

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'J' MUMBAI**

**ITA No. 3195 & 3196/Mum/2010
Assessment Year - 2005-06 and 2006-07**

**DY CIT,
CIR. 15(3)
MATRU MANDIR, 1 ST FLOOR
TARDEO ROAD
MUMBAI-400007**

Vs

**M/s SHAH BUILDERS & DEVELOPERS
323-329, ARENJA CORNER
PLOT NO 71, SECTOR 17, VASHI
NAVI MUMBAI-400 705**

T R Sood, AM and Asha Vijayaraghavan, JM

Dated: May 06, 2011

ORDER

Per: Asha Vijayaraghavan:

These two appeals preferred by the Revenue are directed against the orders passed by the Id. CIT(A)-26 for the Assessment Years 2005-06 & 2006-07.

2. The assessee is engaged in the business of Civil Construction and developing and building Housing –Cum- Commercial project as a regular course of activities and derives income there from. During the financial year 2003-04 Appellant had undertaken for developing and building a project viz. Shah Arcade in Navi Mumbai. This project was approved by the City & Industrial Development Corporation (CIDCO) of Maharashtra vide CIDCO/BP/ATPO/322 dated 26.3.2004. This project of commercial-cum-residential building was approved on Plot No. 4 & 5 in Sector 6 at Kharghar, Navi Mumbai. There were 2 allotment of commercial-cum-residential plots, one is of allotment No. CIDCO/MM-II/ CLT/KHR/35 dated 27.08.2003/28.08.2003 and second one is CIDCO/MM-II/CLT/KHR/36 dated 27.08.2003/28.08.2003. The Appellant has computed profit @ 8% on the cost of construction i.e. WIP of Rs. 11,84,75,650/- in respect of the project Shah Arcade on estimation basis and has shown estimated profit of Rs 94,78,052/- While filing the Return of Income Appellant had claimed deduction u/s 80IB (10 at Rs 86,63,749/- after excluding the profit attributable to commercial area of the project. The Ld. AO in assessment order appealed against has disallowed appellant's claim of deduction on the ground that the commercial area of the project exceeds 5% of aggregate built-up area and even more than 2000 sq.ft. against the amendment provision of section 80IB (10) by the Finance Act (2) 2004 w. e. f. 01.04.2005.

3. According to the AO the deduction u/s 80IB(10) of the Act is allowable to an undertaking developing and building housing projects approved by a local authority. With the very same social objective, the local authorities have also been empowered to approve the projects under various categories with conditions prescribed over the commercial content in such projects. To be eligible to claim the deduction u/s 80IB (10), all the conditions laid down in the section are required to be fulfilled. In case, any one or more conditions prescribed, are not fulfilled the project shall not be eligible for the claim of said deduction. Claiming deduction u/s 80IB(10) without fulfilling each and every condition would amount to get the unjust enrichment at the cost of the Exchequer without fulfilling obligation to achieve the social objections as intended by the Legislature. Therefore, such projects which do not fulfill the prescribed conditions, cannot and must not be allowed to claim deduction u/s 80IB(10). Further, AO has pointed out the provision of section 80IB(10) requires fulfillment of the following conditions.

i. The undertaking commences the development and construction of Housing project on or after 01.10.1998 and where the Housing project is approved before 01.04.2004, completes such construction on or before 31.03.2008.

ii. The project is on the size of plot of land has a minimum area of one acre.

iii. The residential unit has a maximum built up area of 1000 square feet where such residential unit is situated within the city of Delhi/Mumbai or within 25 Kms. From the municipal limits of the cities or 1500 sq.ft. at any other place. iv. The built up area of the shops and other commercial establishments included in the housing project does not exceed five percent of the aggregate built-up area of the housing project or 2000 sq.ft. whichever is less.

4. According to the AO, out of above, condition No.4 is not fulfilled by the assessee as the total commercial built-up area is more than 5% of the aggregate built-up area of the housing project and also more than 2000 sq.ft as prescribed u/s 80IB(10). Hence, In view of this clear eligibility conditions for claiming deduction u/s 80IB(10) of the Act, the project under consideration has failed the mandatory parameters. Since the basic criteria for the deduction is not fulfilled. All the other arguments of the assessee are futile and do not support its cause. According to AO deduction u./s 80IB(10) is allowable only to an undertaking developing and building housing projects. A housing project has to be a residential project having residential units for the people to stay or reside. Commercial establishments or shops cannot be termed as housing projects. The conditions laid down by the local authorities approving the housing projects also limit the commercial area content in such projects to a maximum 5% of the total built-up area. The projects having commercial area in excess of 5% are considered to be commercial projects and are not termed as housing projects at all. In the assessee's case, the commercial area is in excess of 8% of the total built-up area This is ascertainable from the approved plans details submitted and from the fact that the assessee has excluded the profits to the extent of 8.59% of the total profits, being attributable to commercial content. Thus, the assessee's undertaking is not an eligible undertaking u/s 80IB(10) as it is not developing and constructing eligible housing project as per the conditions laid down in section 80IB(10) and even as per the conditions laid down by the local authority approving the project is not fulfilled. Hence no deduction u/s 80IB(10) of the Act is allowable in the case of the assessee. Further AO has mentioned that appellant has excluded 8.59% of the profits attributable to or derived from commercial area which

is not allowable as there is no provision u/s 80IB(10) to allow partial or proportion deduction. According to the AO the vital point is either an undertaking eligible for deduction or it is not. It is not that anyone or two of the conditions are to be fulfilled but all the conditions have to be complied for claiming such deductions.

5. Further during Appellate proceedings, the AO has represented the case and has submitted a letter No. Dy. CIT 15(3) /Shah Builders & Developers /09-10 dated 23.6.2009 pointing out the fact that assessee has got permission for residential – cum-commercial building and not for the housing project vide copy of letter dated 26.03.2004 and 22.02.2002 of Additional Town Planning Officer issued to the assessee and letter dated 28.8.2003 issued by Marketing Manager, CIDCO. According to the submission of Ld. AO the allotment of plots as well as approval granted to the appellant is not for Housing project but for residential cum commercial building. Further, it is submitted by the AO, that project of the appellant was not illegible housing project u/s 80IB(10) as its plan was approved in the year 2002 and therefore prior to 1.4.2004 there was no provision for commercial area in housing project. The clause of commercial area of 2000 sq.ft or 5% of the area was brought only for the project, which has been approved on or after 1.4.2004. AO has further referred to the part of budget speech of Finance Minister and memorandum explaining the provision of Finance Bill 99 and argued that intention or the primary motive of the legislature is to provide the incentives to the Housing Sector and also providing housing facility to the middle class investors wishing to purchase or dwelling in it. Incentives are also given to the finance sector to provide sufficient finance to the residential projects. According to the AO, the speech of Finance Minister referred to dwelling in it and not the commercial shops. However, after 1.4.2005 with a view to give validity of such projects, provision for commercial area was also included to the extent of 5% of the total area of residential unit or 2000 sq.ft. whichever is less.

6. As regards denial of claim of deduction u/s 80IB(10), it is contended that claim has been rightly made as project is the Housing Project duly approved by the local authority i.e. CIDCO, it is further submitted that approval letter dated 26.03.2004 reveals that in the project, there are residential flats as well as some shops and this project is situated in residential zone only which is being governed by Development Control Act, 1991. It is an admitted position that in residential zone, commercial or industrial building cannot be approved by the local authority. The project Shah Arcade is situated exclusively in the residential zone and hence is to be treated as residential housing project. But in the residential housing projects convenience shopping / easement shopping are allowed by the local authority to take care to the needs of the occupants. This term is mandatory, Considering the requirements of the local residents, the local authority approves the plans of housing project with some convenience shopping area in the said building., But the project remains a housing project only, which includes some area of convenience shopping. According to the Ld. AR a housing project in order to be a self sufficient would require to support/ provide the amenities such as banking, post office, market, shops, schools, etc. Keeping all these factors in view only the local authority grants the approval. Since projects were approved as housing projects, though include some inconvenient shopping, satisfy the requirement of section u/s 80IB(10). It is further submitted that provision of law u/s 80IB(10) does not say that there cannot be any convenient shopping in a housing project. The only requirement of the section is that residential unit should have the maximum built up area of one thousand square feet. Therefore, some shopping area in the housing project does not disentitle the assessee to claim the deduction u/s 80IB(10). All the other conditions of the section are duly satisfied

and there is no dispute about that. It is further submitted that 'housing project' is not defined in the section 80IB(10), but it is defined by section 80HHBA. Therefore, Ld AR has reproduced the definition of this section as under:

"Housing project means a project:

- i. Construction of any building, road, bridge or other structure in any part of India.*
- ii. The execution of such other work (of whatever nature) as may be prescribed."*

Thus, according to the Ld. AR 'housing project' is having wide meaning and even includes not only construction of building but also includes the constructions of roads, bridges or any other structure. It is argued that Appellant is engaged in construction and development of Housing Project. It is Further argued that the issue as to "what is a housing project" was considered by the Central Board of Direct Taxes in response to a query raised by the Maharashtra Chamber of Housing Industry. The query raised by the chamber was for the clarification regarding the housing project where the residential building includes some convenient shopping. In response to this CBDT vide its letter dated 04.05.2001 bearing No. F.No. 205/03/2001/ITA –II replied as under:

".....With regard to query regarding definition of housing project it is clarified that any project which has been approved by a local authority as a housing project should be considered adequate for the purpose of section 10(23G) and 80IB(10)"

7. The Board clearly states that a housing project is one, which is approved by the local authority as a housing project, which includes residential flats as well as certain shops. Therefore our project is housing projects in terms of CBDT circular and therefore qualify for deduction u/s 80IB(10) for whole of the profits including the profit of shops which are part and parcel of the housing project. Therefore question of any disallowance of the deduction does not arise. LD AR has referred to the decision of Hon'ble Mumbai ITAT the case of Harshad P. Doshi (Appeal No. ITA/2305/M/2006) dated 28.02.2007 wherein the full amount of deduction was granted. The facts of that case were that the housing projects had some shops and in which the proportionate disallowance for profit attributable to shops was made by the AO while granting deduction u/s 80IB(10). The ITAT allowed the full claim of that assessee. Further the Ld. AR has referred to the Hon'ble Supreme Court in the case of Bajaj Temppo Ltd., vs CIT 196 ITR 188 has held that since all the provisions indicated for promoting growth has to be interpreted liberally the restriction on it has to be construed so as to advance the objective of the promotion and not frustrate the same. Similar were the views in the cases CIT vs Madho Jatia 105 ITR 179 & CIT vs Vegetable products 188 ITR 192. It is also settled position in law that where provision in statute admits two interpretations, a view which is favourable to the subject (assessee) must be adopted. The restriction of maximum commercial area in the housing project of 2000 sq.ft. or 5% of the aggregate built-up area, whichever is less, has been brought on the statute book w.e.f. 01.04.2005 which is applicable for the projects approved on or after 01.04.2005. In Appellant's case the project was approved prior to 01.04.2005 when there was no restriction of commercial area was in force. The Honourable ITAT in the case of Harshad P. Doshi has accepted the argument of the assessee, which is discussed in para 8 of the order. Finally, it is argued that so long as the housing project with some shops is approved by the local authority as a housing project it is a sufficient compliance of the section 80IB(10) for

the housing projects approved prior to 01.04.2005. As such project is well within the provisions and claim of deduction for the whole of the profits of the projects is in order and no departure there-from is warranted at all.

8. Further the Ld. AR has submitted a rejoinder dated NIL through dak on 08.07.2009 reiterating the above representations and arguments with further reference of decision of Hon'ble Pune Special Bench of ITAT in the case of Brahma Associates vs JCIT (009) 122 TTJ (Pune) (SB) 433 and has stated that contention of the Ld AO is devoid of any merit and latest decision applies to the appellant's case. In this rejoinder Ld. AR has submitted as under:

"In the instant case, the appellant got the permission from CIDCO for construction of residential cum commercial building on Plot Nos. 4 & 5, Sector -6, Kharghar, Navi Mumbai vide letter dated 26.03.2004, which was subsequently amended vide letter dated 22.02.2005 for construction of residential cum commercial building. In the instant case, the appellant constructed residential cum commercial, project comprising of seven buildings on Plot Nos. 4 & 5, Sector-6, Kharghar, Navi Mumbai. The total area of the plots is 7225.05 Sq.Mtrs, which is approximately 1.78 acres. The commercial plot area is 724.30 Sq.Mtrs, which is 10% of the total plot area. The residential plot area is 6500.75 Sq. Mtrs, which is 90% of the total plot area. The residential plot area of 6500.75 Sq.Mtrs. is approximately 4.60 acres.

Since the project was approved prior to 01.04.2004 i.e. prior to insertion of clause (d) by the Finance Act, 2004, the commercial area up to 10% of the total built-up area is permissible in view of the decision of the Special Bench. Since the total commercial area is within the permissible limit of 10%, the appellant is entitled to get deduction in respect of the entire profits of the project.

Without prejudice to the above, it is submitted that the plot area of the residential portion of the project on a standalone basis is more than one acre and therefore, the appellant is entitled to get deduction u/s 80IB(10) since all other conditions laid down in clauses (a), (b) & (c) are fulfilled. For your honour's kind perusal and consideration we are enclosing a paper book comprising of approval/ sanction, occupancy certificate, approved plans etc., which shows that the appellant is entitled to get deduction u/s 80IB(1)."

9. After receipt of reply a show cause notice No. CIT(A) XV/SB & D/2009-10 dated 15.07.2009 was issued and served upon Assessee. In response to the same LD AR has submitted reply dated 25.8.2009 stating that CIDCO has allotted Commercial-Cum-Residential Plot No. 4 & 5 by allotment letter dated 28.8.2003 and subsequently Appellant has executed these agreement lease agreement with CIDCO in respect of "Residential-Cum-Commercial " Plot Nos. 4 & 5, Sector-6 at Kharghar, Navi Mumbai vide lease agreement dated 16.2.2004 in respect of aggregate land area of 7,225.05 Sq. Mtrs. The said lease agreement is duly registered. The copy of receipt for Registration, payment of stamp duty proof, possession letter and lease agreement are placed at page Nos. 17 to 38 of the paper book. Thereafter, CIDCO passed assessment order No. 758/2003-04 Register No. 08 page No.758 vide letter No. CIDCO/BP/ATPO/321 dated 26.03.2004. As per assessment order, the total plot area is 7,225.05 Sq.Mtrs. The plot area for residential use is 6,500.75 Sq.Mtrs. which is exactly 90% of the total plot area and the plot area for commercial use is 724.30 Sq.Mtrs, which is exactly 10% of the total plot area. On the same day, CIDCO has granted approval for development of "Residential-Cum- Commercial" building on Plot

Nos. 4 & 5, Sector-6 at Kharghar, Navi Mumbai vide letter and assessment order dated 26.03.2004 issued by CIDCO are placed at page Nos. 1 & 2 of the paper book. As per the assessment order dated 26.03.2004, the permissible FSI is 1.5. and the total permissible, built up area of 10,837.575 Sq. Mtrs. Similarly, the total residential built-up area is 9,751.139 Sq.<Mtrs, which is exactly 90% of the total permissible, built up area of 10,837.575 Sq.Mtrs. On receipt of approval letter from CIDCO, the appellant started construction of "Residential Cum Commercial Project" on Plot Nos. 4 & 5 Sector-6 at Kharghar, Navi Mumbai. Subsequently, there was some revision in the plan for "Residential Cum Commercial Building" on Plot Nos. 4 & 5 Sector-6 at Kharghar, Navy Mumbai and accordingly CIDCO has amended the approval to revise plan vide letter No. CIDCO /BP/ATPO/258 dated 22.02.2005 and issued commencement certificate of even date. The copy of amended approval to revised plan for Residential-Cum-Commercial building on Plot Nos. 4 & 5, Sector-6 at Kharghar, Navi Mumbai and commencement certificate dated 22.02.2005 issued by CIDCO are placed at page Nos 74 to 78 of the additional paper book. As per the commencement certificate and the Revised Plan, the net built up area was 10,830.547 Sq/ Mtrs. Out of which residential area is 9744.111 Sq.Mtrs, which is exactly 90% of the total built up area and the commercial built up area is 1086.436 Sq.Mtrs, which is exactly 10% of the total built up area. The commercial built-up area is inclusive of two Fitness Centres whose built up area is approximately 46.82 Sq.Mtrs. which are not meant for sale but meant for the use of the residents of the buildings and therefore, the total built up area for the commercial use is less than 10% of the total built up area and the total built up area of residential use is more than 90% of the total built up area. It is further submitted that instead of "Commercial-Cum-Residential Project". There is "Residential-cum- Commercial Project" and thereafter case of Brahma Associates vs JCIT has again been referred to and relevant paragraph of the decision has been reproduced.

10. The copy of the reply of the Appellant/AR was also sent to the Assessing Officer for representation and counter comments, who has submitted his representation by letter No./ ACIT/15(3)/Scrutiny Asst./2009-10 dated 09.09.2009.

11. Further, the appellant was given opportunity along with copy of representation of AO dated 09.09.2009 as reproduced above, for counter comments. In compliance, the Ld.A.R has submitted a written reply dated 23.09.2009 reiterating the earlier submissions and pointing out the relevant paragraph of the decision of ITAT of Brahma Associates (supra) to be considered. The Ld.AR has submitted that upto FY 2004-05 relevant to AY 2005-06 only 33% construction work was completed hence 8% profit is most reasonable one. Further, in para 5, Ld.AR has clarified that case of M/s.Bhumiraj Construction is not comparable as this assessee was adopting Project Completion Method whereas, Appellant was adopting Percentage Completion Method. Therefore, there is no comparison of these two cases. Therefore, the Ld. A.R has argued that neither his case is for any enhancement nor for denial of legitimate deduction of u/s.80IB(10) of I.T Act, 1961.

12. The Ld. CIT(A) further held after elaborate discussions in his order as follows:

Appellant fulfills all the conditions lays down u/s. 80IB(10), therefore the contention of the AO is not tenable. As regards commercial construction, it is relevant to mention that the terms and conditions of the scheme of CIDCO compels the builder to construct such commercial complexes. The clauses (5) of terms 11 reads as under:

"A minimum 25% of the permissible FSI shall be used for Mercantile and Business uses. However, CIDCO may issue NOC for minimum 10% component for commercial use on request from allottee for commercial + Residential plots of area more than 1000 sq.mtr and having permissible FSI of 1.5."

Therefore, CIDCO has allotted 'commercial + residential plots' to the appellant and CIDCO has granted approval for construction of Residential Cum Commercial Project." As per approved plan of CIDCO, total built up area for commercial use is 10% or less and total built up area for residential use is 90% or more of the total built up area. Thus, the appellant is entitled to deduction u/s.80IB(10) and reply of the Appellant dated 25.08.2009 and further representation dated 23.09.2009 against the show cause No. CIT(A)XV / SB & D / 2009-10 dated 15.07.2009 are found to be tenable, satisfactory and acceptable. As regards comparable case of M/s.Bhumiraj Construction at Kharghar, referred to by the Assessing Officer in letter dated 09.09.2009, it is relevant to mention that if the deduction u/s.80IB(10) is allowable then it would be academic matter to consider whether 15% profit is reasonable or 8% of work-in-progress. Moreover, M/s.Bhumiraj Construction was following project completion method whereas, Appellant is following Work-in-progress method which cannot be compared with such case. Furthermore, there are so many other points as mentioned in para 5 of rejoinder dated 23.09.2009 of Ld.AR which reveals the fact that there is no comparison of that case with Appellant's case. Therefore, considering full facts and circumstances of the case and decision of Brahma Associates Vs JCIT (supra), I reach to the conclusion that Appellant is entitled for deduction u/s.80IB(10) and has rightly offered profit for taxation attributable to the commercial area of the Housing Project at Rs. 13,14,696/- and claimed deduction of Rs.86,63,749/-, the AO is, therefore, directed to assess the net taxable income @ 8% being presumptive estimated income on Work-in-Progress Method and allow the deduction u/s.80IB(10) in respect of Housing Project."

13. Aggrieved, Revenue is in appeal before us and has raised the following grounds of appeal.

14. We have heard both the parties. We find that this issue is squarely covered by the decision of the Hon'ble Bombay High Court in the case of CIT Vs Brahma Associates 239 CTR 30 wherein it has been held as follows:

"Uto 31st March, 2005, deduction u/s. 80IB(10) is allowable to housing projects approved by the local authority having residential units with commercial user to the extent permitted under the DC Rules/Regulations framed by the respective local authority irrespective of the fact that the project is approved as "housing project" or 'residential plus commercial'. Tribunal was not justified in holding that upto 31st March, 2005, deduction u/s. 80IB(10) would be allowable to the projects approved by the local authority having residential building with commercial user upto 10% of the total built-up area of the plot; cl (d) inserted in s. 80-IB(10) w.e.f. 1st April, 2005 is prospective and not retrospective."

Respectfully following the decision of the Jurisdictional High Court, the ground raised by the Revenue is dismissed.

15. In the result, the appeals filed by the Revenue are dismissed.