IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'I' MUMBAI

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER**

ITA No.7021/Mum/2008
Assessment Year-2006-07

| | | |
|---|---|---|
| The ITO-6(2)(3),<br>Aayakar Bhavan,<br>Mumbai-400 020 | Vs. | M/s. Everest Home Construction (India) Pvt. Ltd.,<br>116/118, Maniar Bldg.,<br>P.D'Mello Road, Carnac Bunder,<br>Mumbai-400 009<br><br>PAN-AABCE 3133C |
| (Appellant) | | (Respondent) |

Appellant by: Shri Sanjiv Dutt
Respondent by: Shri K. Gopal

Date of Hearing :08.08.2012
Date of pronouncement: 12.9.2012

**O R D E R**

**PER N.K. BILLAIYA, AM:**

With this appeal Revenue has challenged the correctness of the order of Ld. CIT(A)- VI, Mumbai dt. 9.10.2008 pertaining to assessment year 2006-07.

2. The Revenue has questioned the said order by raising following effective ground of appeal:

> *"On the facts and in the circumstances of the case, the Ld. CIT(A) erred in directing the AO to allow deduction u/s. 80IB(10) even though condition laid down in section 80IB(10(d) is not satisfied which is applicable from A.Y. 2005-06 onwards."*

3. Facts giving rise to this dispute show that the assessee company is engaged in the business of building construction following mercantile system of accounting. It has developed property at 12, Arab Lane, Byculla, Mumbai named as "Amatulla' having 3 separate buildings, shops and commercial

establishments. The project was commenced in the year 2003 after getting approval from local authority. It is completed during the year under consideration. The assessee has followed project completion method of accounting for taxation purpose. For the year under consideration, the assessee filed return of income declaring total income of Rs. Nil. The sale proceeds of the project is shown at Rs. 21,65,99,359/- on which the assessee has shown net profit at Rs. 10,09,42,833/- and claimed it as exempt u/s. 80IB(10) of the Act.

4. During the course of the assessment proceedings, the Assessing Officer sought clarification in respect of the claim of deduction u/s. 80IB(10) of the Act. The following facts emerged out of the explanation given by the assessee.

> The 'Amatulla' project consist of 3 buildings i.e. A, B & C building. A consisting of Ground +11 floor wherein entire ground floor except entrance lobby, staircase and lift , consists of commercial units and upper floors consist of residential units totaling to 84 flats. Building B consists of stilt + 12 floors having 70 residential units. Building C consists of stilt +7 floors having 53 residential units. Apart from this, there are 6 shops on the front side of the project for commercial use. The total built up area of the project is 107039 Sq. ft.

5. It was explained that the project is constructed on tenanted property and some tenants were already having their commercial establishments prior to the present construction. The said project was awarded under rehabilitation programme by which the assessee had to provide accommodation to the existing tenant who were residents and also to those who had commercial establishments. Accordingly, building 'C' is constructed for old residential tenants and the other two building, i.e. A & B are constructed for sale. It was also explained that the shops and other commercial construction were meant for existing commercial tenant only.

6. The AO observed that the assessee's project consists of commercial built up area of more than 2000 Sq. ft. The claim of the assessee u/s. 80IB(10) of the Act was examined under the light of the amendment brought under the section w.e.f. 1.4.2005 i.e. A.Y. 2005-06. Clause )d) introduced new condition of claim of deduction u/s. 80IB(10) of the Act restricting maximum commercial built up area of 2000 Sq. ft or 5% of aggregate built up area of the housing project whichever is less. The AO further observed that in assessee's case, total commercial built up area is worked out as 6450 Sq. ft. According to the AO, the assessee has violated one of the conditions for claim of deduction u/s. 80IB. The assessee was asked to explain as to why deduction u/s. 80IB(10) should not be disallowed since it has constructed shops and other commercial units having total built up area of more than 2000 Sq. ft. The assessee submitted a detailed explanation vide its letter dt. 25.3.2008 which is reproduced as under:

> *"The assessee had started this project in Feb. 2003 under an approval from the local authority dt. 11th Feb. 2003 for construction of residential project. The erstwhile provisions of Sec. 80IB(10) did not provided any upper cap on construction of the commercial area. The said provision came into being only for the A.Y. 2006-07 by which time our project had commenced and progressed substantially. Further not a single commercial area constructed by the assessee has been sold to anybody as they were meant for rehabilitating the existing commercial sitting tenants on property & without providing them the commercial area as permanent alternate accommodation this project would have been impossible and also no approval would have been granted by any local authority for redevelopment.*
>
> *In view of the above facts and circumstances we again state that the assessee has not violated any condition laid down u/s. 80IB(10) at the time of commencement of the project. Therefore the assessee should be fully granted the deduction u/s. 80IB at 100% & oblige."*

7. However, the assessee's submission did not find favour from the AO. As according to the AO, after the amendment to the provisions of Sec. 80IB(10) w.e.f. 1.4.2005, those housing project having commercial built up area of more than 2000 Sq. ft are not eligible for deduction u/s 80IB(10) of the Act as the assessee has exceeded maximum permissible limit provided in

the Act hence assessee's submissions cannot be accepted that prior to amendment there was no upper cap on construction of commercial area. It was further contended by the assessee that it has not sold the commercial area but the entire commercial area has been allotted to rehabilitating the existing commercial tenants. The AO rejected this submission of the assessee by stating that the main motive of deduction u/s. 80IB(10) is to provide affordable residential houses to the needy people of the society and not to extend the benefit of exempted profit to the occupants of commercial units. The assessee further filed a detailed explanation as under:

> *"In continuation of our letter dt. 25.3.2008, we further submit that amendment to Sec. 80IB(10) with respect to the maximum cap on construction of the commercial area is with prospective effect from the A.Y. 2005-06 only, which is cleared from the Memo. Explaining Prov. In the Finance (No. 2) Bill, 2004 reported in 268 ITR on page No. 187/188 (copy enclosed which is reproduced as under:*
>
> *"Under the existing provisions contained in sub-section (10) of Sec. 80-IB, a deduction equal to one hundred per cent of the profits of an undertaking developing and building housing projects is allowed if the housing project is approved by a local authority before 31st March, 2005. The deduction is subject to the conditions that the undertaking should have commenced development of the housing project after the 1st day of October, 1998, the project should be on a size of a plot of land which has a maximum built up area of one thousand square feet where such residential unit is situated in Delhi or Mumbai and one thousand and five hundred square feet at other places.*
>
> *It further state that the amendment to Sec. 80IB(10) proposed by the Finance Act 2004 has prospective effect from A.Y. 2005-06.*
>
> *Therefore it is clear that the assessee has fully complied with the provision of Sec. 80IB(10) for the purpose of claiming 100% deduction and there is no violation of any provision of Sec. 80IB(10). Therefore you are requested to allow the 100% deduction u/s. 80IB(10) as claimed in the Income Tax Return."*

8. After considering the submissions made by the assessee, the AO concluded that the entire explanation and submission of the assessee may be

valid prior to the amended provisions but after the amendment, it cannot be accepted and held that assessee has not complied with the conditions laid down in Sec. 80IB(10) of the Act and disallowed the claim of the assessee and completed the assessment at Rs. 10,09,42,830/-.

9. The assessee agitated this matter before the Ld. CIT(A) and reiterated that this project was started in 2003 when there was no upper cap on the commercial area in Sec. 80IB(10) of the Act. The project was fully completed during the A.Y. 2006-07. When the assessee started project in A.Y. 2003-04, it had satisfied all the conditions laid down in Sec. 80IB(10) of the Act. It was argued before the Ld. CIT(A) that even before budget proposals were presented by Hon'ble Finance Minister in Lok Sabha in July, 2004, the assessee had already received occupation certificate for building A&C. Hence the amendment is not applicable to the facts of the case. The Ld. CIT(A) considered the submissions made by the assessee. Ld. CIT(A) relied upon the decision of ITAT, Mumbai 'E' Bench in the case of Saroj Sales Organisation Vs ITO (2008) 3 DTR 494 and allowed the appeal of the assessee and directed the AO to allow the deduction u/s. 80IB(10) of the Act as the Housing project was approved from the Municipal authorities prior to 31.3.2005.

10. Aggrieved by this finding of the Ld. CIT(A), the Revenue is before us. The Ld. Departmental Representative strongly supported the findings of the AO and submitted that it is a well established rule of interpretation that any amendment which is in force at the beginning of the relevant assessment year must govern the case. For this proposition, the Ld. DR relied upon the decision of Glaxo Laboratories (India) Ltd. Vs ITO 18 ITD 226(SB)(Mum). The Ld. DR further submitted that w.e.f. 1.4.2005 i.e. A.Y. 2005-06 clause (d) has been introduced in Section 80IB(10) by which the maximum commercial built up area has been pegged to 2000 Sq. ft or 5% of aggregate built up area of the housing project whichever is less. As the assessee has violated clause (d) of Sec. 80IB(10) of the Act, the benefit of the said section cannot be given to the assessee. The Ld. DR relied upon the observations made by

the Hon'ble Bombay High Court in the case of CIT Vs Brahma Associates 333 ITR 289 wherein the Hon'ble High Court had an occasion to decide whether the amendment to Sec. 80IB(10) has retrospective effect or not to which the Hon'ble High Court has held that the restriction imposed for the first time w.e.f. 1st April, 2005 cannot be applied retrospectively. The Ld. DR also relied upon the decision of ITAT 'I' Bench Mumbai in the case of ITO Vs M/s. Shree Abhinav Associates in ITA No. 5623/M/2009 wherein the Tribunal has held that the amendment to Sec. 80IB(10) has no retrospective application and is applicable from A.Y. 2005-06.

11. Per contra, the Ld. Counsel for the assessee submitted that when the assessee started its project, the law did not provide any restriction on the commercial built up area. The assessee has fulfilled all the conditions prescribed for making it eligible for deduction u/s. 80IB(10) of the Act. Subsequent amendment cannot change the project profile of the assessee. The Ld. Counsel further submitted that the assessee has not sold commercial area to anyone but the entire commercial area has been given to the existing commercial tenants as part of the rehabilitation programs. As the assessee has not received any consideration for the sale of commercial area, the assessee cannot be denied deduction u/s. 80IB(10) of the Act on the sale of its residential unit. The assessee relied upon the decision of ITAT Mumbai in the case of Saroj Sales Organisation Vs ITO 115 TTJ 85 (Mum). The Ld. Counsel also relied upon the decision of Mumbai Bench 'E' in the case of Hiranandani Akruti JV Vs DCIT in ITA No. 5416/M/09 and CIT Vs Brahma Associates (supra) and concluded that the project of the assessee has been approved as Housing Project by the local authority therefore disallowance of deduction claimed u/s. 80IB(10) of the Act is not at all justified.

12. We have carefully considered the rival submissions and perused the orders of the lower authorities and the case laws relied upon by the rival parties . The undisputed fact is that the assessee has commercial built up area of 6415 Sq. ft. This has been accepted by the assessee. It is also not disputed that the project of the assessee is on a plot area of more than one

acre. The only point of dispute is whether amendment brought w.e.f. 1.4.2005 i.e. A.Y. 2005-06 can be made applicable to the facts of the case. The cases relied upon by the Ld. Counsel relates to the pre amended provisions of Sec. 80IB(10) of the Act. Moreover, in the case of Brahma Associates (supra), the Hon'ble Bombay High Court has categorically held that clause (d) inserted to Sec. 80IB(10) is prospective and cannot be applied for the period prior to 1.4.2005 which impliedly means that the amendment brought is applicable from A.Y. 2005-06. The contention of the Ld. Counsel that the project was started keeping in mind the pre amended provisions of Sec. 80IB(10) of the Act and therefore any subsequent changes should not change the project profile cannot be accepted.

13. Let us take an example. Assuming that the Legislature comes up with a tax incentive provision providing that whosoever constructs godowns for the storage of food grains will be allowed to write off entire cost of the godown from his other incomes. 'X' starts constructing four godowns at four different places. Two godowns are completed in one year and 'X' writes off the entire cost from his other incomes. However, in the meantime, the Legislature brings an amendment by providing that henceforth the assessee will be allowed 50% depreciation on the cost of the godown.

14. Can the assessee claim 100% write off after this amendment ?. Further can the assessee say that it started the project of construction of godowns because of the tax incentive given by the legislature ? The logical answer would be **No.** For the simple reason that the assessee might have started the project keeping in mind the benefit by the Legislature but Government, if in public interest decides to grant exemption in one moment can withdraw it another because taxation is an expression of unilateral Will of the Legislature, is an exaction by the State in the exercise of its sovereign powers, estoppel cannot be invoked against Government in the exercise of its legislative powers. For these observations, we draw support from the decision of Bombay Conductors & Electricals Ltd. & Anr. Vs Under Secretary to the Govt.

of India & Ors. The Hon'ble Supreme Court in the case of Reliance Jute & Industries Ltd. VS CIT (1979) 120 ITR 921 has laid down the following law:

> "The assessment for one assessment year cannot, in the absence of a contrary provision, be affected by the law in force in another year. A right claimed by an assessee under the law in force in a particular assessment year is ordinarily available only in relation to a proceeding pertaining to that that year."

15. We find that in all the cases relied upon by the assessee, the ratio laid down by the Hon'ble Supreme Court in the case of Reliance Jute Industries (supra) has not been considered. In our humble opinion, the ratio laid down by the Hon'ble Supreme Court in the case of Reliance Jute Industries (supra) stated hereinabove squarely apply on the facts of the case as the assessee has not fulfilled the conditions precedent provided u/s. 80IB(10)(d) as applicable from AY 2005 - 06. There is no dispute that the assessee fulfills all conditions of section 80-IB(10) as it stood prior to April 1, 2005 , but after the amendment , The assessee is not eligible for deduction u/s. 80IB(10) of the Act. It would not be out of place to highlight the observations made by the Hon'ble Bombay High Court in the case of Brahma Associates [ Supra ] which is as under :

> " From the fact that the deduction under section 80-IB(10) prior to April 1, 2005 was allowable on the profits derived from housing projects constructed during the specified period, on a specified size of the plot with residential units of the specified size, it cannot be inferred that the deduction under section 80-IB(10) was allowable to housing projects having residential units only, because, restriction on the size of the residential unit is with a view to make available a large number of affordable houses to the common man and not with a view to deny commercial user in residential buildings. In other words, the restriction under section 80-IB(10) regarding the size of the residential

unit would in no way curtail the powers of the local authority to approve a project with commercial user to the extent permitted under the Development Control Rules/Regulations. Therefore, the argument of the Revenue that the restriction on the size of the residential unit in section 80-IB(10) as it stood prior to April 1, 2005 is suggestive of the fact that the deduction is restricted to housing projects approved for residential units only cannot be accepted.

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

.....

" It is for the Legislature to impose restrictions on commercial user in a project for the purposes of availing of section 80-IB(10) deduction and that has been done by inserting clause (d) to section 80-IB(10) with effect from April 1, 2005. "

.....

"**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 cannot be applied for the period prior to April 1, 2005. Secondly, 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 restrospectively. 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 restrospectively. 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.**

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

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

.....

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

**{ Emphasis , bold and under lines by us }**

16. We further find that in most of the cases relied upon by the assessee, the judicial authorities have allowed proportionate deduction to the assessee because there was no specific bar on commercial area in the housing project prior to the amendment, therefore, the judicial authorities have allowed proportionate deduction on that part which was used for residential purposes. However, with the insertion of clause (d) w.e.f. 1.4.2005 now there is a cap on a commercial area in the eligible project which condition has been violated by the assessee in the instant case. In our humble opinion, the decisions of Hon'ble Supreme Court in the case of Reliance Jute Industries (supra) and the observations made by the Hon'ble High Court of Bombay in the case of Brama Associates (supra) explained the correct law applicable from A.Y. 2005-06. Therefore, findings of the Ld. CIT(A) are reversed and that of the AO are restored.

17. In the result, the appeal filed by the Revenue is allowed.

Order pronounced on this 12th day of September, 2012

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| (VIJAY PAL RAO) | (N.K. BILLAIYA ) |
| Judicial Member | Accountant Member |

Mumbai, Dated 12th September, 2012
Rj

*Copy to :*
1. *The Appellant*
2. *The Respondent*
3. *The CIT-concerned*
4. *The CIT(A)-concerned*
5. *The DR 'I' Bench*

*True Copy*

*By Order*

*Asstt. Registrar, I.T.A.T, Mumbai*

**FIT FOR PUBLICATION**

**JM** **AM**