No.2) Bill, 2004 cannot be made applicable for the projects approved prior to 31.3.2005.

6. He further submitted that the issue is squarely covered in case of ***Saroj Sales Organization vs. ITO*** reported in **(2008) 115 TTJ 485 (Mum)** and also by a decision of co-ordinate Tribunal rendered in case of ***Hiranandani Akruti Jv vs. DCIT*** reported in**(2010) 39 SOT 498(Mum)**. He further urged that before the Bombay High Court, one of the questions raised was whether clause (d) of Section 80IB(10) is applicable for

assessment year 2005-06 or whether the same needed to be applied retrospectively. The project in that case was approved by the competent authority before 31.3.2005 and the assessment year before the Bombay High Court was 2003-2004 and in such circumstances, the Bombay High Court held that with effect from 1.4.2005, deduction under Section 80IB(10) would be subject to the restrictions set out in clause (d) of Section 80IB(10).

7. It is also further submitted that the Tribunal's interpretation is contrary to the notes on clause to memorandum explaining the substituted provision of Section 80IB(10) with new clause (d) with effect from 1.4.2005. On the basis of approval obtained from 1.4.2005 the assessee is entitled to complete the housing project by 31.3.2008 as per Section 80IB(10)(a)(1). Hence on approval, the assessee would acquire the vested statutory right to claim deduction under section 80IB(10) since deduction is in respect of "profits derived in any previous year relevant to any assessment year from such housing project" on fulfillment of conditions since projects had commenced prior to 1.4.2005.

It is also urged that deduction under Section 80IB(10) of the Act is inseparably linked to the approval and not to the assessment year in which the deduction is claimed. He further urged that the post amendment from 1.4.2005 word " approved before 31st day of March, 2007" can only mean approval from 1st April, 2005 to 31st March, 2007 when compared to pre-amended provision of Section 80IB(10) of the Act. It is also urged that the assessee gets time to complete housing project by 31.3.2008 in consonance with the approval before 1st day of April, 2004, therefore, conditions of approval prior to 1.4.2005 would remain intact till 31.3.2008, the cut off date for completion. It is also the say of the learned advocate that if Tribunal's view of interpretation of Section 80IB(10) is accepted, then the assessee claiming deduction following the method of project completion basis, whose completion date falls after 1.4.2005 will not get the deduction and those assessee, who claim deduction on work-in-progress basis or percentage completion basis, on similar provisions would get the deduction which could never be the intention of the Legislature. He further urged that the method of accounting can never dictate the position of law and with such kind of interpretation of Tribunal, the assessee following project completion method, would be required to perform humanly impossible task.

He further urged that the assessee earned profit and was entitled to deduction under Section 80IB(10) from year to year but he did not claim the same as he firstly wanted to fulfill the pre-conditions of entitlement of deduction beyond any doubt by following project completion method in preference to the work-in-progress method. He, therefore, urged further that if the assessee would have followed the percentage completion basis/work-in-progress method, he could have walked away with deduction from profit by preceding years. Such unjust discrimination between the same class of assessee could have never been contemplated, as urged by the learned counsel.

It is the say of the learned advocate that when application was made by the assessee and approved prior to 1.4.2005 by the local authority, neither the assessee nor the local authority could have assumed that the legislative amendment would structurally change the provision of Section 80IB(10) of the Act and it would be substituted at a later date so

as to disentitle the assessee of its legitimate claim, during the validity of the period of approval for completion of work upto 31.3.2008 as per Section 80IB(10) (a)(1) of the Act.

Reliance is also placed on the decision of the Apex Court reported in ***CIT vs. J.H.Gotla***reported in **(1985)156 ITR 323**, wherein it is held that the interpretation should be such that it does not result into absurd result. The Court needs to modify the language used by the Legislature so as to achieve the intention for bringing about the rational result.

8. He also urged this Court that the assessee's claim for deduction under Section 80IB(10) of the Act is supported by ratio of ***Commissioner of Income-Tax vs. Brahma Associates*** (supra), irregardless of the fact that the Bombay High Court was concerned with assessment year 2003-04. He urged this Court to set aside the order of Tribunal and answer the question in favour of assessee.

9. Learned Senior Counsel Mr.M.M.Bhatt appearing for the Revenue has heavily relied upon the decision of the Bombay High Court and strenuously urged that the conditions as prevalent on the date when the assessment was carried out shall need to be fulfilled by the assessee. He also further urged that there may be onerous conditions but it is not for the assessee to say that these are onerous conditions and, therefore, they need not apply. According to him, there are two stages. The first is of approval of plan to construct where the interest of assessee would begin. Second terminal is the completion of construction. He also further urged that the income which aggregate before the completion of the project shall have to be recorded and all conditions be cumulatively considered. He sought to rely upon following judgments to substantiate his submissions:-

1. ***Commissioner of Income-Tax vs. Gold Coin Health Food P. Ltd.*** reported in **304 ITR 308**
2. ***Udaipur Sahkari Upbhokta Thok Bhandar Ltd. vs. Commissioner of Income-Tax***reported in **[2009]315 ITR 21(SC)**
3. ***Commissioner of Income-Tax vs. TVS Lean Logistics Ltd.*** reported in **[2007]293 ITR 432(Mad)**
4. ***National Agricultural Co-operative Marketing Federation of India Ltd. and another, vs. Union of India and others*** reported in **AIR 2003 SC 1329**
5. ***Reliance Jute and Industries Ltd. vs. Commissioner of Income-Tax, West Bengal***reported in **[1979] 120 ITR 921(S.C)**

10. Upon considering the elaborate submissions of both the sides and on examination of material on record closely, following substantial questions of law are framed for the purpose of our decisions:-

> "(1) Whether on facts, circumstances and evidence on record the Tribunal is right in law in interpreting section 80IB(10) of the Income-tax Act, 1961 for

confirming the disallowance of Rs.6,84,44,461/- made by the Assessing Officer?

(2) Whether on the facts and circumstances of the case the Tribunal has erred in law in applying the amendment made in the provision of section 80IB(10) (d) of the Act with effect from 1.4.2005 retrospectively by implication?"

11. Although there are two questions framed, essentially the central question is one, namely whether the amendment in the provision of Section 80IB(10)(d) of the Act having been made effective from 1.4.2005 is to be held retrospective or prospective for the purpose of deduction claimed by the assessee.

12. Reproduction of Section 80IB(10) prior to the amendment of 1.4.2005 and in post-amendment period is to be made profitably at this stage:-

"**Section 80IB(10) prior to the amendment of 1.4.2005:-**

Subs.by Finance (No.2) Act, 2004 (23 of 2004), sec.18(d), for sub-section(10) w.e.f.1-4-2005). Earlier sub-section(10) was amended by the Finance Act, 2000 (10 of 2001), sec.39(e)(i) and (ii) (w.e.f.1.402001), by Finance Act, 2003 (32 of 2003), Sec(c)(i) and (ii) (w.e.f. 10402002). Sub-section(10), before substitution by Finance (No.2) Act, 2004, stood as under:

"(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005 by a local authority, shall be hundred per cent. of the profits derived in any previous year relevant to any assessment year from such housing project if,-

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998;

(b) the project is on the size of a plot of land which has minimum area of one acre; and

(c) the residential unit has a minimum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and fiver hundred square feet at any other place."

"**Section 80IB(10) in the post-amendment period :-**

"(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008 by a

local authority shall be hundred per cent. of the profits derived in the previous year relevant to any assessment year from such housing project if,-

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes such construction-

(i) in a case where a housing project has been approved by the local authority before the 1st day of April, 2004, on or before the 31st day of March, 2008;

(ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1st day of Apri, 2004 but not later than the 31st day of March, 2005, within four years from the end of the financial year in which the housing project is approved by the local authority.

(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five years from the end of the financial year in which the housing project is approved by the local authority.

Explanation-For the purposes of this clause,-

(i) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority;

(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority;

(b) the project is on the size of a plot of land which has a minimum area of one acre:

Provided that nothing contained in clause(a) or clause(b) shall apply to a housing project carried out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf;

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place;

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

13. Section 80IB(10) originally indicated 100% deduction on the profits derived from housing projects approved by local authority subject to certain conditions set out in the provision. By virtue of the amendment having come into effect from 1.4.2005, deduction is permissible to housing project having residential units with commercial units to the extent permitted therein.

14. It needs to be noted, at this stage that Section 80IB provides for the deduction in respect of profits and gains from certain industrial undertaking other than the infrastructure development undertakings. This Section applies to the industrial undertakings, permitting them to compute the total income after deduction from such profit and gain of an amount equal to such percentage and if such number of assessment years as specified in Section provided fulfillment of certain conditions.

15. The provision as that stood prior to the amendment permitted 100% of the profits if the industrial undertaking develops and builds housing project approved before 31st day of March, 2005, the profit to be derived in any previous year relating to any assessment year from such housing project subject to certain conditions. Assessee needs to commence the development in construction on or after 1st day of October, 1998 with the project on the size of a plot of land, which has a minimum of 1 acre of land and the residential unit has a maximum built up area of 1500 sq.feet, if not situated at Delhi, Mumbai or within 25 kms. from the Municipal limit of these areas.

It was essentially to provide incentive to the undertakings in developing and building housing projects. However, this provision was amended by way of Finance (No.2) Act, 2004 with effect from 1.4.2005. As can be noted from the amendment provision, clause(a) is further qualified necessitating the completion of construction within stipulated period where Section 80IB(10), clause-(1) provides for completion of such housing project within 4 years. In other words, if approved by local authority before 1st day of April, 2004, the completion has to be on or before 31st day of March, 2008. Clause (2) provides for completion of such project if approved by the local authority on or after 1st day of April, 2004 but not later than 31st day of March, 2005 within 4 years from the end of the financial year in which housing project is approved by the local authority. Clause (d) has been introduced, which provides for the built up area of the shops and other commercial establishments included in the housing project, which should not exceed 3% (with effect from 1.4.2005) of the aggregate built up area of housing project or 5000 sq.feet, which ever is higher (2000 sq.feet) which ever is less from 1.4.2010.

In other words, it can be capsulized that Section 80IB(10) provides for deduction of 100% of the profit derived by an undertaking developing and building housing projects,

subject to certain conditions. It can be also noted that amended provision provides for time limit for completion of the project, which was not there in the earlier Section. The date of such completion certificate also appears to be relevant for the said purpose in the amended provision. It will be apt to mention that the issue regarding construction of shopping in the housing project in accordance with the permission of the Municipal laws was requested to be considered adequate for the purpose of Section 80IB(10). It also further can be deduced that the deduction which was available if the project is on a plot land of minimum area of 1 acre has been in the amended provision liberalized in accordance with the scheme framed by the Central or the State Government. Again, the deduction was available if the built up area for the residential unit does not exceed 1000 feet in the city of Delhi, Mumbai or within 25 kms from Municipal Limit of these cities and 1500 sq.feet at any other place. This 'built up' area appears to have been defined in the amended provision.

However, in respect of the housing projects, which have been approved and commenced prior to 1.4.2005, the issue of applicability of this provision is a question that requires to be answered by the Court.

16. As mentioned hereinabove there are two projects of the present appellant, namely, Krishna Park and Prashiddhi Project, in respect of which the assessee has claimed deduction under Section 80IB(10) of the profits earned from these projects. As also noted hereinabove, the Assessing Officer disallowed such deduction and CIT(Appeals) allowed the same. The Tribunal concurred with the Assessing Officer following the decision of the Bombay High Court in ***Brahma Associates*** (supra) and denied such benefit to the appellant. The project of Krishna Park comprises of tenements constructed in six lanes with independent raw-houses. First lane comprises of Units No. 80 to 99. Four units were found to be bigger in size as compared to other units. Accordingly the Assessing Officer was of the opinion that Krishna Park did not fulfill the basic requirement and condition of limitation of maintaining built up area of 1500 sq.feet per unit as laid down under the statute. Moreover, according to him, another condition of the total area of commercial shops also violated as the total built up area of the shops was found to be exceeding maximum limit of 2000 sq.feet.

As far as project Prashiddhi is concerned, the total built up area of the shops and the commercial establishment could not exceed 5% of the aggregate built up area of the housing project or 2000 sq.feet, which ever is less and, therefore, in the opinion of the Assessing Officer this was in violation of the provisions. There is not dispute to the fact that the appellant has got both the projects approved by the local authorities. The fact is also not in dispute that as per the sanctioned plan of the local authorities that the entire project has been carried out. Building completion permission also has been obtained. Furthermore, fact is also not in dispute that the appellant has been following the project completion method for claiming the profit admittedly prior to 31.3.2005. As far as Krishna Park project is concerned, the building has been completely constructed and BUC in the entire project was also obtained prior to 31.3.2005. As noted above, provision of Section 80IB(10) (a) requires such undertaking to develop and build “housing project” as approved by the local authority and such project has been approved by the local

authority. Certificate to that effect also has been obtained from Surat Municipal Corporation. The whole project was approved and completed prior to the insertion of amended provision of Section 80IB(10) of the Act with effect from 1.4.2005.

17. It can also further be noted that as per the criteria laid down by the Municipal Corporation, the permissible Common Open Plot ("COP" for short) for the residential project is minimum 10% of the total are of land, which is to be utilized for the project. While for commercial project, the minimum 15% of the total area of land requires to be kept as COP. It is not in dispute that the assessee has kept 10% of COP for its residential project as required under the rules and regulations of the local authority and the area worked out of commercial offices is 5.12% of the total built up area of the project. This bifurcation is indicated in a tabular form in the order of assessment, which is as follows:

PROJECT KRISHNA PARK

SR.No.	**Residential Unit (Tenement)**	**Total Built up Area in Sq.ft**	**Area of Plot in Sq.mts.**
1	99 Units	89,966	11,197
2	8+4 Shops	4,607	428
	TOTAL	94,573	11,625
	% of Built-up Area for shops to total Built up Area	4607/94573* 100=5.12%	428/11625* 100=3.68%

As far as Prashiddhi project is concerned, it has been developed on an area, which is more than 1 acre. The plan has been approved on 18.1.2003 and BUC has been obtained on 29.12.2004. For tower A1, A2 and B1 and for B2, the BUC was obtained on 30.6.2007. Vide an application dated 20.7.2005. This housing project was approved by the local authority as is apparent form the certificate of the Surat Municipal Corporation and the ratio worked out of commercial offices to the total built up area for residential project is 3.5%. As can be seen from the chart given hereinbelow:-

Sr.No.	Residential Unit-Flats	Total Built up area in sq.ft.
1	Building A1	23,672
2	Building A2	23,927
3	Building B1	27,904
4	Building B2	27,904
	Total	1,03,407
5	Shops	3,778
	Grand Total	1,07,185

	% of Built up Area for Commercial shops to total Built up Area.	3778/107185*100=3.5%

18. Reliance is placed on the judgment of ***Brahma Associates*** (supra) of the Special Bench by the Assessee and it is insisted that the issue raised in this case is directly covered in favour of the assessee in this decision of the Special Bench, wherein, it has been held that condition of the built up area of shops not exceeding 5% of the total built up area or 2000 sq.feet, whichever is less is held to be prospective in nature and would not be applicable to the projects approved prior to 1.4.2005. As can be noted from the above details, the appellant got the plans approved of both the projects respectively on 30.12.2002 and 18.1.2003, which is prior to the amended provision made applicable from 1.4.2005.

Admittedly in both the projects as is culling out from the record, the built up area of commercial user in terms of the shop is below 6%. In Krishna Park as noted from the tabular chart 5.12% and in Prashiddhi it is 3.5%, which is below 10% of the total built up area. The vital question, however, is whether this amendment would have a bearing on the claim of assessee whose project is approved prior to the amendment which became effective from 1.4.2005.

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 80 IB(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:-
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> "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 fiver 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% of the total built up area or 5000 sq.feet which ever is higher (now in post 2010 period)or 5% 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% to the total built up area by way of amendment and reduction of which by further amendment to 3% of the total built up area, has to be necessarily construed on prospective basis.

22. As is very apparent form 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 statue.

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-IB(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-IB(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-IB(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-IB(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.*** reported in **[2012] 21 taxmann.com140 (Karnataka)** 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% 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-IB(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% of the total built up area, reduction of this ratio to 3% 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 forman 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' 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).
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> 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 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.

(Akil Kureshi, J.)

(Ms.Sonia Gokani, J.)