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

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

ITA No. 598/PN/2013
(Assessment Year: 2009-10)

M/s. Gera Developments Pvt. Ltd.,
200, Gera Plaza, Boat Club Road,
Pune – 411001
PAN No.AAACG6703F .. Appellant

Vs.

JCIT(OSD),
Circle-1(2), Pune .. Respondent

ITA No.768/PN/2013
(Assessment Year: 2009-10)

Dy.CIT, Circle-1(2), Pune .. Appellant

Vs.

M/s. Gera Developments Pvt. Ltd.,
200, Gera Plaza, Boat Club Road,
Pune – 411001
PAN No.AAACG6703F .. Respondent

Assessee by	:	Shri S.K. Tyagi
Revenue by	:	Shri Rajesh Damor
Date of hearing	:	18-12-2014
Date of Pronouncement	:	31-12-2014

ORDER

PER G.S. PANNU, A.M. :

These are cross-appeals filed by the assessee and the Revenue, which are directed against the order of the Commissioner of Income-tax (Appeals)-I, Pune dated 31-01-2013 which, in turn, has arisen from order dated 26-12-2011 passed by the Joint Commissioner of Income Tax (OSD), Circle-2, Pune (Assessing Officer) under section 143(3) of the Income-tax Act, 1961 (in short "the Act), pertaining to the assessment year 2009-10.

2. In so far as appeal of the assessee is concerned although the assessee has raised multiple grounds of appeal but essentially the dispute is on two issues. Firstly, the dispute is in relation to addition of Rs.2,78,20,447/- made by the income-tax authorities by invoking the provisions of section 40(a)(i) of the Act. Secondly, the assessee is aggrieved by the action of the income-tax authorities in denying allowance of depreciation in respect of Honda Motor Car @50%.

3. In so far as the first issue is concerned, the relevant facts are that the Assessing Officer noticed that assessee had made payments to a non-resident concern, M/s. Arthur Gensler and Associates without deduction of the requisite tax at source. As per the discussion contained in para 5 of the assessment order, the Assessing Officer has concluded that the payments of Rs.2,78,20,447/- made to M/s. Arthur Gensler and Associates were in the nature of fee for technical services, and therefore remittance of such amount to the said non-resident concern was liable for deduction at source. As the assessee had not deducted the requisite tax at source, the Assessing Officer invoked the provisions of section 40(a)(i) of the Act and made an addition of Rs.2,78,20,447/- to the returned income of the assessee. The CIT(A) has also affirmed the said addition against which assessee is in appeal before us.

4. In the above background, the learned representative for the assessee has raised a preliminary objection contending that the provisions of section 40(a)(i) of the Act are not attracted in the present case, even if it is to be accepted that there was a default in the deduction of tax at source. Explaining the preliminary objection, the learned representative submitted that section 40(a)(i) can be invoked to

disallow an expenditure which has been claimed as a deduction in computing the income chargeable under the head profits and gains of business or profession. Whereas in the present case, the impugned payment to the foreign party has not been claimed as a deduction, as the said amount lies capitalized in the capital work-in-progress which is depicted in the Balance Sheet. It was also submitted that the Hon'ble Punjab & Haryana High Court, in a somewhat similar circumstance, in the case of CIT Vs. Mark Auto Industries Limited reported in (2013) 358 ITR 43 (P&H) observed that no expenditure could be disallowed u/s.40(a)(i) of the Act if such expenditure was capitalized and not claimed as a revenue expenditure.

5. On this preliminary objection, the Ld. Departmental Representative has not controverted the factual matrix but has relied upon the orders of the authorities below to justify the disallowance. On this aspect, it is noted that the CIT(A) in Para 5.3 of her order has dealt with the aforesaid objection as follows :-

> *"5.3 Therefore, during appellate proceedings, it is noticed that the only issue being disputed by the appellant company is regarding the fact that the architectural fees of Rs.2,78,20,447/- was not claimed as deduction in the Profit & Loss account for the relevant assessment year. My attention has been drawn to Schedule 11 of the Profit & Loss account whereby under the head "Administrative and Other Expenses" an amount of Rs.81,00,668 only has been claimed under the sub head "legal and professional fees". Regarding this ground taken by the appellant it is noted that the Assessing Officer has already met this objection by referring to the notes of accounts annexed to the audit report for the relevant F.Y. 2008-09 which mentions that the "Inventories of unsold units of flat is valued at lower of cost and net realizable value. Work in progress represents directly attributable to the expenditure incurred in respect of projects under development and carried at cost. Cost includes land, related acquisition expenses, construction cost, borrowing cost added to work in progress and other expenses directly attributable to the project'. I have further examined Schedule 14 of the notes forming part of the financial statements which clearly mentions architect consultancy fees of Rs.2,88,34,252 as having been paid during the year in foreign currency. Accordingly, this objection of the appellant is not tenable."*

6. We have carefully considered the rival submissions. Notably, the controversy before us primarily revolves around invoking of section 40(a)(i) of the Act. Broadly speaking, section 40(a)(i) of the Act prescribes that no deduction shall be allowed in computing income chargeable under the head profits and gains of business or profession of the amounts like, Interest, Royalty, Fees for technical services or other sums chargeable under this Act which are payable outside India or to a non-resident and on which tax is deductible at source under Chapter XVIIB of the Act and such tax has not been deducted or after deduction, has not been paid during the previous year or in the subsequent year before the expiry of the time prescribed under sub-section (i) of section 200 of the Act. The aforesaid section has been invoked by the Assessing Officer in the context of payment of Rs.2,78,20,447/- to M/s. Arthur Gensler and Associates, a non-resident concern. According to the Assessing Officer, the aforesaid remittance to the non-resident amounts to 'fee for technical services' and is therefore within the ambit of section 40(a)(i) of the Act. Since the assessee had made the aforesaid remittance without deduction of tax at source, the Assessing Officer disallowed the same by invoking section 40(a)(i) of the Act and added the sum of Rs.2,74,44,270/- to the returned income. Firstly, assessee resisted the addition by contending before the income-tax authorities that the remittances made to M/s. Arthur Gensler and Associates are not subject to the deduction of tax at source in India. For the present, we are not concerned with the said controversy as the assessee has raised an alternate plea to the effect that section 40(a)(i) of the Act is not applicable at all. In order to appreciate the said point, we may reproduce hereinafter the relevant portion of section 40(a)(i) of the Act :-

"Amounts not deductible.

40. Notwithstanding anything to the contrary in sections 30 to [38], the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", -

(a) in the case of any assessee –

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200:

***Provided** that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."*

7. The point sought to be raised is to the effect that section 40(a)(i) of the Act governs a situation where an amount is claimed as a deduction in computing the income chargeable under the head "Profits and gains of business or profession" and not otherwise. The case made out by the assessee is that the amount of 2,78,20,447/- paid to M/s. Arthur Gensler and Associates is not debited to the Profit and Loss Account and is therefore not an amount deducted in computing the income chargeable under the heads 'Profits and gains of the business or profession'. Therefore, such an amount does not fall within the purview of section 40 of the Act itself. There is no dispute to the aforesaid factual matrix. The only point raised by the CIT(A), which we have reproduced in the earlier part of the order, is to the effect that assessee has paid the aforesaid sum during the year under

consideration in foreign currency. The insistence of the Revenue to say that the amount has been paid in this year and therefore it is covered within the prescription of section 40(a)(i) of the Act is quite otiose to the requirements of section 40(a)(i) of the Act which we have reproduced above. There is no dispute to the proposition that the said payment has not been claimed as a revenue expenditure while computing the income chargeable under the head 'Profits and gains of business or profession' in this year and therefore the same would not fall for consideration in section 40(a)(i) of the Act. Thus, by adverting to the aforesaid short point, we do not find any justification to uphold the addition of Rs. 2,78,20,447/- made by the lower authorities by invoking section 40(a)(i) of the Act. The order of the CIT(A) is set-aside and the Assessing Officer is directed to delete the addition of Rs.2,78,20,447/- . Thus, on this aspect assessee succeeds.

8. The second Ground of appeal raised by the assessee is with regard to the rate of allowance of depreciation on Honda Motor Car. The assessee claimed depreciation on Honda Motor Car @ 50% on the ground that it was a 'light motor vehicle' and was therefore covered within the meaning of a commercial vehicle. The assessee had relied upon the CBDT Notification No.10/2009 dated 19-01-2009 which prescribes that enhanced depreciation @ 50% is allowable on new commercial vehicles acquired on or after 01-01-2009 but before 01-04-2009 and which are put to use before 01-04-2009 for the purpose of business or profession. The Assessing Officer, however, allowed depreciation at the normal rate of 15% on the ground that the enhanced rate of depreciation @ 50% allowed by the CBDT Notification dated 19-01-2009 (supra) would cover only trucks and other heavy vehicles and

not a motor car. The CIT(A) has also affirmed the aforesaid stand of the Assessing Officer, against which assessee is in appeal before us.

9. In this context, the Learned Representative for the assessee submitted that the objection of the income-tax authorities that a motor car does not amount to a commercial vehicle is misconceived having regard to the Depreciation Table annexed to the Income Tax Rules, 1962. In this context, it is noted that Rule 5(1) of the Income Tax Rules, 1962 (in short 'the Rules') prescribes that the depreciation allowance is to be calculated at the percentages specified in the Table in Appendix-I thereof. The contents of the Table so far as they are relevant for our purpose read as under :

"III. Machinery and Plant

(1) ……..

(2) ……..

(3) (i) …….

To

(vi) …….

(via) New commercial vehicle which is acquired on or after the 1st day of April, 2009 but before the 1st day of [April], 2009 and is put to use before the 1st day of [April], 2009 for the purposes of business or profession."

10. Further, paragraph 6 of the Notes below read as under :-

"6. "Commercial vehicle" means ……. "light motor vehicle", ……. . The expressions ……. "light motor vehicle", …….. shall have the meanings respectively assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1998)."

11. A conjoint reading of the aforesaid provisions would reveal that the vehicle in respect of which assessee seeks to claim depreciation @ 50% is a 'light motor vehicle' and therefore the claim for enhanced rate of depreciation is on a sound footing. Ostensibly, the aforesaid

provisions of the Depreciation Table annexed as Appendix-I to the Rules clearly apply and therefore the lower authorities were not justified in denying assessee's claim for allowance of depreciation @ 50% on the vehicle in question, subject to the fulfillment of other conditions. As a consequence, we set-aside the order of the CIT(A) and direct the Assessing Officer to re-compute the depreciation allowable on the impugned vehicle as per our aforesaid direction and in accordance with law. Thus, on this aspect assessee succeeds for statistical purposes.

12. In the result, the appeal of the assessee is allowed, as above.

13. In so far as cross-appeal of the Revenue is concerned, it has raised the following Grounds of Appeal :-

> *"1. The order of the Id. Commissioner of Income-tax (Appeals) is contrary to law and to the facts and circumstances of the case.*
>
> *2. The Id. Commissioner of Income-tax(Appeals) grossly erred in allowing deduction to the assessee u/s.80IB when assessee could not complete the Housing Project as required under provisions of Sec.80IB(10)(a)(iii) of the Income-tax Act, 1961.*
>
> *3. The Id. Commissioner of Income-tax (Appeals) grossly erred in allowing deduction to the assessee u/s.80IB when the explanation (ii) to Clause (a) of Sec.80IB(10) provides that the date of completion of construction of the Housing Project shall be taken to be that the date on which the completion certificate in respect of such Housing Project is issued by the Local Authority and no such certificate was submitted by the assessee.*
>
> *4. The Id. Commissioner of Income-tax (Appeals) grossly erred in interpreting section 80IB(10), in the context of applicability of Explanation (ii) to clause (a), in a manner neither contemplated nor provided for under the Act.*
>
> *5. For these and such other grounds as may be urged at the time of hearing, the order of the Id. Commissioner of Income-tax (Appeals) may be vacated and that of the Assessing officer be restored.*
>
> *6. The appellant craves leave to add, alter or amend any or all the grounds of appeal."*

14. In the aforesaid context, the relevant facts are as follows. The assessee is a company which is engaged in the business of property

development. In respect of a housing project undertaken by it, named 'Emerald City' at Baner, Pune it claimed a deduction u/s.80IB(10) of the Act of a sum of Rs.23,87,480/-. The Assessing Officer noted that the development of the aforesaid housing project was commenced by the assessee in terms of a commencement certificate dated 21-11-2005 issued by the local authority, i.e. Pune Municipal Corporation (in short 'the PMC'). The Assessing Officer held that the assessee was not eligible for the claim of deduction u/s.80IB(10) of the Act on the ground that it had not complied with the requirements of section 80IB(10) (a)(iii) of the Act. As per the Assessing Officer where an housing project has been approved by the 'local authority' on or after 01-04-2005, its construction was liable to be completed within 5 years from the end of the Financial Year in which the housing project is approved by the local authority. In the present case, the Assessing Officer noted that the housing project was approved on 21-11-2005 as per the commencement certificate issued by PMC and therefore the construction was to be completed by 31-03-2011. The Assessing Officer also noted that the date of completion was to be understood as the date on which completion certificate in respect of such housing project is issued by the 'local authority', as required by Explanation (ii) to section 80IB10(a) of the Act. In so far as assessee's project was concerned, the Assessing Officer noted that no completion certificate was issued by PMC before the stipulated date and therefore according to him, assessee did not comply with the requirements of section 80IB(10)(a)(iii) r.w. Explanation (ii) thereof. Therefore, he disallowed such deduction.

15. The CIT(A) however noted that assessee had applied for obtaining the certificate of completion of construction to PMC with all

the requisite NOCs on 04-12-2007 itself. It was also observed by the CIT(A) that assessee was consistently pointing out that he had actually completed the construction of the project as per the sanctioned plans and its application to the PMC for obtaining of the occupancy certificate was based on the architect's completion certificate and other NOCs required for such purpose. The assessee also pointed out that in response to its application dated 04-12-2007 made to the PMC, there was no refusal of the occupancy certificate. Therefore, in terms of the relevant Development Control Rules applicable to the PMC, the occupancy certificate is deemed to have been granted within 21 days from the date of assessee's application seeking completion certificate, if no objections or refusal is intimated by PMC. Thus, as per the assessee, in the absence of any refusal from the PMC, the project is deemed to have been completed. Further, assessee also submitted before the lower authorities that such deemed completion concept was upheld by the Pune Bench of the Tribunal in the case of Satish Bora and Associates vide ITA No.713 & 714/PN/2010 dated 07.01.2011 in the context of examining the compliance with the requirements of section 80IB(10)(a) r.w. Explanation (ii) thereof. The CIT(A) has accepted the aforesaid plea of the assessee. It is also notable that CIT(A) made a reference to the PMC and sought information u/s.133(6) of the Act in the context of assessee's application for obtaining occupancy certificate of the project. The CIT(A) noted that neither the completion certificate was issued by the PMC and nor any objections or refusal was communicated by PMC to the assessee. Therefore, the CIT(A) proceeded to allow the plea of the assessee by relying on the decision of the Pune Bench of the Tribunal in the case of Satish Bora and Associates (Supra). The relevant discussion in the order of the CIT(A) is as under :-

"4.6. I have considered the submissions made by the appellant along with the response received from the Pune Municipal Corporation with respect to the completion certificate. The appellant company has applied for completion (occupancy) certificate before the PMC along with the Architect's completion certificate and all the other NOCs required for the completion certificate on 4.12.2007. However, no such completion certificates have been issued nor any objections nor refusal has been received from PMC. The delay in issuing the occupancy-certificate on the part of PMC is stated to be the stay on the said property imposed by the State Government due to the ongoing dispute under the Urban Land Ceiling Act. The PMC has provided domestic water supply in the housing project and on the basis of property tax assessment made by PMC, residents of the housing project have paid their property taxes to PMC. The appellant has placed reliance on the Pune ITAT decision in the case of Satish Bora & Associates in ITA Nos. 713 &714/PN/2010 para 19 and 20 of the said decision is as under:

"19. For a ready reference our above findings are summarized as under:

1. In the case of PMC, the completion certificate in prescribed form issued by the licensed architect etc, who has supervised the construction is furnished with four sets of completion plan under rule 7.6 of the DC Rules of the PMC. Thereafter PMC is required to return one of the sets duly certified as Completion Plan to the owner along with the issue of full Occupancy Plan to the owner along with the issue of full Occupancy Certificate after inspection of the work under rule 7.7 of the DC Rules. Since Explanation (ii) to section 80-IB(10)(a) of the I. T, Act, requires Completion Certificate issued by the local authority to be taken as the date of Completion of the Construction, a general understanding in our view is that a Completion Certificate which is issued by the local authority after conducting inspections of construction by it. In case of PMC, it is only Occupancy Certificate which is issued along with certified completion plan after inspection of the construction by it, we have treated the date of issuance of such Occupancy Certificate, along with Certified Completion plan as the date of Completion Certificate of the construction for the requirement of Explanation (ii) to section 80IB(10)(a) of the I.T. Act.

2. Since in fact PMC do not issue Occupancy Certificate generally in time and with this understanding the Legislature have also introduced a deeming provision of 21 days to put constraint upon PMC, we after detailed deliberation in preceding paragraphs have come to a conclusion that in case of small objections of PMC raised after expiry of deeming period of 21 days under Rule 7.7 of DC Rules under PMC, the date when the applicant acquired deeming sanction will be treated as date when the applicant acquired deeming sanction will be treated as the date of Completion (occupancy) Certificate to meet out the requirement of Explanation (ii) to Section 80IB (10)(a) of the Act. We have already discussed hereinabove what would be the small objections. In brief those objections which do not affect the main project and are generally temporary constructions.

20. We thus while setting aside orders of the authorities below direct the A. O. to allow the claimed deduction under Section 80/8(10) of the I. T. Act 1961 in the assessment years under consideration treating the required date of completion of construction of the housing project as the date when above discussed deeming provision period of 21 days expired i. e. 20/11/2005.

4.5. In view of the binding decision of the jurisdictional ITAT, it is to be held that deduction u/s 80IB(10) in respect of Emerald City Baner is allowable. Ground No. 2 of the appeal is thus allowed."

16. In the aforesaid background the Ld. Departmental Representative has made his submissions. According to the Ld. Departmental Representative, Explanation (ii) to section 80IB(10)(a) of the Act prescribes that the date of issuance of completion certificate by the PMC is to be understood as the date of completion of construction of the project, and in the present case, it is quite clear that the requisite occupancy certificate has not been issued by PMC and therefore such a project could not be said to have complied with the requirements of completion of construction contained in clause (a) to section 80IB(10) of the Act.

17. On the other hand, the Ld. Representative for the respondent-assessee vehemently pointed out that there is no refusal or any objections raised by the PMC with regard to non-completion of construction of the project and therefore the CIT(A) made no mistake in following the decision of the Pune Bench of the Tribunal in the case of Satish Bora and Associates (supra) while allowing the claim of the assessee.

18. We have carefully considered the rival submissions. Quite clearly, the entire case of the Assessing Officer rests on Explanation (ii) to section 80IB(10)(a) of the Act which prescribes that 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. In the present case, the local authority, i.e. Pune Municipal Corporation has not issued the requisite completion certificate (to be understood as occupancy certificate in the context of the PMC) before the stipulated date. However, the assessee has countered the aforesaid objection by pointing out that in-fact it has completed the construction of the project on 04-12-2007 i.e. much before the stipulated date of completion contained in section 80IB(10)(a) of the Act, it had applied to the PMC for obtaining of the occupancy certificate based on the certificate of the architect and the other NOCs required for the said purpose. The CIT(A) has also called for information u/s.133(6) of the Act from the PMC and its response did not reveal any objection on the part of the PMC that the construction was not complete with respect to the sanctioned plans. Therefore, factually speaking, there is no controversion to the assertions of the assessee that it's project was otherwise complete as per the sanctioned plans within the stipulated date. In this background, in our view, the CIT(A) made no mistake in allowing the claim of the assessee and her approach is not only consistent with the decision of the Pune Bench of the Tribunal in the case of Satish Bora and Associates (supra) but it is also in line with the judgement of the Hon'ble Gujarat High Court in the case of CIT vs. Tarnetar Corporation, (2014) 362 ITR 174 (Guj). The relevant portion of the judgement of the Hon'ble Gujarat High Court in the case of Tarnetar Corporation (supra) is reproduced hereinunder :-

> "*In the present case, therefore, the fact that the assessee had completed the construction well before 31st March 2008 is not in doubt. It is, of course, true that formally BU permission was not granted by the Municipal Authority by such date. It is equally true that explanation to clause (a) to section 80IB(10) links the completion of the construction to the BU permission being granted by the local authority. However, not every condition of the statute can be seen as mandatory. If*

substantial compliance thereof is established on record, in a given case, the court may take the view that minor deviation thereof would not vitiate the very purpose for which deduction was being made available.

In the present case, the facts are peculiar. The assessee had not only completed the construction two years before the final date and had applied for BU permission. Such BU permission was not rejected on the ground that construction was not completed, but the some other technical ground. In that view of the matter, granting benefit of deduction cannot be held to be illegal."

19. Following the aforesaid discussion, we therefore find no reason to interfere with the ultimate conclusion of the CIT(A) in allowing assessee's claim for deduction u/s.80IB(10) of the Act amounting to Rs.23,87,480/-. As a consequence, the order of the CIT(A) is hereby affirmed and Revenue fails in its appeal.

20. Resultantly, whereas the appeal of the assessee is allowed, that of the Revenue is dismissed.

Order pronounced in the open Court on 31st December, 2014.

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

Pune, Dated : 31st December, 2014
Satish/Sujeet

Copy to:-

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

By Order

//True Copy//

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