**INCOME TAX APPELLATE TRIBUNAL,
SPECIAL BENCH, PUNE**

**Before Shri Vimal Gandhi, Hon'ble President
Shri Pramod Kumar, Accountant Member, and
Shri Mukul Shrawat, Judicial Member**

ITA No. 1417/PN/06
Assessment year 2003-04

Brahma Associates ***……Appellant***
H1/2, Brahma Paradise,
Off Mangaldas Road, Pune 411 001

Vs.

Joint Commissioner of Income Tax (OSD) ***…….Respondent***
Circle 4, Pune

ITA No. 111/PN/07
Assessment year 2003-04

Dhareshwar Promoters & Builders ***……Appellant***
Sr No. 128/2 C , SUS Road,
Abhjinav Vidhyaly, Pashan
Pune 411 021

Vs.

Income Tax Officer ***…….Respondent***
Ward 4(6), Pune

ITA No. 5/PN/07
Assessment year 2003-04

Kumar Behary Rathi ***……Appellant***
Kumar Capital, 2nd floor
2413, East Street
Pune 411 001

Vs.

Dy Commissioner of Income Tax ***…….Respondent***
Circle 4, Pune

Appellants by	:	Dr Sunil Pathak
Respondents by	:	Shri S D Kapila, and Shri Prakash Chandra Yadav

ITA No. 164/PN/07
Assessment year 2003-04

Raviraj Kothari Punjabi Associates ***……Appellant***
Sl No. 68/7/8/9, Behind Sopan Baug
B T Kawade Road, Ghorpadi
Pune

Vs.

Dy. Commissioner of Income Tax ***…….Respondent***
Circle 4, Pune

ITA No. 165/PN/07
Assessment year 2003-04

Tushar Developers ***……Appellant***
1239, Bhawani Peth,
Pune 411 042

Vs.

Income Tax Officers ***…….Respondent***
Ward 5(3), Pune

Appellants by	:	Shri V L Jain
Respondents by	:	Shri S D Kapila, and Shri Prakash Chandra Yadav

Interveners

ITA No. 113/PN/2007	***Apurva Properties & Estates Limited*** (Represented by Shri Rajan Vora)
ITA No. 1193/PN/08 ***ITA No. 349/PN/08***	***Khinvsara Chavan Associates*** ***Anand Construction, Pune*** (Represented by Shri S R Puranik)
ITA Nos.3365,4465/Mum/07	***Harsh Unique Construction*** (Represented by Shri S K Tulsiyan)

O R D E R

Per Pramod Kumar :

1. On recommendations dated 30th August 2007, made by a Division Bench of this Tribunal, Hon'ble President has constituted this Special Bench. The Division Bench had noted that there are clear divergences in the views expressed by the various Division Benches of the Tribunal on certain issues relating to Section 80 IB(10) of the Income Tax Act, 1961, and, therefore, a larger bench is required to consider the following questions:

> **1. Whether deduction under section 80 IB (10), as applicable prior to 1st April 2005, is admissible in case of a 'housing project' comprising residential housing units and commercial establishments?**
>
> **2. In case the question no. 1 is answered in affirmative, whether considering facts and circumstances of a particular case, a proportionate deduction should be allowed?**
>
> **3. In case the answers to question no. 1 and 2 are in affirmative, whether the limit prescribed by clause (d) of Section 80 IB (10) should operate?**

2. Hon'ble President accepted these recommendations of the Division Bench and, accordingly, constituted this Special Bench to resolve the conflict between Division Bench decisions. That is how this Special Bench came to be *in seisin* of the matter.

3. Learned counsel appearing for the appellants have prayed that Brahma Associates be taken as the lead case, and Dr Pathak be allowed to lead the arguments. Shri Kapila, learned Special Counsel appearing for the respondents, did not object to this prayer. We have, therefore, accepted the prayer of the appellants and taken up Brahma Associates as the lead case. Dr Pathak, learned counsel for this assessee, has also been permitted to lead the arguments.

4. Dr Pathak suggests some minor amendments in the questions before this Special Bench. He suggests that in second question words "under section 80 I B (10) to the extent of profits from the residential units" be added after the word 'deduction' and before the words 'should be allowed'. Similarly, so far as third question before the Special Bench is concerned, Dr Pathak's suggestion is that the words "introduced by Finance (No. 2) Act, 2004" be added after the words 'clause (d) of Section 80 IB(10)' and before the words 'should operate'. It is submitted that these minor changes will lead to greater clarity about the controversy requiring our adjudication. He, however, admits that there will be no impact of these changes so far as core issues requiring our adjudication are concerned. Shri Kapila, learned Special Counsel for the Revenue, objects to these suggestions. It is his contention that once the questions for consideration by the Special Bench are framed by the Hon'ble President, it is not open for the Bench to tinker with the same. The matter will have to go back to the Hon'ble President for reframing of questions. In view of this objection, Dr Pathak does not press for the suggested changes to the questions.

5. Briefly stated, material facts of the case, so as far as relevant to the issues before this Special Bench, are like this. The assessee before us is an Association of Persons (AOP) and is formed by a single joint venture agreement between Brahma Builders and some members of Surendra Kumar B Agarwal family. The assessee has contructed a project called 'Brahma Estate' situated at Knodhwa Khurd, Tal Haveli, District Pune. The project was started on 14th August 2000 and it was completed on 3rd October 2005. The total area of the plot was 34,209.79 square meters. The built up area of the residential flats was 24,583.31 square meters, whereas built up area of the commercial premises was 7,128.87 meters. The percentage of commercial area to the total area was thus 20.83%. Pune Municipal Corporation had duly approved the aforesaid project. The approval letter dated 6th October 2000, a copy of which was placed before us at page 13A of paper book, described the project as "New/ Residential + Commercial". On these facts the Assessing Officer noted as follows:

> **"6.3 Project not purely residential**
>
> **Pune Municipal Corporation has classified the project as 'Residential + Commercial. Thus, the said project is not a purely housing project."**

6. The Assessing Officer then proceeded to observe that "Section 80 IB (10) gives deduction for housing project" and that "From a plain reading of the section, it is very much clear that these deductions are meant for housing project meaning project consisting of residential units".

The Assessing Officer further observed that “While giving deduction, one has to keep in mind the entire project in totality, as approved by the municipal corporation”. A reference was then made to the Rules framed by the Pune Municipal Corporation. Rule 13.6 of the said Rules, as noted by the Assessing Officer, provided that “ In the case of layouts or subdivision of areas in residential and commercial zones, provision shall be made for ‘convenience shopping’” and that “Such convenience shopping area shall not be less than 2%, but shall not, however, exceed 5% area of the plot”. The Assessing Officer further took note of Rule 13.6 (ii) of the Development Rules which provides that “Such convenience shops shall not have an area of more than 20 square meters”. The Assessing Officer also noted that even the usage of such convenience shops can only be for specific purposes, in terms of the provision of the Rules framed by the Pune Municipal Corporation. Analyzing the facts of the case, the Assessing Officer noted that none of these three conditions are satisfied. Not only the commercial usage of plot is 20%, the size of shops and offices is more than 20 sq mtr and the shops are being used for all sort of commercial purposes including sale of plywood and showrooms for mobile communication services. The Assessing Officer then rejected the claim of deduction under section 80 IB (10) by observing as follows:

> **As observed earlier, deduction under section 80 IB (10) is allowable only for housing projects. …. the housing project is not defined in the section, but Section 80 IB (10) says housing projects as approved by the local authority. In the case of the assesse, local authority is Pune Municipal Corporation. The assessee’s project, Brahma Estate, has been approved by PMC**

as 'Residential + Commercial'. This is very much evident from the approved layout plan. Thus the assessee's project has not been approved by the Pune Municipal Corporation as a housing project, but it has been approved as 'residential + commercial' project. Therefore, the said project is not eligible for deduction under section 80 IB (10).

7. The Assessing Officer then took note of the amendment in Section 80 IB(10) with effect from 1st April 2004 whereby it is provided that "the built up area of the shops and other commercial establishments included in the housing project does not exceed 5% of the aggregate built up area of housing project, or 2,000 sq ft, whichever is less". The Assessing Officer was of the view that this amendment is effective assessment year 2003-04, this amendment is only explanatory in nature. The Assessing Officer further made certain observations about final completion certificate, as also certain other issues, but those aspects of the matter are not really relevant so far as issue in appeal before us is concerned. The Assessing Officer, based on the reasoning discussed above, declined deduction claimed by the assessee under section 80 IB (10). Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success.

8. Learned CIT(A) elaborately discussed the findings of the Assessing Officer observed that the rationale for the Assessing Officer's declining the deduction can be summed up as on the following basis:

(i) On verification, it was found that the project of the appellant had been sanctioned by the local authorities as Residential + Commercial. The plans submitted by the appellant were of its own choice which enumerated both residential and commercial construction. If the appellant had floated two different projects, one being purely residential and the other being purely commercial and had submitted the lay out plan accordingly, it would have been approved by the PMC.

(ii) The project was still incomplete in March, 2006. The appellant was following project completion method and, therefore, no deduction was available in the year under consideration.

(iii) The commercial areas consisting of buildings C-1 & C-2 was more than 7000 sq.mtrs. whether the plot area is taken at 22789.79 sq.mtrs. or taken at 34209.79 sq.mtrs. as claimed by the appellant. It is more than 30% of the plot area if deductions as per PMC Rules is made. In any case the commercial area is more than 20% of the plot area if the plot area is taken at 34209.79 sq.mtrs. and such deduction as per PMC Rules is made while as per DP Rules such commercial area for convenient shopping could not be more than 5% of the area of the plot.

(iv) The usage of the commercial areas for convenient shopping was not for the purposes of which it was sanctioned and the areas of some shops being more than 20 sq.mtrs. further infringed the DP Rules.

(v) The amended provisions of section 80IB(10) are clarificatory for otherwise, section 80IB(10) could not be harmoniously interpreted. For the same project, the condition commercial area being less than 5% or 2000 sq.ft. whichever is less would not be applicable for the year under consideration while for the A.Y 2005-06 such condition would be applicable to disallow the deduction.

9. Learned CIT(A) then also summarized the main contentions of the assessee, in support of admissibility of deduction under section 80 IB (10) as follows :

(i) The project was approved prior to 31-3-2005, development was started after 1-10-1998, area of plot was more than 1 acre and the residential units were less than 1500 sq.ft. As all the conditions for claim under section 80IB(10) were satisfied, the deduction under the said section was wrongly disallowed by the Assessing Officer.

(ii) The appellant was following project completion method and consistently following recognized sales method, which is an accepted method of accounting. The appellant had competed and handed over the residential units in the accounting period relevant to the Assessment Year 2003-04.

(iii) The appellant never claimed that commercial area constructed was convenient shopping as the two separate buildings were constructed for commercial area. The Assessing Officer's observation regarding commercial area being more than 20% of the plot area while as per DP Rules it was allowed at not more than 5% or 2000 sq.ft. whichever is less is, therefore, not correct. Also, for the same reasons, the Assessing Officer's observation regarding usage if convenient shopping not for the purposes for which it was sanctioned and the area of the shops being more than 20 sq.mtrs. is not applicable.

(iv) The area of the plot after amalgamation as per the 6th completion certificate received was 34209.79 sq.mtrs. while the total built up area of the commercial buildings C-1 & C-2 was 7128.872 sq.mtrs. The commercial units are housed in separate building C-1 & C-2, which are separately fenced from the residential buildings. There are two separate co-operative societies for the commercial

and residential units and tax had also been paid on the commercial units in the next year.

(v) The amendment to section 80IB(10) specifically lays down that it was applicable with effect from 1-4-2005 and, therefore, it was not clarificatory in nature.

(Vi) The possession of commercial units was not given prior to 31-3-2003 except allowing two parties to carry out renovation.

(vii) The incentive provisions are to be interpreted liberally.

10. Having thus noted the rival contentions of the assessee and the Assessing Officer, learned CIT(A) formulated the following two issues for his considerations and proceeded to adjudicate on the same :

(i) Whether the amendment to section 80IB(10) w.e.f 1-4-2005 was retrospectively applicable?

(ii) Whether the deduction under section 80IB(10) is available to a housing project by splitting the project into residential and commercial buildings for the assessment year under consideration.

11. As for the first question that he posed to himself, i.e. whether or not the amendment to Section 80 IB(10) with effect from 1st April 2005 is prospective or not, learned CIT(A) held that this amendment can only be prospective in nature. The relevant discussions in the impugned order are as follows :

2.19 It is established law that amendments to the law should be taken to be effective only from the date which is indicated in the amended statute. They have to be inferred only to be prospective in nature unless retrospectivity is clearly spelt out. However, in the matters of procedural law or even in matters of substantive law, the amendments of clarificatory nature can have retroactive or retrospective effect. In the case of fiscal laws, which have to be construed strictly, it is trite law that the vested rights cannot get divested by such amendments unless specifically provided. In Allied Motors Pvt. Ltd. vs. CIT reported in 224 ITR 667, the Hon'ble Supreme Court held that the proviso to section 43B(a) which permitted deduction of unpaid taxes, if paid prior to the due date of filing the return, was intended to remedy an unintended consequence of disallowing legitimate taxes wherein mercantile system of accounting is followed. The objective as evidenced by the Finance Minister's speech, memorandum of understanding, the reasons for introduction of the proviso and the rational as understood by the courts persuaded the Supreme Court to hold that the amendment was curative or merely declaratory in nature and, therefore, the proviso was held to have retrospective effect. The Supreme court has taken similar view in Suwalal Anandilal Jain vs. CIT reported in 224 ITR 753, relied upon by the Assessing Officer, in a judgment rendered by the three judges as regards the nature of amendment being Explanation-2 to section 40(b), which was inserted with a view to remove the disallowance of interest paid to a partner in the capacity different from one in which he was a partner. Since the blanket disallowance of all interest in the name of a partner was not fair, an Explanation was introduced and it was held to be merely declaratory of law and, therefore, was held to have retrospective effect.

2.20 From the above, it is clear that the amendment should ordinarily be treated as prospective though wherever it is clarificatory or related to a matter of procedure, it may be treated as having retrospective effect. The amendment cannot, however, have

the effect of divesting the vested rights. In the case of CIT vs. Berger Paints (I) Ltd. reported in 252 ITR 503(Cal.), it was held that the amendment from retrospective effect is one of the most categorical branches of the law and its intent is mostly gathered from the express words employed to further the current fiscal policies of the Government. The amendment to procedural law is often constructed as having retrospective effect even if the amendment were to be only prospective. The Supreme Court in K.V. Sharma vs. ITO reported in 254 ITR 772 pointed out that even in respect of procedural law, it may not be understood that the vested rights got divested by a prospective amendment. The decision was rendered in the context of extension of time limitation brought about by an amendment to sections 150(1) and 150(2) of the Income Tax Act. It was held that retrospective intent may be inferred only where it is expressly provided or otherwise, is inferable by necessary implications. In provisions of section 80IB(10), the legislature has explicitly codified a restriction on construction of commercial area by the Finance Act, 2004 w.e.f 1-4-2005. It was not mentioned that it would be with retrospective effect. There is no lack of clarity in the amended section. The plain reading is that the prospective effect is a conscious decision of the legislature. In the case of Varas International Ltd. vs. CIT reported in 283 ITR 484, it has been held that the presumption is always against the retrospective operation and in order that an amendment of the statute is construed as being retrospective, the amended provisions should itself indicate either in terms or by necessary implications that it is to operate retrospectively. The Additional Solicitor General who appeared in support of the reference conceded that the issue had been conclusively determined by the Supreme Court consistently in affirmative over a period of years. There is no conflict which required resolution by way of a reference. The decisions in the case of CIT vs. Podar Cement (P) Ltd. 226 ITR 625(SC), Allied Motors (P) Ltd. vs. CIT 224 ITR 677 (SC), Brij Mohan Das vs. CIT 233 ITR 825(SC) & Suwalal Anandilal Jain vs. CIT 224 ITR 753 (SC) were referred to by the Constitutional Bench for consideration. On the basis of the

above discussion, it is amply clear that the amended provisions of section 80IB(10) w.e.f. 1-4-2005 cannot have retrospective effect so as to be applicable to the Assessment Year 2003-04. I also do not agree with the Assessing Officer that if the amended provisions of section 80IB(10) are not treated as clarificatory, section 80IB(10) could not be harmoniously interpreted……..

12. While the CIT(A) held that the amendment could not be treated as retrospective in application and, to that extent, he reversed the stand of the Assessing Officer. Incidentally, Revenue is not in appeal against the said finding of the CIT(A) in the present case.

13. The next question that the CIT(A) had posed for himself was whether deduction under section 80IB(10) is available to a housing project by splitting the project into residential and commercial buildings for the assessment year under consideration. It is important to bear in mind that at the assessment and the first appellate stage, the case of this assessee, so far as claim of deduction under section 80 IB(10) was concerned, was that deduction under section 8oIB(10) should be granted in respect of profits attributable to the residential units or dwelling unit segment of the overall project. It is only at the stage of the proceedings before the Tribunal that the assessee has moved an additional ground of appeal and made a claim for deduction on entire profits of the housing project, including profits attributable to the commercial use segment of the housing project. Be that as it may, the CIT(A) dealt with the question whether any commercial use of built up area was permissible in a housing project and whether the assessee is eligible for deduction for profit of the project so far as relatable to the dwelling units. On both of these issues,

he answered in negative. He concluded that no part of built up area of the housing project could be used for commercial purposes and that deduction under section 80 IB(10) was not available even for residential units segment of a residential cum commercial project. Learned CIT(A) observed as follows:

> *2.21 Having said so, it is however, to be seen as to the second issue which arises for consideration as referred above whether the housing project would also include commercial area even prior to the amendment so as to deny the deduction to the entire project. The words "Housing Project" is not defined in section 80IB(10) of the Income Tax Act, 1961 and as there was a controversy regarding the definition of this term under section 80HHBA and there was also possibility of different view points on the issue, the language of the section with regard to 'housing project' being not clear and unambiguous, reference is required to be made to the speech of the Finance Minister and the circular issued by the CBDT in this regard to interpret the will of the legislature. As per Circular No. 5 of 2005 dated 15-7-2005, a deduction equal to hundred per cent of the profits of an undertaking developing and building housing projects is allowed subject to the condition that the project should have commenced on or before 1st October, 1998 and approved by the local authority …… The residential unit (underline supplied) should have maximum built-up area of one thousand square feet where such residential unit is situated in Delhi or Mumbai and one thousand five hundred square feet at other places. It was clarified that this tax incentive was provided to increase the stock of house for lower and middle-income group keeping in view the fact that there was still huge shortage of houses. Further, in the speech of the Finance Minister introducing the Finance Act, 2004, under the purpose of tax holiday under section 80IB" ……, it has been stated as under:-*

"Under the existing provisions contained, in subsection (10) of section 80IB, a deduction equal to one hundred per cent of the profits of an undertaking developing 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 1st day of October, 1998, the project should be on a size of a plot of land which has a minimum area of one acre, and that the residential unit should have 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 is possible to substitute the existing subsection so as to rationalize the provision and provide additional incentive. With a view to allow more hosing projects to avail the tax holiday under this local authority to 31st March, 2007. However, it is also proposed to provide a time limit for the completion of the housing project within 4 years form the end of the financial year in which the project is approved by the local authority. It is proposed to take the date of approval as the date on which the building plan is first approved by the local authority and the date of completion of the housing project as the date on which the completion certificate is issue by such authority.

It is further proposed to provide that the built-up area of the shops and other commercial establishments included in the housing project or 200 sq.ft. whichever is less.

With a view to encourage the redevelopment of slum dwelling, it is proposed to relax the conditions of minimum plot size of one acre in the case of 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 and notified by Board in this behalf.

It is also proposed to define the expression "built-up area" to mean the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but not including the common areas shared with other residential units."

It is seen that the words "residential unit" appear time and again with reference to section 80IB(10) and even while defining the expression "built-up area", the inner measurements of the residential unit were mentioned. It is, therefore, evident from the Circular No.5 of 2005 explaining the provisions relating to Direct Taxes Law and the speech of the Finance Minister which refer to the huge shortage of houses and residential unit that the deduction was always intended to be allowable to the residential units only.

2.22 It is a cardinal principle of construction of statute that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. It is the Parliament's opinion in these matters that is paramount. When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context means the statute as a whole, the previous state or law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy.

2.23 The relevance of legislative intention has been summarized in the book of 'Principles of Statutory Interpretation' by Justice G.P.Singh (Seventh Edition), at page-9, thus :

"The intention of the Legislature thus assimilates two aspects : in one aspect it carries the concept of 'meaning', i.e. what the words mean and in another aspect, it conveys the concept of 'purpose and

object' or the 'reason and spirit' pervading through the statue. The process of construction, therefore, combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words use in the enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed."

2.24 During the course of appellate proceedings, the appellant was pointedly asked to state whether the layout plan, commencement certificate, part completion certificate, development plans or from any other documents, it was possible to ascertain that the residential and commercial units were different projects, it was admitted that out of the 17 buildings constructed, 2 buildings were entirely commercial area as applied for and sanctioned as <u>one</u> housing project. From the language of section 80IB(10) of the Act, it is clear that the deduction is available to an undertaking which is developing and building housing projects approved by a local authority. The undertaking M/s Bramha Associate has developed and built the project as one project and it is, therefore, not possible to separate the project in the manner done by the appellant. The separate Co-operative Societies formed for the commercial as well as residential units, separate entrance or the fencing done would not dissect the project into two different and independent projects as the project being Residential and Commercial but it remained one project for which sanction was given by the PMC as Residential + Commercial. In my considered view, the case of the appellant is not different from the cases of other assesses, wherein, in the same residential building certain portion was built as commercial area, being shops or halls, which were used for commercial purposes. Also, the appellant's assertion that no possession of the commercial units was given before 31-3-2003 is not correct as would be seen in the succeeding paragraphs but even then it cannot be argued that if commercial units were not sold in a particular year and

only residential units were sold in that year, the deduction would be available on the sale of residential units in that year. The very fact that commercial units were constructed in pursuance of the Local Authorities' sanction Is sufficient to hold that the deduction was not available as what is required to be seen is whether it is possible to allow deduction on proportionate basis as claimed by the appellant or the entire deduction claimed is required to be withdrawn, for the appellant has undisputedly infringed the provisions of section 80IB(10) in so far as commercial activity was not envisaged in the said section. The rule established over the years is that omission in a statute cannot supplemented through interpretation. In CIT vs. K.S.Vaidhyanathan (1985) 153 ITR 11(Mad.FB), the view expressed is that if a particular case gets omitted from the terms of a statute though it appears that it should have been there and the omission seems to have been caused due to accident or inadvertence, the case cannot include the omitted case by supplying the omission. A cansus omissus cannot be supplied by the court except in the case of a clear necessity and when reason for, it is found within the four corners of the statue itself. Where the Legislature clearly declares its intent in the scheme and language of a statute, it is the duty of the court to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which is congenial to or consistent with such expressed intent of the lawgiver; more so, if the statute is a taxing statute [CST vs. Parson Tools & Plants (1975) 35 STC 413]. The courts cannot usurp legislative powers in the garb of interpretation.

2.26 The principle to be followed in the construction of fiscal statute is expressed by Rowlatt in Cape Brandy Sydicate vs. IRC (1921) 1 KB 64 as follows :

" In a taxing statue one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Noting is to be read in, nothing is to be implied. One can look fairly at the language used."

There is no presumption as to tax. Nothing is to be read in and nothing is to be implied. No equitable construction of a charging section is to be applied. The charging section is to be construed strictly regardless of its consequences that may appear to the judicial mind to be. In the case of Orissa & Rajasthan State Warehousing Corporations vs. CIT JT 1999 (2) SC 527 the apex court has said that an exemption is an exception to the general rule and since the same is opposed to the natural tenor of the statute, the entitlement for exemption, therefore, ought not to be read with any latitude to the taxpayer or even with a wider connotation. Referring to its decision in the case of Keshvaji Ravji & Co. vs CIT AIR 1991 SC 1806, the courts has quoted the following observations from its this decision :-

"Artificial and unduly latitudinarian rules of construction which, with their general tendency to 'give the taxpayer the breaks' are out of place where the legislation has a fiscal mission."

Moral precepts are not applicable to the interpretation of revenue statues.

14. Learned CIT(A) then proceeded to deal with the Mumbai Division Bench decision in the case of Laukik Developers Vs DCIT (105 ITD 657) and extensively quoted from the said decision of the Tribunal. Learned CIT(A) observed as follows:

2.27 In the case of Laukik Developers vs. DCIT, Circle-3, Thane the Income Tax Appellate Tribunal, Mumbai Bench 'C' in ITA No.532/M/06 for the Assessment Year 2002-03, had occasion to adjudicate on this issue. The assessee in that case filed return of income declaring total income at nil, which was arrived at after

claiming deduction under section 80IB(10). The claim was rejected mainly on two grounds, i.e. (i) the project contained commercial area of 3143 sq.ft.; & (ii) the project was within 25 kms. from the city of Mumbai and consisted of six residential units whose built-up area was more than 1000 sq.ft. The counsel for that assessee submitted that -

(i) the housing project was approved by Municipal Corporation, which was the local authority;

(ii) the housing project was not defined in section 80IB(10) but as per Explanation to section 80HHBA, the housing project meant a project for construction of any building, road, bridge or other constructions in any part of India;

(iii) the local authority sanctioned the building plan under residential zone;

(iv) the housing project had to provide facilities for convenience of its residents in this housing project in a planned manner, which may contain shops, etc;

(v) section 5(1)(iv) of the Wealth-tax Act, 1957 has been interpreted to state that the house used for commercial purposes was eligible for exemption and, therefore, commercial property laws considered as housing property;

(vi) rejecting of claim of the assessee under section 80IB(10) was untenable, as the amendment in the provisions of section 80IB(10) was effective from 1-4-2005;

(vii) the amendment was not retrospective and, therefore, should not be applied to earlier years;

(viii) deduction under section 80IB(10) will be available even if shops and other commercial establishments are included in housing project;

(ix) total commercial area in the housing project was 3143 sq.ft. only which was essential for the proper provision of basic necessities; and

(x) the query of Maharashtra Chamber of Housing Industry dated 1-1-2001 referred to by the Finance Minister and the reply of the CBDT vide Notification dated 4-5-2001 were relied upon wherein it was clarified that any project approved by a local authority as a housing project should be considered adequate for the purpose of section 10(23G) and section 80IB(10).

The Hon'ble ITAT, Mumbai was pleased to, inter alia, hold (the decision regarding distance from the city of Mumbai is not being given) as under :-

"We have considered the rival submissions carefully. We have also perused the orders of the Assessing Officer and the CIT(A) and also the copies of the various documents filed by the assessee in its compilation before the Tribunal. We find that the provision of section 80IB(10) of the Act is a beneficial provision giving deduction at the rate of 100% of the profits derived in any previous year from a housing project, if all the conditions mentioned therein are fulfilled by an assessee. In this case the assessee is a registered firm engaged in the business of developing real estate project in Dombivali. The assessee has claimed exemption with regard to its building project at village Gajbandhan, Dombiviali under section 80IB(10) of the I.T.Act,1961. It has been denied by the Assessing Officer and the order of the Assessing Officer has been confirmed by the CIT(A). The ground of rejection of the claim of the assessee under section 80IB(10) of the Act by the Department are two namely

that the project contain commercial area of 3143 sq.feet of shops and hence is not a housing project.……

The material facts of the case are not in dispute. Before proceeding to decide the issues before us, it shall be relevant to reproduce the relevant provision of section 80IB(10) of the Act as prevalent in the relevant period, as under :-

Section 80IB(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 order after 1st day of October, 1998.
(b) the Project is on the size of a plot which was a minimum area of one acre; and
(c) the residential unit has a maximum built-up area of one thousand the square feet where such residential unit is situated within the cites of Delhi or Mumbai or within twenty-five kilometers from the municipal limits of these cities and one thousand and five hundred square feet at any other place.

The fist issue before us is whether the building project of the assessee at village Gajbandhan, Dombivali is a "housing project" of the assessee for the purposes of section 80IB(10) of the Act. Both the assessee and the Revenue stated before us that the amendment brought by Finance No.(2) Act, 2004 with effect from 1-4-2005 introducing sub-clause (d) in the provision of section 80IB(10) shall have no application to the case of the assessee for the reason that the amendment is not retrospective in nature. The assessee has admittedly constructed commercial area of 3143 sq.feet in its building project. The word "Housing Project" is not defined under

section 80IB(10) of the Act. We find that in the explanation to section 80HHBA(4) defining "Housing Project" is in entirely different context and therefore, has no bearing on the issue before us. The legislative has introduced the provision of section 80IB(10) to encourage residential housing projects of units not exceeding specified built-up area. In order to avail the tax exemption with regard to the housing project, the assessee has to fulfill all the conditions laid down under the beneficial provision of section 80IB(10) of the Act. The construction of shops or commercial place cannot be considered a "Housing Project" for the purposes of application of the provision of section 80IB(10) of the Act. We find that in this case it was not established by the assessee that its building project is primarily a "Housing Project" in the facts of the case of the assessee. The building project of the assessee was approved by the local authority named Kalyan Dombivali Municipal Corporation (KDMC) as a residential as well as commercial project. The CIT(A) has given a clear-cut finding on this issue on the basis of a coy of the approval letter by KDMC filed by the assessee. We are unable to accept the argument of the Ld. Counsel for the assessee that since the case pertains to pre-amended period, the deduction under section 80IB(10) will be available to the assessee even if the shops and other commercial establishments are included in the housing project of the assessee. If this argument of the assessee is accepted, then it shall nullify the very object of introducing the provision o section 80IB(10) in the statute book for promotion of hosing activity in the country since there shall be no limit of the total built-up area devoted to the construction of shops and other commercial establishments in the housing project of the assessee. The clarification of CBDT vide letter dated 4-5-2001 to Maharashtra Chamber of Housing Industry clearly states that any project, which is approved by local authority as a "housing project", should be considered adequate for the purposes of section 10(23G) AND 80IB(10) of the ACT. This clarification by the CBDT is of no help to the case of assessee for the reason that the Building Project of the assessee was not approved by the local authority namely

KDMC as a 'Housing Project' and was in fact approved as a 'residential as well as commercial project' by them. Although we are aware that incentive provision of law should be given a liberal interpretation as held in a number of decisions by the Hon'ble courts but the liberal interpretation shall no be to extent of defeating the very purpose of enacting a particular incentive provision of law. We find that the plea of the Ld. Counsel for the assessee that while dealing with the provision of section 5(1)(iv) of the Wealth-tax Act, various courts held that house used for commercial purposes was also eligible for exemption and therefore commercial property should be considered as a housing property, is not sustainable, since the decisions relating to the provision of section 5(1)(iv) of Wealth Tax Act were in the context of exemption of housing property for the purpose of the Wealth Tax Act and has no bearing to the present issue before us with regard to exemption of 'housing project' under the provisions of Income Tax Act, 1961. We are of the considered view that no proportionate deduction can be allowed to the assessee to the extent of residential units constructed by it in the building project for the simple reason that the building project should be eligible first in order to claim exemption under the provision of section 80IB(10) of the Act by fulfilling the conditions precedent for its application and the non-fulfillment of a single preconditions as detailed ion the provision of 80IB(10) of the Act shall disentitle the assessee from claiming exemption of any part of its income which may accrue from its building project during the year. The fact that the assessee's site fall under the residential zone is not decisive of the issue in view of the above findings, it is clear that the provisions of section 80IB(10) of the I.T.Act is not applicable to the facts of the case of the assessee for the relevant year as the building project of the assessee was not a 'Housing Project' and accordingly does not qualify for deduction under section 80IB(10) of the Act. In view of our finding that the building project of the assessee was not a 'Housing Project' and therefore the assessee's case does not qualify for deduction under section 80IB(10) of the Act, we hold that all the conditions specified under section 80IB(10) are not satisfied

by the assessee and accordingly the assessee is not entitled to any deduction under section 80IB(10) of the Act on this ground alone."

15. Learned CIT(A) thus relied upon the Tribunal's decision in the case of Laukik Developers (supra) and concluded that no element of commercial use of built up area was permissible in a housing project until the amendment in section 80 IB (10) came into force with effect from 1st April 2005.

16. The CIT(A) then addressed himself to the assessee's contention that the incentive deduction under section 80 IB (10), being a beneficial provision, should be construed liberally. This plea was also rejected by observing as follows:

2.28 It was also contended that section 80IB(10), being beneficial provision of tax incentive, should be interpreted liberally so as to confer the benefit on the so called developer-cum-builder. Law is fairly settled in this regard by a number of decision of the Apex Court whose ratio is summarized below :-

(i) Petron Engg Construction Pvt.Ltd. vs. CBDT 175 ITR 523- Liberal interpretation of an incentive provision can be resorted to only when it is possible without imparing the legislative requirement and the spirit of the provision. Where the phraseology of a particular provision takes within its sweep the transactions which are taxable, it is not for the courts to strain and stress the language so as to enable the tax payer to escape the tax.

(ii) Pandian Chemicals Ltd. Vs. CIT 262 ITR 278- Rules of interpretation would come into play only if there is any doubt with regard to the express language used in the provision. Where the words are unequivocal, there is no scope for importing the rule of liberal interpretation of an incentive provision.

(iii) CIT vs. N.C.Budharaja & Co. 204 ITR 412- Liberal interpretation of an incentive provision should not do violence to plain language. The object of an enactment should be gathered from a reasonable interpretation of the language used therein.

(iv) IPCA Laboratores vs. DCIT 266 ITR 521- Any interpretation has to be as per wording of the provision including incentive provision. If the wordings of the provision are clear, then the benefits, which are not available under the provision, cannot be conferred by ignoring or misinterpreting the words in the provision."

It is trite law that there is no violation of equity in taxing statutes. Even otherwise, it is settled that equity and hardship are hardly relevant consideration for interpreting tax laws [Karamchari Union vs. Union of India 243 ITR 143(SC).]

17. It was thus held that in the name of liberal interpretation, no violence can be done to be language of the provision and then when as per wording of a legislative provision, benefit cannot be granted to the taxpayer, the same cannot be granted by misinterpreting or ignoring the words of the statute. The underlying proposition apparently was that when the law did not permit any commercial use of built up area in a housing project, the same cannot be inferred either. Learned CIT(A) also referred to a Pune Division Bench decision in support of this stand and observed as follows:

2.29 Further, in the case of Om Engineers & Builders, Pune vs. ITO, Ward 3(1), Pune in ITA No. 160/PN/2005 for the Assessment Year 2001-02, it was contended on behalf of the appellant that the aforesaid provision had been inserted in the then section 80IA with a view to promote investment in housing projects and that in interpreting incentive provisions approach of the Assessing Officer should be liberal and, therefore, the claim of the appellant for deduction under section 80IB(10) should be allowed. It was contended on behalf of the Revenue that one of the basic conditions was not fulfilled by the assessee and, therefore, its claim for deduction under section 80IB(10) should not be allowed. After considering the rival submissions in the light of the material on record, the Hon'ble Pune ITAT in the order dated 31st August, 2005 held as under:-

"The elementary principle of interpreting or construing a statue is to gather the mens or sentential legis of the Legislature. Where the language is clear, the intention of the Legislature is to be gathered from the language used...."

2.30 The decision in the case of Federation of Andhra Pradesh Chamber of Commerce & Industries & Others vs. State of Andhra Pradesh & Others reported in 247 ITR 36(SC) was quoted wherein the classic passage from Cape Brandy Syndicate's case (1921) 1 KB 64, 71 was extracted as narrated in para - 2.26 above. The deduction under section 80IB(10) was not allowed.

18. It was in this backdrop that the "denial of deduction under section 80IB(10) to the appellant" was upheld and the related grounds of appeal are dismissed. Aggrieved by the stand so taken by the CIT(A), the assessee is in second appeal before us.

19. As we have noted above, the core issue before us is whether or not deduction under section 80 IB (10), as applicable prior to 1st April 2005, is admissible in case of a 'housing project' comprising residential housing units and commercial establishments. That is the issue we must take up first.

20. Dr Pathak, learned counsel appearing for Brahma Associates, begun by submitting basic facts of the case. It was pointed out that the project was started on 14th August 2000 and it was completed on 3rd October 2005. Copies of the completion certificates of various buildings in the project were filed before us. Learned counsel for the assessee submits that the Assessing Officer's objection to grant of deduction under section 80 IB (10) was two fold – first, that since commercial use in the project was more than 5% of the total constructed area and its such commercial use went beyond what is permissible as 'convenience shopping' in PMC rules, it cannot be termed as a 'housing project'; and that – second, the 2004 amendment, i.e. insertion of clause (d) in section 80 IB(10) was retrospective in effect as it was only a clarificatory amendment. While the CIT(A) held that the 2004 amendment to Section 80 IB was only prospective in nature – a finding against which Revenue is not appeal, the CIT(A) also held that deduction under section 80 IB (10) is available only when it is a purely residential project. It is submitted that the stand of the authorities below to the effect that the term housing project meant only a residential project is not justified. Our attention was invited to the fact that the term "housing project" was not defined in section 80IB(10), and that there is no basis whatsoever for interpretation

of the term ‘housing project’ as a pure residential project. It was also submitted that the project was duly approved by the Pune Municipal Corporation but as “New/ residential/commercial” project. He submits that there is no system in vogue in the Pune Municipal Corporation which approves a ‘project’ as a ‘housing project’. It was submitted that nowhere in the statute the legislature has taken a stand that the deduction u/s 80IB(10) was confined only to purely residential project. Learned counsel submits that connotations of the expression ‘housing project’ are much wider than the expression ‘residential project’. These two expressions, according to the learned counsel, cannot be used interchangeably. It was submitted that originally, with effect from assessment year 1999 – 2000, legislature had introduced section 80IA(4F) to provide 100% deduction in respect of the profits from developing and building housing projects. It was argued that while introducing this section, the Hon’ble Finance Minister had stated that housing was an activity which required utmost attention and in that context he had outlined several incentives to encourage house building activity. One of the incentives was 100% deduction from profits. In the same context, the Hon’ble Finance Minister also proposed an incentive of exempting certain specified commercial properties from wealth tax. Thus, if the term “housing project” meant only a residential project, the Hon’ble Finance Minister in his speech would not have included the concession for the commercial property in the incentives for housing sector. It was submitted that the true intention of the legislature while introducing this provision was to encourage house building activity. It was emphasized that there is a conspicuous absence of any mention about the intention of encouraging construction of

residential buildings, which has been inferred by the authorities below, whereas, as highlighted by him, there was a specific mention about encouraging the house building activity when the predecessor section in 80 IA (4F) was introduced . It was submitted that where the provisions were not clear, Finance Minister's speech could be relied upon for interpreting the provisions of the Act. In support of this proposition, reliance was placed on the Hon'ble Supreme Court's landmark judgment in the case of K. P. Verghese (131 ITR 597). Our was also invited to the Finance Minister's speech, notes on clauses and circular No. 5 issued by CBDT while amending section 80IB(10) and providing a restriction on the built up area of the shops and commercial establishments. It is to be noted that nowhere it was mentioned that earlier the housing project could not include any shops or commercial establishments. In fact, the notes on clauses and the circular state that "it is further proposed to provide that the built up area of the shops and commercial establishments included in the housing project should not exceed 5%." Thus, it is clear that by bringing this amendment, the legislature has only put a restriction on the area of shops and commercial establishments included in the housing project. The very fact that a restriction was put on the use as shops and commercial establishment would show that it was permissible in the pre amendment law.

21. It was then submitted that the term "housing project" did not mean purely residential project , as also apparent from reading the provisions of section 80IB(10). The assessee submitted that clause (c) of section 80IB(10) provided that the residential unit has a maximum built up area of

1000 sq.ft. or 1500 sq.ft depending upon the city concerned. If housing project meant only residential project, then in clause (c), it would have only been mentioned that the **unit** should have maximum built up area instead of the words "**residential unit"** should have maximum built up area of 1000 or 1500 square feet, as the case maybe. This itself indicated that because housing project included commercial area, the legislature had to specifically provide in clause (c) that the built up area of residential unit should not exceed specified limit. Learned counsel gives an example by stating that when a person asks for a fruit basket with content of banana less than, say, x%, he presupposes that the said fruit basket includes bananas as well. Of course, if he does not want onions in this fruit basket to be more than x%, instead of saying that onion content should be less than x%, he would perhaps say that onions can also be mixed in fruit basket to the extent of x%. There is no question of restricting something which is not includible in the first place.

22. Our attention was invited to clause (d) of section 80IB(10) which provides that the built up area of the shops and other commercial establishments included in the housing project should not exceed 5% of the built up area or 2000 sq.ft – whichever is less. It was submitted that if housing project meant purely residential project, there was no question of including commercial area therein and clause (d) would have been worded in a different manner. The question of limiting the area of the commercial complex in a housing project comes up only if the commercial area is included in a housing project. It is thus contended that the wording of Section 80 IB(10) suggests that commercial usage was part of

the housing project, though, in view of the specific provisions of the statute, its ration is restricted with effect from assessment year 2004-05. As a corollary thereto, until the assessment year 2004-05, no such restriction existed and the commercial usage nevertheless continued to be an integral part of the housing project. A reference was the made to the Hon'ble Supreme Court's judgment in the case of Gem Granites (271 ITR 322). In this case, the Supreme Court was required to deal with the controversy whether deduction u/s 80HHC was allowable to an assessee engaged in the business of trading in cut and polished granite for A.Y. 1987 – 88. Supreme Court observed that till 1991, the deduction was not available to minerals and ores. However, later on, there was an amendment and it provided that deduction would not be available to minerals and ores (other than processed minerals and ores specified in twelfth schedule). Accordingly, Supreme Court observed that the exclusion in the later amendment clearly indicated that earlier, the deduction was not available even to processed minerals and ores. By the same logic, clause (d) of section 80IB(10) states that the built up area of the shops and commercial establishments included in the housing project should not exceed the specified limit. Thus, clause (d) is merely providing a bar on the total area of shops and commercial establishments allowable in a housing project.

23. It was also contended that the word 'house' included both residential as well as commercial units. In support of this proposition, a reference was made to the provisions of section 22 of the Income Tax Act which provided for taxability of income from house property which

included both residential and commercial units. Further, reliance was also placed on the provisions of section 5(1)(iv) of Wealth Tax Act which provided exemption to house property from Wealth Tax and the courts have held that the term "house" included both residential and commercial properties. It was also submitted that wherever the legislature wanted to specify only residential unit or residential house, the same was explicitly provided. Attention was invited to the provisions of section 54 / 54F which provide exemption from capital gains on **purchase of a residential house**. Thus, it was clarified that when the legislature wanted to restrict the benefit to purely residential house, the same was expressly provided in the Act. Reliance was also placed upon the judgment of Hon'ble Supreme Court in the case of Tata Engineering and Locomotive Co. Ltd. v. Gram Panchayat (AIR 1976 SC 2463). In this case, Supreme Court held that the word "house" in its ordinary sense would include any building irrespective of its user. Thus, it was contended that the word "house" did not mean a purely a residential unit.

24. Our attention was invited to the CBDT Circular dated 4th May, 2001 as also to the letter written by the Maharashtra Chamber of Housing Industry addressed to Hon'ble Finance Minister, asking for clarification in respect of the issue whether commercial area could be included in a housing project. It was submitted that the said circular was issued in reply to the aforesaid letter. It was in the context of this letter that the CBDT replied that if the project was approved as a housing project by the local authority, the deduction would be available. It was submitted that the Pune Municipal Corporation (PMC) did not have any such system of

granting approval as a housing project, and that, as a matter of fact, this term i.e. 'housing project' was not at all used by the PMC. However, according to the learned counsel, the point to be noted was that the CBDT also did not state that the term "housing project" meant only residential project. It is to be noted that section 80IB(10) does not state that the deduction is allowable to a project which is approved by the local authority as a housing project . All that the section 80 IB (10) states is that the deduction is allowable to a housing project which is approved by a local authority. Thus, limiting the deduction only to the cases wherein the project is approved as a housing project by the local authority is not justified. A distinction is thus made out between a housing project approved by the local authority and a project approved as a housing project by the local authority.

25. Reliance on Hon'ble Supreme Court's judgment in the case of Shaan Finance P Ltd. [231 ITR 308] for the proposition that the courts cannot alter the words in the section or provide for casus omissus. A reference was then made to Hon'ble Supreme Court's judgment in the case of Taj Mahal Hotel [82 ITR 44] for the proposition that if the word has not been defined in a statute, it must be construed in its popular sense. Further, reliance was also placed on the Supreme Court decision in the case of R. Kanakasabai and Others [89 ITR 251] for the proposition that if the taxing provision is ambiguous and is reasonably capable of more than one interpretation, the interpretation which is beneficial to the subject must be adopted. Reliance was also placed on the Calcutta H.C. decision in the case of Chloride India Ltd. [256 ITR 625] for the

proposition that where there is a doubt about the meaning of a word used in a particular provision, it is to be understood in the sense in which it best harmonizes with the subject of the enactment and the object which the legislature has in view.

26. It was then pointed out that there is a series of decisions by various division benches of this Tribunal wherein the deduction u/s 80IB(10) was allowed in respect of the profits of the project which included commercial area and which was sanctioned prior to 1st April, 2005. In the case of Arun Excello Foundations Pvt. Ltd. Vs ACIT (108 TTJ 71), the commercial use of built up area was 9.31% and yet the project was treating as housing project. Learned counsel, however, fairly admits that in this case only proportionate deduction under section 80IB(10), to the extent of profits from residential units, was granted, whereas the assessee's case before us is that no disallowance of deduction under section 80 IB(10) can be made in respect of commercial area. In the case of Harshad P Doshi Vs ACIT (109 TTJ 335), even though there was commercial area, the Division Bench allowed the deduction under section 80 IB (10) on the ground that the project was approved by the Bombay Municipal Corporation as a housing project. In the said case, it was also held that no disallowance of deduction under section 80 IB (10) can be made in respect of the commercial area and shops. The same was the logic employed by another Division Bench in granting deduction under section 80 IB(10) in the case of Saroj Sales Organisation Vs ITO (115 TTJ 485), and in the unreported case of Ideal Realtors (ITA No. 4292/MUM/07). Learned counsel submits that approval

as a housing project is not the requirement of statute, though the Board circular certainly states so. Our attention is invited to the words of 80IB(10) to the effect "by an undertaking developing or building housing projects approved....by a local authority". He thus submits that all that the statute requires is that it should be a housing project and it should be approved by the local authority.

27. Referring to Division Bench decision in the case of Laukik Developers Vs DCIT (105 ITD 657) wherein it has been held that the term "housing project" would not include any commercial shops or establishments, it was pointed out that said decision, Division Bench had stated that the assessee could not establish that its building project was primarily a housing project. The question then arises as to what is 'primarily' a housing project. It was submitted that the said decision is inherently incapable of being implemented, as it does not lay down precise yardsticks on which it can be decided whether or not a project is primarily a housing project. Without prejudice to this argument, it was also contended that the only objective yardstick for deciding whether a project is mainly or primarily a residential project was that 51% of the units should be residential units. Learned counsel's perception is that once more than 51% of the total area was occupied by residential units, the project was primarily a housing project and accordingly, the deduction u/s 80IB(10) was allowable. In this context, reliance was placed on the provisions of section 104 – 109 for the proposition that the word 'mainly' would mean anything above 51% . Reliance was also placed upon the Supreme Court decision in the case of Bajaj Tempo Ltd. [196 ITR 188] for

the proposition that incentive provisions should be interpreted liberally and accordingly, the deduction u/s 80IB(10) should be allowed for the projects which also included some commercial area. On the strength of these submissions, learned counsel submitted that so far as the question "whether deduction under section 80 IB (10), as applicable prior to 1st April 2005, is admissible in case of a 'housing project' comprising residential housing units and commercial establishments" is concerned, the answer has to be in affirmative, and that, for the detailed arguments so advanced, it could not be said that merely because there was some commercial usage of area, the deduction under section 80IB(10) could be declined.

28. As regards the issue as to whether the proportionate deduction is to be allowed in respect of profits attributable to residential units, learned counsel contends that once Tribunal comes to the conclusion that a housing project can include shops or commercial establishments prior to the amendment, there is no good reason for restricting the deduction to profits in respect of the profits of the residential units. It is contended that the section provides for one hundred percent deduction from the profits of a housing project and therefore, the entire profits including the profit on sale of shops or commercial establishments would be eligible for deduction. The later amendment in clause (d) of section 80IB(10) clearly supports this aspect of the matter, as after this amendment, the deduction is allowable to a housing project including the commercial portion. Without prejudice to this argument, learned counsel submits that in any event and even assuming that Tribunal comes to the conclusion that no

part of commercial use ca be resorted to in a housing project, at least proportionate deduction should be allowed in respect of the residential portion.

29. As regards the third question i.e. whether the limit prescribed by clause (d) of section 80IB(10) would be applicable even for the assessment year before us, learned counsel for the assessee, as also the learned special counsel appearing for the Revenue, submitted that it is nobody's case that amendment was retrospective in nature. Since both the parties have agreed on this issue, it is not necessary to address ourselves any further on this issue.

30. We may mention that the assessee had raised an additional ground of appeal before us, whereby the assessee has also claimed deduction under section 80IB(10) in respect of the profit in respect of commercial portion was also claimed to be eligible for deduction u/s. 80IB(10). Learned counsel for the Revenue objects to this additional ground by submitting that as the relevant facts are not on record, the additional ground at this stage. Learned counsel for the assessee, other hand, submits that since the Assessing Officer himself has specifically computed the profits from the commercial portion in the asst. order at Rs. 13,67,687, it cannot be said that relevant facts are not on record and there is, therefore, no good reason for not admitting this additional ground of appeal and adjudicating the same on merits. We, however, see no reasons to address ourselves to the question as to whether or not the said additional ground of appeal can be admitted at this stage. The issues

that this Special Bench is to decide will have no impact of admission or non admission of the additional ground of appeal in question. It is, therefore, for the Division Bench disposing of the appeal to deal with the admission of this additional ground of appeal and adjudication, if required, of the same. We decline to address ourselves to the question whether or not additional ground of appeal in question needs to be admitted by the Tribunal.

31. Shri V L Jain, learned counsel appearing for Raviraj Kothari Punjabi Associates and Tushar Developers, submits that he is in entire agreement with Dr Pathak has said, and he adopts these arguments. He further submits that the expression 'housing project' is not defined under the law. He submits that a house is much more than a dwelling unit, and that the expession 'house' and 'housing' are not the same thing. He submits that the connotations of the expression 'house' are very wide and include not only a building for human habitation but also a building for keeping animals and goods as also a building of boarding school, a place of public refreshments a restaurant or even an inn. In support of this understanding about meaning of expression 'house', learned counsel relies upon various dictionaries and files copies of the relevant pages from dictionary. He also refers to the 'Law Lexicon' which, at page 817, states that "the weight of judicial opinion is conclusively in favour of the view that the word 'house' extends to a building which is used for business and should not be restricted to a mere dwelling house'. While learned counsel recognizes that residential unit is taken as thrust of the statutory provisions, he also submits that restriction is placed on the size

of the unit. He also takes us through the letter written by the Maharashtra Chamber of Housing Industry, in response to which the Board clarification was issued, to demonstrate that the Government was fully aware of the controversy regarding residential and commercial units being part of the housing project, and yet the expression used by the statute was 'housing' and not 'residential'. It was submitted that using the word 'residential' in the place of 'housing' amounts to supplying an expression which does not find place in the statute. This is, according to the learned counsel, a classic case for filling up the gaps in the process of interpretation of law – something which is not permissible as is the settled legal position. A reference is then made to Section 2(ea) of the Wealth Tax Act which refers to 'house' used for commercial as also residential purposes. It is thus possible that a housing project may have commercial as well as residential units, and yet it may be treated as a housing project. According to the learned counsel, there is no conflict in a project being housing project and that project also having commercial housing units. It is submitted that a housing project could be purely residential or for residential as well as commercial purposes. Learned counsel also submits that the development charges collected by the PMC are on the basis of rates applicable for residential area, and a letter from architect is furnished before us to substantiates this contention. He then makes an interesting reference to the website of Kolkata Metropolitan Development Authority (www.kmdaonline.org) which, at one place, states as follows:

Barrackpore Housing (Phase II)

Housing is one of the priority areas of KMDA's intervention. It has been estimated that the annual requirement of additional dwelling units in Kolkata Metropolitan Area is to the tune of 90,000 if the cumulative deficit as well as the new demand is to bemet over a period of time. The private sector initiatives in housing arc not found to be adequate to meet the deficit and hence public sector efforts have to be continued along side. Moreover, the private sector housing efforts often cannot match the affordability of LIG and MIG categories of households who constitute a considerable proportion of KMA's population.

It is, therefore, imperative on part of public sector agencies like KMDA to focus attention on housing provision for the different sections of households whose affordability is somewhat limited.

KMDA's Barrackpore Housing (Phase-II) is a step in that direction. It needs to be mentioned that KMDA is also engaged in implementation of a number of housing schemes under the Government of India sponsored VAMBAY programme, whereby dwelling units are created for the economically weaker sections (EWS) including those categorized as BPL families Under the Phase-I of Barrackpore Housing project, KMDA completed construction of 768 fats, of which 240 were for the LIG category and 528 for MIG category. The total amount expended in Phase-I amounted to about Rs.1700 lacs. Almost all the flats in Phase-I have been allotted to the selected beneficiaries. Given tl1e

success of Phase-I and also to address the social objective of providing affordable dwelling units to MIG and LIG households, KMDA has been prompted to take up this Phase-II of Barrackpore Housing.

Project details

No. of MIG flats	**288**
No. of LIG flats	**192**
Commercial complex	**6,000 sq ft**
Community Hall	**2,000 sq ft**

32. Learned counsel submits that, as evident from website of a KMDA, a housing project by even Governmental Bodies involves commercial use of area as well. In such a situation, it is indeed contrary to commonsense meaning of the term 'housing project' to exclude all such projects which are not pure residential projects from the ambit of 'housing projects'. The very foundation of the stand of the authorities below is thus devoid of legally sustainable basis.

33. Shri Jain thus concludes, on the basis of above arguments and relying upon the submissions made by Dr Pathak, that deduction under section 80IB(10) could not be declined for pre 2004 amendment period only on the basis that a part of constructed area has been utilized for commercial purposes. Once the project is question has a residential as

well as commercial units, the project is to be treated as a 'housing project', and, in terms of the provisions of Section 80IB(10), entire profits of the housing project are eligible for deduction. No distinction is envisaged in the profits relatable to the commercial units and residential units. He submits that since 5% limit was not applicable until the amendment in Section 80IB(10) came into effect by the virtue of Finance (No. 2) Act, 2004, no such limit can be read into the Act. It is also submitted that the provisions of Section 80(IB)(10)(1)(d), prescribing the aforesaid limit of 5%, are only prospective in nature, and that there is no dispute on this aspect of the matter.

34. Shri Rajan Vora, appearing for Apoorva Properties and Estates Limited – an intervenor in this special bench, invites our attention to the 'Memorandum Explaining Provisions in the Finance (No. 2) Bill, 2004' which states that 'it is proposed to substitute the existing sub section so as to rationalize the provisions and provide additional incentives'. It is submitted that this amendment was aimed at rationalizing the scheme of Section 80 IB(10). Our attention is also invited to the observation made in this Memorandum to the effect that "it is further proposed to provide that the built up area of the shops and other commercial establishments included in the housing project shall not exceed five percent of the aggregate built up area of the housing project or 2000 sq ft whichever is less". Shri Vora submits that as a part of the rationalization of Section 80IB (10), the use of built up area for shops and other commercial purposes is restricted to 5% of the aggregate built up area or 2,000 sq ft – whichever is less. However, the fact that this was so done as a part of

rationalization exercise indicates that prior to this amendment there was no restriction on use for shops and commercial purposes and that such an absence of restrictions was perceived as irrational by the legislature. It is then submitted that once such a restriction did not find in pre amendment law, the same cannot be supplied by way of an aggressive interpretation either. Learned counsel then mentions about convenience shopping, and submits that the 5% limit on use of aggregate built up area for the purpose of convenience shopping was being accepted by the Revenue as maximum permissible commercial use, but that interpretation is also, according to the learned counsel, erroneous. No restrictions were placed on the area of commercial use of built up area for such convenience shopping till the 2004 amendment to Section 80IB(10) was made. In addition to these submissions, learned counsel relies upon the submissions made by Dr Pathak and Shri Jain, and supports the stand taken by these representatives of the appellants before us.

35. Shri S K Tulsiyan, appearing for Harsh Unique Construction- another intervener before this Special Bench, submits that a housing project essentially involves a residential plot but it is only elementary that residents should also get necessary amenities as well. He submits that by and large these housing projects are aimed at being complete and standalone projects, and therefore a reasonable element of commercial usage of built up area is an inevitable requirement of such projects. The intent of the legislature, according to Shri Tulsiyan, was to grant tax incentives to such housing projects and one cannot interpret law in such a manner so as to defeat the purpose of the statute. It is submitted that

until the 2004 amendments, no limit was fixed on such a commercial use or use at shops, and, therefore, it cannot be open to Revenue to read the limits into provisions of the law. He also submits that when commercial built up area is the main component of housing project, it ceases to be a housing project. The onus, however, is on the revenue to demonstrate that it is not a housing project and that the thrust of the project is commercial usage of built up area. He submits that no hard and fast formula can be developed for the same and this must be demonstrated by the Revenue that it is not primarily a housing project. He further submits that in a situation when the project is approved by the local authority as a housing project, the deduction under section 80IB (10) is required to be granted by the Revenue as is clear mandate of the Board clarification issued in response to representation by Maharashtra Chamber of Housing Industry. He also relies upon the Tribunal decisions in the cases of Harshad P Doshi (supra) and Saroj Sales Organization (supra) and submits that once the project is approved as housing project by the local authority, the deduction under section 80 IB(10) is to be granted with reference to the entire profits of the project and the same cannot be restricted to only such profits as are attributable to residential units. Learned counsel also supports the submissions made by Dr Pathak, Shri Jain and Shri Vora.

36. Shri S R Puranik, appearing for Khinvsara Chavan Associates and Anand Construction – two other interveners before this Special Bench, supports the arguments advanced by Dr Pathak, Shri Jain, Shri Vora and Shri Tulsiyan. He also files a copy of the Hon'ble Calcutta High Court's

judgment in the case of Bengal Ambuja Housing Developments Ltd approving the Kolkatta bench decision in that case. This document was filed as there was a discussion, at some stage of the hearing. about this case, though it was later realized that nothing much turns on this case. Shri Puranik was, however, gracious enough to assist the bench by filing necessary documents by way of copies of orders.

37. Shri S D Kapila, learned Special counsel appearing for the Revenue, joins the issue with learned representatives of the assessee on the question as to what was the objective of introducing Section 80 IB(10). He submits that when an assessee does not have certificate of a local authority as a 'housing project', the only basis on which one could come to the conclusion whether it is a housing project or not is whether or not this is a project for dwelling units. He, however, fairly accepts that once the approval as 'housing project' is granted by the local authority, in view of the stand taken by the Central Board of Direct Taxes, it is sufficient for the purpose of claiming deduction under section 80IB (10), but when no such approval as 'housing project' is available to the assessee, the expression 'housing project', in the context in which it is used, can only mean a project for dwelling units. He then takes us through speeches of the Finance Ministers to demonstrate the context in which 'housing project' is used in the statute. In the budget speech for the year 1997-98, he invites our attention to the following extracts :

Housing :

21. A constraint on adding to the housing stock of the country is the Urban Land (Ceiling and Regulation) Act, 1976. It is the intention of the Government to move a bill for amending the Act in this session of parliament.

22. Indira Awas Yojna was launched to build houses for the poor in rural areas. Housing finance companies provide credit, but bulk of the credit flows to urban and semi urban areas. There are some rural housing development programmes but they lend meager amounts up to Rs 10,000. There is virtually no source of credit for the farmer who wishes to build a modest house on his freehold land or to improve or add to his old dwelling. This gap must be filled. In consultation with the National Housing Bank (NHB) and others, I have worked out a plan. Loans upto Rs 2 lakhs will be given for building houses on freehold land in rural areas at normal rate of interest, subject to borrower putting in one third of the value of the house. NHB is requested to prepare a scheme in which other organizations will also participate. The Prime Minister will launch this scheme on August 15, 1997, and it is our goal to sanction 50,000 loans in the first year.

38. Shri Kapila submits that the above references to housing in Finance Minister's 1997 budget speech could not, by any stretch of logic, be related to anything other than dwelling units. Indira Awas Yojna was a

scheme for the dwelling units and that was a part of the Finance Minister's deliberation on the 'housing'.

39. Our attention is then invited to 1998 budget speech of the Finance Minister. Once again, considerable attention is devoted to the 'housing' issue, and the relevant extracts from the budget speech are as follows"

> **Housing :**
>
> **The National Agenda identifies housing as a priority area. We will move purposefully to tackle country's enormous housing shortage problem, through partnership between Government, housing finance institutions and the private sector.**
>
> **20 lakhs additional dwelling units will be built this year, with 13 lakhs in rural areas and 7 lakhs in urban areas.**
>
> **The budget allocation for Indira Vikas Yojna Programme is being substantially enhanced to Rs 1600 crores, from Rs 1144 crores in RE 1997-98. The scope of this scheme is being widened to include a loan cum subsidy programme.**
>
> **The Urban Land Ceiling and Regulation Act will be repealed to free the supply of usable urban land for housing construction.**

The capital base of Housing and Urban Development Corporation (HUDCO) is being increased by Rs 110 crores from the budget so that it may leverage more funds for housing construction.

I also have some tax incentives for housing which I will outline later in my speech.

40. The above extracts from the 1998 budget speech, according to Shri Kapila, make two things very clear. First, that reference to housing is for dwelling units, as evident from the fact that the reference is specifically for building addition dwelling units, for HUDCO which deals with dwelling units, and for Indira Awas Yojna which again is a scheme for building dwelling units for poor persons in rural areas. Second, the plan expenditure is linked with tax incentives, as evident from the last sentence reproduced in the above extracts. It would in turn show that any reference to housing in successive budgets has been for dwelling units. Learned counsel submits that it is inconceivable that there could be plan expenditure for building offices, commercial complexes and shops. When plan expenditure and tax incentives are to be considered in a harmonious manner and in conjunction, the reference can only be for dwelling units and not commercial units.

41. In 1999 budget speech, as pointed out by Shri Kapila, it is stated that “the rural housing shortage at the beginning of 1997-98 was estimate at nearly 140 lakhs units, which included shelterless households and

those with only kucha dwellings". This again shows that reference to housing is infact a reference to dwelling units. To the same effect, we are taken through several budget speeches of the successive Finance Ministers. The common thread in all these budget speeches has been that every time a reference is made to 'housing', it would be clear from discussion under that heading that reference is infact for dwelling units.

42. Our attention is then invited to 2000 budget speech by the Finance Minister in which the Finance Minister, at one place has stated as follows:

> **Mr Speaker, Sir, I wish to now turn to another area of special focus in this budget, namely Housing Sector. In regard to this sector, I propose a comprehensive package of fiscal incentives focused at :**
>
> **- the middle class investors wishing to purchase a dwelling unit;**
> **- the promoters of middle income housing projects; and**
> **- the housing finance companies.**

43. These words of the Finance Minister clearly show that reference to housing projects is infact a reference for dwelling units. The expression 'housing projects' is used in the company of expressions 'dwelling units' and 'housing finance companies' which cannot be meant to refer to houses, commercial space and other business places.

44. It is submitted that one cannot be oblivious to what actually constitutes 'housing' problem in the country. This certainly does not refer to the dearth of shops or commercial space in the country. There are people sleeping on the roads and there are even middle class people

living in slums like Dharvi. The tax incentives, such as one provided by Section 80IB (10), are costs for bringing in more dwelling units so that shortage of dwelling units can be addressed. If housing problem constitutes shortage of dwelling units, the statutory provisions to tackle this housing problem should be so read as to be harmonious with this housing problem i.e. shortage of dwelling units. Building more offices, shops and commercial space is certainly not part of the solution. It would therefore be absurd to interpret a provision, aimed at tackling housing shortage issue, in such a manner as to end up encouraging building of more non residential units. The incentive provision of Section 80 IB(10), according to the learned counsel, is an incentive for supply and development of dwelling houses.

45. A reference is then made to the 'Law and Practice of Income Tax by Kanga, Palkivala and Vyas' (9th Edition, Volume 1,@ page 20, 21) in support of the proposition that speeches made by the Finance Ministers can be taken into consideration for the purposes of discovering the legislative intent or to ascertain object or the purpose behind the legislation.

46. As regards the references made by the learned counsel for the appellants to the wealth tax provisions, learned special counsel submits that the scheme of income tax and wealth tax have one fundamental difference and that is the fact that while in the income tax law, nature of asset is irrelevant and character of income is relevant, it is the other way round for wealth tax law. So far as taxation under the head 'income from

house property' is concerned, all that is necessary is that there should be a building. As to what is nature of building, is not relevant for income tax purposes. The anology drawn by the assessee, according to the learned counsel, is thus not valid.

47. Shri Kapila submits that every expression in the dictionary has several meanings, but what is required to be done by someone interpreting that expression is to find a meaning which is more appropriate to context and the setting in which that expression appears. Reliance is placed on the judgment of Hon'ble Supreme Court in the case of CIT Vs Venkateshwara Hatcheries Pvt Ltd (237 ITR 174). It is submitted that, as held by the Hon'ble Supreme Court in the Venkateshwara Hatcheries (supra), where dictionary gives more than one meaning of a word, that word 'has to be construed in the context of the provisions of the Act and regard must also be had to the legislative history of the provisions of the Act and the scheme of the Act'. According to the learned counsel, the two important considerations in ascertaining appropriate meanings of a word, which is capable of more than one meaning, are (i) legislative history , and (ii) objects of the provisions in which the word is used. Our attention is then drawn to extracts from 'Webster's Encyclopedic Unabridged Dictionary of English Language', copies of which are filed at pages 3 and 4 of the compilation, and it is submitted that, considering the legislative history and undisputed objectives for which the tax concession under section 80 IB(10) was introduced, the most appropriate and contextual meaning of the word 'house' will be " a building in which people live; residence for human

beings", and the most appropriate and contextual meaning of the word 'housing' will be " houses collectively". Viewed in this perspective, according to the learned counsel, there is no scope of a commercial space or shop being treated as a part of housing project.

48. Shri Kapila then refers to famous slogan of seventies 'roti, kapda aur makaan' which incidentally was also title of a well received hindi movie in that era. He submits that makaan undisputedly means 'house', but then this popular slogan does refer to the basic human necessities in which 'house' connotes 'shelter'. The popular meaning of house thus is, according to the learned counsel, shelter. That is how millions and millions in this country understood house to be. To suggest that the expression 'house' must take in its sweep shops, commercial establishments and offices will be stretching the things too far, and such a meaning, even if it can be so taken, will be a hyper technical meaning which will have no relationship with ground realities.

49. A reference is then made to Section 2(16) of Maharashtra Cooperative Housing Society which defines 'housing societies' as "a society, object of which is to provide its members with open plots for housing, dwelling units or flats; or, if open plots, dwelling houses or flats are already acquired, provide its members common amenities and services". It is submitted that a shop keeper and office owner cannot be a part of such a housing society and it is thus, contrary to common sense meaning of the expression 'housing', to include such shops and commercial spaces.

50. Assailing the argument of the assessee that the legislature has not used the expression 'residential projects' at any place and therefore we cannot infer that provision is construed to benefit only residential projects, learned special counsel submitted that legislative history of the provisions as also Finance Minister's speeches on the floor of the Parliament are eloquent testimonies to the unambiguous thrust of the tax incentives under section 80 IB(10) being for promoting supply of dwelling units and for commercial use of area being alien to the scheme of things envisaged by lawmakers. It is submitted that huge shopping and recreation areas being promoted alongwith residential units cannot have anything to do with solving the acute housing problem in our country – the objective for which tax incentive under section 80IB(10) was granted. It is thus contended that deduction under section 80IB (10) can not be granted for commercial complexes and offices because there are other deduction, such as under section 80IB(7A) or under section 80IB(7B) , for those purposes.

51. Learned special counsel then invites our attention to a news report "Realtors say affordable houses unviable" appearing in the Indian Express of 22nd January 2009. It is pointed out that this reports states that private real estates developers have told the Government that "affordable housing is financially unviable in India" and that "If the Government wants them to build low cost houses, not only will it have to give them a sovereign guarantee to buy these houses, but also extend a host of direct and indirect tax exemptions". This report also thus,

according to the learned special counsel, supports his submission that the expression 'housing' refers to dwelling units.

52. Shri Kapila then relies upon the Hon'ble Supreme Court's judgment in the case of Allied Motors Pvt Ltd Vs CIT (224 ITR 677) in support of the proposition that when an amendment is made to the statute to remedy the unintended consequences and to make it workable, one has to take into account the intent of legislature and construe the same accordingly.

53. It is then submitted that housing is a state subject as land is a state subject. Accordingly, laws are framed by the State Legislatures to deal with the subject, but one common thread in all housing legislation is that they deal with dwelling units – whether in rural areas, or in slum areas or even in town and metropolitan areas. Our attention is invited to Maharshtra Regional and Town Planning Act 1966, and Bombay Provincial Municipal Corporation Act, 1949, which are also referred to the Development Control Rules for Pune Municipal Corporation, 1982. Learned special counsel has then extensively taken us through these Development Control Rules which govern approval of construction in Pune. Shri Kapila points out various types of buildings and occupancy or use groups referred to in the said rules. It is pointed out that the expression 'convenience shopping' is neatly defined in the Development Control Rules, and there are extensive guidelines about the use of such convenience shopping area. It is pointed out that not only purposes for which convenience shopping area can be used is specified, but also size of each unit is restricted to 20 sq mtrs , as also the overall limit on 5% of

the area of plot. We are also taken through various other provisions of the DCR and it is highlighted that convenience shopping, which can perhaps be said to be an integral part of the housing project, cannot at all be equated with commercial use of constructed areas in the cases before us. We are also taken through facts of some of the cases, and the nature of application of commercial use, to emphasize this point.

54. Shri Kapila then submits that a project can be a residential project, a residential cum commercial project or commercial project. However, when a project is said to be residential cum commercial project, it presupposes that both the activities, i.e. residential as also commercial, are main objects. Learned counsel then links this to Hon'ble Supreme Court's judgment in the case of CIT Vs Indian Sugar Mills Association (97 ITR 486) wherein it was held that if one of the objective of the assessee is different, the assessee loses status of charitable institution. On this basis, it is argued that once assessee accepts that developing commercial project is one of the main objects of the assessee's activity, the assessee cannot be said to be eligible for tax incentive meant for a housing project.

55. It is also contended that there is admittedly no ratio fixed upto which a residential cum commercial project may have commercial use. If assessee's contention is to be accepted, even if only one residential unit is built and all the remaining use is for commercial purposes, the project can still qualify for deduction under section 80 IB(10) which will be nothing less than a mockery of the law. The correct interpretation,

therefore, would be that to the extent permissible commercial use of area is concerned, the same can be taken as an integral part of the housing project. Anything in excess of such commercial usage, according to the learned counsel, would vitiate the character of project and would render the same ineligible for deduction under section 80IB(10). Learned counsel submits that by introducing clause (d), by Finance (No. 2) Act 2004, restricting the commercial use to 5% of total built up area, which is the area restricted for convenience shopping, the legislature has made explicit what was earlier implicit in a housing project. To this limited extent, the 2004 amendment is clarifiactory in nature. However, what is more important is that 2004 amendment has also introduced a restriction on convenience shopping also to the maximum permissible area of 2,000 sq ft. That is an additional limitation and this limitation can not be viewed as retrospective.

56. Learned special counsel also points out that it was never the assessee's case that the commercial use of constructed area is for convenience shopping. Learned special counsel for the assessee also referred to specific facts of the cases, but, as we are only dealing with the broad issue in principle, we need not address ourselves to specific facts of those cases. These matters, if need be, can be addressed by the Division Benches when the appeals come up for disposal before the Division Benches.

57. Shri Kapila then submits that as far as Tata Engineering and Locomotive Co. Ltd. v. Gram Panchayat's case (supra) is concerned, that

was a situation in which issue before the Hon'ble Court was whether taxing a house came within the jurisdiction of the Gram Panchayat. That was a different context altogether. Learned counsel once again referred to Hon'ble Supreme Court's judgment in the case of Venkateshwara Hatcheries (supra) and reiterated the proposition that context in which meaning is to be given is of paramount importance.

58. On the circular issued by the Central Board of Direct Taxes, learned special counsel states that this circular is at best a support of the proposition that once a project is accepting as a housing project, deduction under section 80 IB(10). Nothing more, according to the learned counsel, can be read into this circular.

59. On the strength of these submissions, and also relying upon the orders of the authorities below, learned special counsel submits that so far as first question before the special bench is concerned, his submission is that deduction under section 80IB (10), even in the pre amendment period, is not admissible unless it is a purely residential project. He , however, concedes that provision for convenience shopping, in accordance with the Development Control Rules, would not vitiate the character of such a project as a housing project, and, for that reason, the assessee will not be disentitled for deduction under section 80 IB (10). On the second question, i.e. on the question of proportionate deduction, learned special counsel submits that first thing to be shown is whether deduction under section 80 IB (10) is available and if the presence of commercial building vitiate the character of the project, deduction under

section 80 IB (10) is not at all available. However, he fairly concedes that in the absence of any rule to that effect, pro rate deduction cannot be allowed in respect of the profits of the residential units. In other words, if deduction is to be held admissible, according to the learned special counsel, it is to be admissible on the entire profits of the project. On the third and final question, i.e. on retrospectivity of insertion of clause (d) in Section 80 IB(10) inserted by the Finance (No. 2) Act, 2004, learned counsel submits that it is not his case that clause (d) will have retrospective application, though, his contention is that reference to 5% is clarificatory in nature inasmuch as convenience shopping to the extent of 5% in accordance with the Development Control Rules, even in pre amendment situation, could also be allowed for commercial use and that would not vitiate character of the project as a housing project.

60. In rejoinder, Dr Pathak pointed out that learned special counsel had stressed on the point that the deduction u/s 80IB(10) was introduced in order to increase the dwelling units by referring to the Finance Minister's speech while introducing the provisions, but he did not deal with the assessee's stand that the incentive u/s 80IB(10) was included in the incentives given to housing industry which also included exemption from Wealth Tax for certain commercial properties. Thus, the speech of the Finance Minister ought to be considered in entirety and not in isolation. It could not be said that one part of the speech had more importance than the other part. Accordingly, the term "housing" would imply both residential and commercial units. It was not the case that the deduction was claimed only for purely commercial project.

61. Dr Pathak further pointed out that, according to learned special counsel, intention of legislature for introducing this section was to encourage dwelling units, while assessee's contention was that the intention of legislature was to encourage house-building activity and not merely construction of dwelling units. Without prejudice to this assessee's contention, it was further submitted that the intention behind this section 80IB(10) being only to grant the deduction in respect of a residential project is incorrect . This was shown by way of an example. For example, if a project is of 100 residential units and no commercial portion, the Assessing Officer will grant the deduction, but if there are 99 residential units and 1 commercial unit , the deduction will be denied. Such a treatment is illogical for the reason that in both the cases, the intention of the legislature in making available residential units was served. The approach of the revenue authorities thus, according to the learned counsel, proceeded on fallacious logic.

62. As regards learned special counsel's suggestion that deduction under section 80IB(10) was not allowable for shops or commercial establishments because deduction under section 80IB(7A) or under section 80IB(7B) were allowable for those purpose, it was pointed out that the deduction available to multiplex theatre under section 80IB(7A) or for convention centre under section 80IB(7B) was allowable only where the assessee was in the business of building, owning and operating a multiplex theatre or a convention centre and not for purely developing the same. The parity drawn up by the learned counsel was thus , according to the assessee, incorrect.

63. As regards learned special counsel's stand that where the shops are constructed as convenience shopping having regard to the rules of local authority, the deduction u/s 80IB(10) would be allowable to the project, learned counsel for the assessee submitted that there was no reason for allowing the deduction only for the convenience shopping as it is allowable even if, the shops constructed are not convenience shopping as per the local laws. It was again emphasized that clause (d) inserted w.e.f 1st April, 2005 also did not mention anything regarding the convenience shopping and therefore, it was not justified to allow the deduction only if the shops constructed were convenience shopping.

64. As regards learned special counsel's pea that contextual meaning of a term should be preferred over its pure dictionary meaning, it was submitted that even accepting his arguments, under the Income Tax Act itself, the word "house" denoted both residential and commercial units and therefore, applying the contextual meaning, the term "housing project" included commercial area also.

65. On the objection of the department that there is no provision for a pro rata deduction, it was submitted that even in the context of section 80I, 80IA, etc. pro rata deduction to the eligible unit is granted by the courts. This was , however, without prejudice to the argument that there is no need of pro rata deduction when the entire project is to be treated as a housing project.

66. As regards Revenue's reliance on the Indian Sugar Mills Association's case (supra), that if any one of the conditions is not satisfied, the charitable trust has to be denied the exemption, it was submitted that the reliance was misplaced as in the context of a trust, the specific provision is there that the trust should be wholly for charitable purpose and it should satisfy the other conditions in the section. No such condition is placed in section 80IB(10).

67. It was also submitted that the reliance placed by the Revenue on the Development Control rules of PMC is out of context as no where in those rules, it is mentioned that on satisfaction of any conditions, the project becomes a housing project. These rules, according to the assessee, are of no practical use and donot provide any solution to the problem before us.

68. Shri V L Jain once again referred to the KMDA website which refers to their housing project but the project details given on the website clearly show that commercial units are also included in the housing project. He also referred to the proviso to Section 80IB(10) which refers to 'reconstruction and redevelopment of existing building in areas declared to be slum areas'. Our attention is also invited to the restrictions placed under the Development Control Rules for commercial use under residential zones. Finally, reliance is placed on the Hon'ble Supreme Court's judgment in the case of CIT Vs Vegetable Products Limited (88 ITR 192) in support of the proposition that when two reasonable views are possible, one in the favour of the assessee must be adopted.

69. A reference was also made to depreciation schedule which refers to the “buildings other than those covered by sub item (3) below which are used mainly for residential purposes” in support of the proposition that even under the scheme of the income tax law, the emphasis is on use ‘mainly’ rather than ‘exclusively’. It was thus indicated that a project, which is mainly a residential project, should, in the worse case scenario, be treated as a residential project. Learned special counsel, however, vehemently opposes this suggestion and submits that the expression ‘mainly’ which does not anywhere figure in the relevant provision cannot be supplied by the court as that would amount to supplanting the law rather than interpreting the law.

70. Shri Tulsiyan submitted that even if convenience shopping or commercial use of area is more than 5%, as long as local authorities permit it to be a part of the housing project and approve the project as such, that should not be allowed to affect entitlement of deduction under section 80IB(10). He once again lays emphasis on the fact that what is material is whether or not the local authorities approve the project as a housing project. Once such an approval is granted, the area used for non residential purposes is immaterial. Non residential use of area beyond 5% of cannot take away the tax benefit due to a project which is approved as a housing project.

71. Shri Puranik submits that 5% restriction for use as convenience shopping , under the Development Control Rules, is 5% of the entire plot

area and not merely built up area. Our attention is invited to the wordings of the provisions in the Development Control Rules. Shri Puranik also supports the arguments of Shri Pathak, Shri Jain and Shri Tulsiyan.

72. We have given our careful consideration to the rival submissions. We have also perused the records and duly considered factual matrix of the case as also the applicable legal position.

73. Section 80 IB (10) as it stood at the material point of time was as follows :

> **Section 80IB(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 order after 1st day of October, 1998;**
>
> **(b) the project is on the size of a plot which was a minimum area of one acre; and**

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

74. There is no dispute about the basic position that some element of commercial use of built up area can be treated as an integral part of the housing project, inasmuch as learned special counsel for the revenue has conceded that commercial use of built up area for convenience shopping, to the extent of 5% of total area of plot as permissible under the Development Control Rules for Pune Municipal Corporation, will not vitiate the claim of deduction under section 80IB(10) of the Act. Learned special counsel has also accepted that in such a situation deduction under section 80 IB (10) will be admissible for the entire profits of the housing project, though he also contends that when assessee constructs commercial area more than permissible convenience shopping, entire claim of deduction under section 80 IB(10) will be lost.

75. We are in considered agreement with the learned special counsel that entire thrust of the tax concession under section 80IB(10) is aimed at providing more dwelling units. In every budget speech, the successive Finance Ministers have made every endeavor to address problem of acute shortage of dwelling units – primarily for less privileged sections of the society. As learned special counsel rightly points out that this problem is

tackled on one hand by expenditure on various housing schemes , and , on the other hand, by providing tax incentives on the revenue side. As a matter of fact, the fact that size of residential unit is restricted to 1,000 sq fts in areas within 25 kms from municipal limits in Delhi and Mumbai , and to 1,500 sq fts in other areas, also shows this unmistakable thrust in the tax incentive. The tax incentive by way of deduction under section 80 IB(10) is clearly linked to provision for affordable dwelling units. As regards assessee's contention that the provision is aimed at promoting house building activity, in our considered opinion, promotion of house building activity cannot be viewed in isolation or as main objective of this provision. Undoubtedly, when construction of dwelling units takes place, house building activity is promoted and economic benefits from the same are realized. No fiscal incentive is a unidimensional measure for achieving an objective; it has several dimensions and, more often than not, it results in or is intended to result in more than one benefit in one or more areas. However, that cannot mean that promoting house building activity is main objective of Section 80IB(10), or else there was no need of placing any restriction on the size of the dwelling unit. It cannot be any body's case that economic benefits from constructions of smaller dwelling units will be more than the economic benefits from construction of larger dwelling units. A plain reading of Section 80 IB(10), in entirety, makes it clear that this section is aimed at promoting construction of housing projects so as to address the problem of shortage of dwelling units. No doubt the word 'house' is amenable to various meanings in the dictionaries, but when we examine its meaning in the context in which it is used in Section 80IB(10), it refers to dwelling units. The predominant

objective of this incentive provision, therefore, is to encourage better availability of the dwelling units for low and middle class segments of the society. As for the emphasis placed by the learned counsel for the assessee on dictionary meanings of the word 'house', and their contention that since the several dictionary meanings of the expression 'house' go well beyond dwelling units, connotations of the expression 'house' cannot remain confined to the dwelling unit, we may point out that as held by the Hon'ble Supreme Court in the Venkateshwara Hatcheries (supra), where dictionary gives more than one meaning of a word, that word 'has to be construed in the context of the provisions of the Act and regard must also be had to the legislative history of the provisions of the Act and the scheme of the Act'. Viewed in this perspective, and bearing in mind unambiguous thrust of the legislative history and background of the provisions of Section 8- IB (10), most appropriate meaning of the expression 'house' in the present context, in our humble understanding, is a dwelling unit. In the case of K.P. Verghese Vs Income Tax Officer (131 ITR 597) also, Hon'ble Supreme Court has deprecated a mechanical approach to the task of interpretation of statutes by laying too much of emphasis on the dictionary meanings of the expression used in the statute. In their inimitable and felicitous language, Their Lordships observed as follows :

> **The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of**

the Legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and, as pointed out by Lord Denning, it would be idle to expect every statutory provision to be " drafted with divine prescience and perfect clarity ". We can do no better than repeat the famous words of judge Learned Hand when he said:

" ..... it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

We must not adopt a strictly literal interpretation of ..... but we must construe its language having regard to the object and purpose which the Legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisions in which sections..... appears, because, as pointed out by judge Learned Hand in the most felicitous language:

".. ..... the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.

76. We are, therefore, of the considered view that the tax incentive by way of deduction under section 80 IB(10) is predominantly for the purpose of augmenting affordable dwelling units, and it must be interpreted in that light. We are unable to see any legally sustainable merits in learned counsel's plea that the purpose of section 80 IB (10) is to encourage house building activity per se and it is immaterial whether such an activity is to construct dwelling units or commercial units. The interpretation canvassed by the learned counsel for the assessee is clearly contrary to the scheme of the Act and legislative history of the provisions of Section 80 IB(10).

77. The question then arises whether construction of non residential units, i.e commercial space or shops etc, comes in conflict with the objective of the incentive provision to the extent that the this incentive can be declined proximately for the reason that a part of the built up area is used for commercial or non residential purposes. In other words, we need to address ourselves to the question whether could non residential use of built up area in a housing project could, by itself, lead to denial of deduction under section 80 IB(10).

78. As we have seen while perusing Development Control Rules applicable in Pune, there can not be a pure residential project inasmuch as it is incumbent on a developer to provide at least 2% of the plot area, and upto a maximum of 5% of plot area, for convenience shopping. As Shri Puranik pointed out, the reference is to the plot area and not the built up area. Therefore, even if permissible FSI is 1:1 but if a part of the total plot is vacant, the actual ratio of non residential use vis-à-vis aggregate built up area can be even more than 5%. In view of the specific provisions in the Development Control Rules, therefore, there cannot be any residential project which is a purely residential project and in which no part of the land is used for commercial purposes. Commercial use of area is thus an integral part of a housing project and merely because a part of the plot is used for commercial purposes, the character of housing project is not vitiated. It is not even revenue's case before us that there cannot be any element of commercial usage of built up area in a housing project.

79. Let us take a pause here and deal with the decision of a Division Bench in Laukik Developers Vs Deputy Commissioner of Income Tax (105 ITD 657). That is a case in which assessee had admittedly constructed 3,143 sq ft commercial area in its building project in a suburban area of Mumbai city, and the project was approved by the Kalyan Dombivile Municipal Corporation as a residential cum commercial project. On these facts, the Division Bench was of the view that "the construction of shops and commercial place cannot be considered a 'housing project' for the purposes of application of provisions of Section

80IB (10) of the Act". It was not even revenue's case that the project was only for building commercial space, but, as evident from the arguments recorded in paragraph in paragraph 3 of the order, revenue's case was that "there cannot be any commercial space in a housing project of the assessee in order to claim exemption from tax in terms of the provisions of Section 80IB (10) of the Act". This was the argument which was eventually accepted by the Division Bench. However, this argument not only runs contrary not only to the scheme of the Act because even under the scheme of the section 80IB(10), the commercial use of built up area is merely restricted, or say regulated, but not prohibited, but this argument also leads to an absurdity inasmuch as without some element of commercial use of the plot area mandatorily for convenience shopping, as per the Development Control Rules, a housing project cannot be approved at all. Unless at least a part of constructed area, as per applicable rules, is used for commercial purposes, a housing project cannot be granted approval by the local authorities, but then, if we are to apply the ratio of Laukik Developer decision (supra), the moment any part of built up area is used for commercial purposes, the eligibility for deduction under section 80 IB (10) will be lost. It leads to an absurd situation that no housing project can be eligible for deduction under section 80IB (10) at all, because unless the project is approved by the local authority, it is not eligible for deduction under section 80IB(10), but one of the conditions of approval of the project, i.e. mandatory provision for convenience shopping, is such that some element of commercial use of built up area is inevitable, and this commercial use, per se, is held to be reason enough to render assessee ineligible for deduction under

section 80IB(10). This is a vicious cycle of circular logic and it is inherently impossible for an assessee to come out of it. That apart, it is not even the case of the revenue before us that there cannot be any commercial use at all of built up area in a housing project. Revenue's case only is that such commercial use of built up area should be confined to permissible convenience shopping. It is thus not possible for us to follow, nor are we inclined to do so on merits either, the approach adopted by the Division Bench in the case of Laukik Developers (supra).

80. In view of the discussions above, it is now beyond any serious dispute or controversy that commercial use of built up area, by itself, does not vitiate the claim of deduction under section 80 IB(10). It is also thus beyond dispute or controversy that, notwithstanding legislature's unambiguous objective of introducing tax benefits under section 80IB (10) for augmenting availability of dwelling units for low and middle class, the availability of tax benefits are not confined to only such housing projects which are purely residential projects and in which no part of area is used for commercial purposes. Now that we come to the conclusion that an element of commercial use is implicit and permissible in a housing project, the next question that we need to address ourselves to is as to upto what degree and in what measure such a commercial use is permissible.

81. As a matter of fact, this commercial use of area generally leads to a more convenient and complete housing project. Many a times, these housing projects are away from the commercial centers in the city, and,

therefore, it is necessary that the residents of the dwelling units built in these housing projects have the benefit of commercial establishment in the near vicinity. There is thus no contradiction in providing for commercial use of built up area and in providing for affordable dwelling units. When a local authority approves a project as housing project, there is apparently no difficulty. As long as local authority approves the project as a housing project, it is immaterial as to what is the quantum of use of built up area as for commercial purposes. This is so, inter alia, for the reason that the Central Board of Direct Taxes itself, vide letter dated 4th May 2001 addressed to Maharashtra Chamber of Housing Industry, has stated as follows:

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

82. The position with effect from assessment year 2005-06 will, however, be different in view of the specific restriction brought into effect by Section 80IB(10)(d) which provides that the commercial use of built up area shall not exceed 2,000 sq fts or 5% of the aggregate built up area – whichever is less. However, we are not really concerned at this stage about the legal position post 2004 amendment which brought on the statute book clause (d) above. Suffice to say that, so far as assessment years before us, which is prior to the assessment year 2005-06, is

concerned, approval by the local authority as a housing project constitutes admissible material to come to the conclusion that the housing project is eligible for deduction under section 80 IB (10). Nothing further, therefore, needs to be examined in such a case.

83. Under the Development Control Rules for Pune Muncipal Corporation, as applicable in the cases before us, admittedly there is no provision under which a project is approved as a 'housing project'. The projects are approved as residential, residential cum commercial or as commercial projects. We have to , therefore, address ourselves to the question whether in order to be termed as a housing project, any commercial use of built up area was at all permissible in the assessment years before the assessment year 2005-06, and, if so, to what extent.

84. It is interesting to note that when clause (d) was inserted vide Finance (No. 2) Act, 2004, which reads as **"the built up area of the shops and other commercial establishments, included in the housing project, does not exceed five percent of aggregate built up area or two thousand square feet, whichever is less"** , Explanatory Notes to Provisions relating to Direct Taxes (CBDT Circular No. 5 of 2005 ; dated 15th July 2005) stated that " **It has also been decided that the built up area of shops and other commercial establishment included in the housing project should not exceed 5% of the aggregate built up area of the housing project, or 2,000 sq. ft, whichever is less**". It is thus clear that the amendment brought into effect a limitation on use of built up area as commercial area or as shops etc. The wordings of the statute,

as also of the Explanatory Notes, leave no doubt that what was brought into effect was a restriction on use of built up area for commercial purposes, and not a relaxation to use the built up area for commercial purposes. If it was a relaxation, it could have been worded in the way so as to convey relaxation to use the built up area upto 5% for non residential use. That is not the case.

85. In the case of Gem Granites (supra), Their Lordships of Hon'ble Supreme Court was *in seisin* of a situation in which the benefit of deduction under section 80 HHC in respect of export of, inter alia, cut and polished granite specifically granted with effect from 1st April 1991 by laying down an exception to the denial of benefits to exports of minerals or ores, whereas prior to that date deduction under section 80 HHC in respect of export of minerals and ores was inadmissible and no exception was available from this general exclusion clause. The assessee's plea was that this rider to this denial of section 80 HHC benefits in respect of exports of minerals or ores was no more than clarificatory. Their Lordships rejected this plea and held that the very fact that this concession is granted with effect from 1st April 1991, it would show that the benefit of deduction under section 80 HHC was not available till that point of time. Their Lordships observed as follows:

> "The introduction of the phrase 'other than' in clause (b) of sub section (2) of Section 80 HHC in 1991, in our opinion, indicates that carving out of a specific class from the general class of 'minerals or ores'. This means that were it not for the exception, the specified

processed minerals and ores would have been covered by the words 'minerals and ores'……."

86. By the same logic, in our opinion, the very fact that a specific restriction was placed on the commercial use content of the built up area would indicate that there was no such limit in force for the earlier years as well. One can restrict only what is permitted. The restriction is placed at 5% in the assessment year 2005-06. This limit is applicable only with prospective effect and there is no justification to presume that such a limit or prohibition was in place in the earlier years as well on the commercial use of area. There is nothing in the context or in the language of the amendment to suggest that the same is applicable in earlier years. If this limit was to be applicable in the earlier years as well, there was no need to make it applicable with prospective effect from Ist April, 2005 only. Further commercial built up area beyond a specified limit is not only prohibited but it is a now condition precedent for getting benefit of section 80IB(10) that commercial built up area must not be more than 5% of total plot area. The presumption of implicit condition can not, therefore, be inferred. There can neither be a presumption about retrospectivity of this ceiling on commercial use, nor can it be presumed that such a ceiling amounted to a concession and that no commercial use was at all permitted in the preceding years. It is clear that undertakings were building excessive commercial areas because of lacuna in the provision, and to check this mischief, the provision regarding limitation on commercial built up area in a housing project was introduced as a requirement but this imitation applied w.e.f. 1st April 2005 only. The

restriction placed on commercial use of built up area in a housing project, by itself, shows that commercial use of built up area was permissible, in principle, in a housing project. The amendment brought about by insertion of clause (d) in Section 80IB(10), in our understanding, is a substantive amendment and it is applicable from the date the legislature has so specifically provided i.e. 1st April, 2005.

87. The view that we are thus taking, find support from the following decisions.

88. Their Lordships of Hon'ble Supreme Court in the case of H.V.Thakur vs. State of Maharashtra AIR 1994 SC 2623 (at page 2641) have culled out the following principles of interpretation after considering the various cases decided by Hon'ble Supreme Court and have observed that these principles are illustrative though not exhaustive which will cover the ambit and scope of amending Act and its retrospective operation:

> *"(i) "A statute which affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment, whereas a Statute which merely affects procedure, unless such a construction is textually impossible is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits.*

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature.

(iii) Every litigant has a vested right in substantive law, but no such right exists in procedural law.

(iv) A procedural Statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished.

(v) A Statute which not only changes the procedure but also creates a new rights and liabilities, shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

89. Hon'ble Supreme Court in the case of Maharaj Chintamani Saran Nath Shahdeo vs. State of Bihar AIR 1999 SC 3609 in para 22-23 observed as follows:

"22. In Garikapatti Veeraya vs. N.Subbiah Choudhury, 1957 SCR 4888: (AIR 1957 SC 540), the Chief Justice S.R. Das speaking for the Court observed as follows (at p.553 of AIR):

'The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed.'

23. We may also refer to Francis Benion's Statutory Interpretation, 2nd Edn., at p. 214 wherein the learned author commented as follows:

'The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex post facto law is enshrined in the United States Constitution and in the Constitutions of many American States, which forbid it. The true principle is that Lex prospicit non-respicit (law looks forward not back). As Willes, J.said, retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

90. In paragraph 24 Their Lordships have referred to the aforementioned decision of Apex Court in the case of HV Thakur vs. State of Maharashtra (supra) and principles of interpretation laid down therein.

91. We have held that clause (d) inserted in the section is applicable for the assessment year 2005-06 onward. We have also held that clear and dominant objective of the incentive provision is to provide dwelling units for low and middle class though some commercial built up area by itself does not vitiate the claim. These two findings are to be construed in harmony. The pertinent question, therefore, is to find out how much use of area for commercial purpose in a housing project could be treated as permissible inasmuch as it would not vitiate the character of housing project. Learned counsel for the assessee first suggests that once there is no limit on commercial built up area, even if one residential unit is built in the project, it will meet the requirements of law, and then, as an alternative argument, suggests that as long as commercial built up area is less than 50% of the total area, the project must be treated as a housing project. Learned counsel has relied upon the scheme of old Section 104 to 109 of the Income Tax Act to draw this *lakshman rekha* of 51%. None of these arguments meets our approval.

92. In our opinion, this argument of the assessee is incompatible with our finding, as we have recorded earlier in this order, that dominant objective of the tax incentive is to augment the supply of affordable dwelling units. The project eligible for this tax concession, therefore, has

to be a housing project for residential dwelling units and not a project to serve commercial purposes. It should predominantly be a project for dwelling units. As regards assessee's contention that even if one of the unit is dwelling unit and the project is approved as residential cum commercial project, the assessee will be eligible for deduction under section 80 IB(10) in respect of entire profits of the housing project, such an interpretation will clearly lead to an absurdity inasmuch as the benefit of tax incentive under section 80IB(10) will then be available in respect of a project which is not even aimed at augmenting the supply of affordable dwelling units. Such a project, by no stretch of logic, can be construed as a project which can be said to be for the purpose of making available the dwelling units.

93. Similarly, the limit of 51% on residential use of built up area, as suggested by learned counsel for the assessee, is also incompatible with our finding that dominant objective of Section 80 IB (10) is to provide tax incentive for a housing project which is predominantly for affordable dwelling units. When commercial use and residential use is almost equal, it cannot at all be said that predominant objective of the project is for providing dwelling units. When two different type of usage are equal or close to equal, as fifty one percent ceiling on residential built up area necessarily mandates, none of the usage can be said to be predominant, as, on a conceptual note, equality is clearly antithesis of predominance. That apart, even from a reasonableness point of view, it would indeed be unreasonable to suggest that when as much as fifty percent of the built up area in a housing project is being used for commercial purposes, the

project can still be said to be a project predominantly for the purposes of residential units. On the other extreme, Revenue contends that shopping complex or commercial portion should be restricted to 5% of total constructed area which is more or less on the same lines as clause (d) introduced subsequently. This extreme view also, for the reasons we have already set out, cannot be accepted either.

94. We have to draw up some *lakshman rekha* nonetheless so as to ensure that the basic character of the project continues to remain in harmony with the object of the tax incentive i.e. augmenting affordable dwelling units.

95. No doubt, this is not an easy job in the sense that we do not readily find any objective criterion for the same. The language of the enactment prior to introduction of clause (d) in the Section did not provide any area limit on commercial construction in the housing project and, therefore, the problem in providing a clear and easy answer. However, we are not the first to face such a situation. We find that eminent jurists and judges of superior courts have often attempted to find solution in similar situation where there is no clear legislative guidance. In paragraph 75 above, we have referred to observations of Lord Denning on purposive rules of interpretation. We deem it necessary to revert to the same and quote **Craies on Statute Law** 7th edition, page 94 as under:-

> *"If the language of an Act of Parliament is clear and explicit, it must as already stated, received full effect, whatever may be the consequences. Of many Acts, however, it can fairly be said, as was*

said by Lord Herschell in ***Western Suburban etc., Building Society v. Martin*** *(1886) 17 QBD 609 of the Building Societies Act, 1884, that no construction 'is free from difficulty, and no construction carries out a clear, defined and well-indicated policy on the part of the Legislature.' If (as is often the case) the meaning of an enactment, whether from the phraseology used or otherwise, is obscure, of if the enactment is, as Brett L.J. said in* ***The R.L. Alston*** *(1883) 8 PD 5 'unfortunately expressed in such language that it leaves it quite as much open with regard to its form of expression, to the one interpretation as to the other, the question arises, 'what is to be done? We must try and get at the meaning of what was intended by considering the consequences of either construction'. And if it appears that one of these constructions will do injustice, and the other will avoid that injustice, 'it is the bounden duty of the court to adopt the second, and not to adopt the first, of these constructions. However 'difficult, not to say impossible', it may be to put a perfectly logical construction upon a statute, a court of justice 'is bound to construe it, and as far as it can, to make it available for carrying out the objects of the Legislature, and for doing justice between parties."*

96. In **Seaford Court Estates Ltd. v. Asher** (1949) 2 All ER 155, 164; 2 KB 481 at p. 498), Denning L.J. spelt out the principle of interpretation of statutes in the following terms:-

"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even, if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the

draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, ***but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give force and life to the intention of the Legislature."***

97. The above observations of Denning L.J. were severely criticized by Lord Simonds but Lord Denning stuck to his views and this is clear from his decision in case of Eddis v. Chichester Constable (1969) 2 ch. 345.

98. The Indian Courts approved of above observations of Denning L.J. and this we find in the case of M. Pentiah vs Veeramallappa AIR 1961 SC-1107. In England, Lord Diplock in the case of **Kammins Ballrooms Co. Ltd. vs. Zenith Investments (Torquay) Ltd.** (1971) AC 850 approved of what he called "a purposive approach to statutory interpretation". According to Lord Diplock, the purposive approach would enjoin a judge to impute to Parliament an intention not to impose a prohibition inconsistent with the objects which the statute was designed to achieve, though the draftsman has omitted to incorporate in express words any reference to that intention. The essence of the purposive approach, according to Lord Diplock, is for the judge to answer a series of questions; "What is the subject-matter of the Act (or part of the Act) being interpreted? What object in relation to that subject-matter Parliament

intended to achieve by the Act. And lastly, what part in the achievement of that object the section under construction was intended to play?" The particular section will then be interpreted according to the object which the court deems the legislation is intended to serve. This operates even if Parliament has failed to incorporate the intention which the judge believes that the section possesses. The learned Law Lord, has re-emphasized the importance of making a purposive approach in Reg. V. Nat. Ins. Commr.: Ex Parte Hudson (1972) AC 944 at page 1005; (1972) 2 WLR 210, 251 (HL) thus:

> *"Meticulous linguistic analysis of words and phrases used in different contexts in particular sections of the Act should be subordinate to this purposive approach. It should not distract your Lordships from it."*

99. No doubt, the above observation was made in the matter of interpretation of a social legislation, viz., National Insurance (Industrial Injuries) Act, 1946, but these observations are equally relevant for interpretation of tax incentive provisions.

100. In **Carter v. Bradbeer** (1975) 3 All ER 158 at p. 161; (1975) 1 WLR 1204, 1206 (HL), Lord Diplock has observed thus:

> *"If one looks back to the actual decisions of this House on questions of statutory construction over the past thirty years, one cannot fail to*

be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions."

111. A five judge bench of Hon'ble Supreme Court, in the case of Padamsundara Rao Vs State of Tamilnadu (255 ITR 147) had an occasion to attempt reconciling between the principle of causus omissus and the need of purposive interpretation. Their Lordships, inter alia, observed as follows :

Two principles of construction—one relating to casus omissus and the other in regard to reading the statute as a whole—appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danckwerts L. J. in Artemiou v. Procopiou [1966] 1 QB 878 (CA) (page 888) "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction (per Lord Reid in Luke v. IRC [1964] 54 ITR 692 ; [1963] AC 557 where at page 577, he also observed : "this is not a

new problem, though our standard of drafting is such that it rarely emerges").

(Emphasis supplied by us by underlining)

112. The true and proper interpretation has to be, therefore, placed on the provision in question in the light of other material available on record and after taking clue from clause (d) which will serve the purpose of the legislature.

113. At this stage, it would be relevant to refer to notes on clauses of Finance (No. 2) Act 2004 when clause (d) was introduced in sub-section (10). It read as under:-

"The changes brought out by the substitution by the Finance (No.2) Act, 2004 w.e.f. 1st April, 2005 have been explained in Notes on Clauses of the Finance (No.2) Act, 2004 which reads as under:-

Under the existing provisions contained in sub-s. (10), hundred per cent deduction of the profits of an undertaking developing and building housing projects is allowed if the housing project is approved by a local authority before the 31st March, 2005 ***subject to the conditions specified in cls. (a) to (c) of the said sub-section.*** *The existing provisions of the said sub-section provides that (a) the undertaking should have commenced development of the housing project after the 1st day of October, 1998, (b) the project should be on a size of a plot of land which has a minimum area of one acre, and (c) the residential unit should have a maximum built-up area of one acre, and (c) the residential unit should have a maximum built-up area of one thousand square feet where such residential units are situated within the cities of Delhi or Mumbai or within twenty-five kilometers from the municipal limits of these cities and one thousand five hundred square feet at any other place.*

Sub-cl. (d) seeks to substitute sub-s. (10) of the said section so as to prove, inter alia, a hundred per cent deduction of the profits derived by an undertaking developing and building housing projects approved by a local authority before 31st March, 2007 instead of 31st March, 2005 under the existing provisions, ***subject to the conditions*** *that (a) such undertaking has commenced or commences development and construction of the housing project or after 1st Oct., 1998 and completes the construction within four years, from the end of the financial year in which the housing project is approved by the local authority; (b) the project is on the size of a plot of land which has a minimum area of one acre except in the case of 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, 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 kilometers from the municipal limits of these cities and one thousand five-hundred square feet at any other place; and (d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed five per cent of the aggregate built-up area of housing project or two thousand square feet, whichever is less."*

114. It is clear from above that prior to introduction of condition as per clause (d), the approval of "housing project" by local authority was not a **condition** for application of the sub-section (10) and for grant of relief. We have noted the three conditions which were required to be satisfied, although Legislature did thought that approval of a "housing project" by local authority will take care of the area to be occupied by shops and commercial establishments in a housing project. We have found that local

authorities approved housing projects where commercial built up was 9.31% in Arun Excello Foundation and much more in the case of Saroj Sales Organisation. Similarly in government approved KMDA Barackpur Housing (Phase-II) Project large portion were reserved for commercial complexes. In the absence of any statutory provision, local authorities of different places did approve different areas for construction of commercial establishments, which were approved as housing projects. However, local authorities at Pune had no power to approve the housing projects as such. Projects could be approved either as “residential projects” or “residential and commercial projects”. Even CBDT in their reply dated 4.5.2001 could not give clear answer to the query raised by Maharashtra Chamber of Housing Industry on the problem as noted above. In the above background, it will only be reasonable, in our opinion, grant benefit of incentive provision to projects in which built up area for commercial purposes is more than 5% say 6% to 9%. It would be palpable injustice to deny benefit of exemption to border line cases merely because commercial built up area in their cases has exceeded the built up area by a small percentage on the touch stone of condition (d) applied subsequently. We are of view that Benches of the Tribunal were correct in holding that conditions of section were satisfied where the commercial built up area had exceeded 9% of total area. This was rightly done by adopting purposive interpretation of an incentive provision under consideration. We are, therefore, of the view that cases where commercial built up area did not exceed 10% of the total area, the benefit of statutory provision could not be denied in such cases. Where approximately 90% or more of the total area is utilised for building

dwelling units of specified area and other conditions of the section are fulfilled, there is no justification to deny the benefit merely because the project had been passed as “residential – commercial project”. Such project should be held to be predominantly residential project fully satisfying the description of term “housing project” as envisaged under statutory provision prior to assessment year 2005-06. On reference to other provisions of the Income-tax Act, we find that 90% of compliance is taken as substantial or full compliance of the provision, for example, of discharging advance tax obligations. We, therefore, hold that where 90% is built up for residential unit, and commercial use is 10% or less, there is substantial compliance of the statutory provisions and the purpose of the provision is duly met. In this connection, we may usefully refer to and rely upon provision of section 234B of the Act which holds that when 90% or more advance tax is paid by the assessee, the advance tax obligations are treated as discharged. In cases where commercial use of built up area is 10% or less, it should not be open to the Revenue to proceed on the basis that the project is not a housing project. The enactment did not provide for any limit on commercial built up area out of total area.The view that non residential use of built up area upto 10% will not vitiate the true character of a housing project is fully justified in the background of provision discussed above. In our view, it would be illegal to apply ceiling of 5% to assessment years prior to assessment year 2005-06 though no such ceiling was provided under the statute, and deny benefit to borderline cases. At the same time there is no justification to allow exemption to project not carried as per the dominant objective of the provision. The legislature itself has accepted 5% as permissible

commercial use from assessment year 2005-06 onwards, and in the period when such a limit was not in force , we can safely take 10% as the maximum permissible commercial use in a housing project, for the reasons discussed in detail above. We are, therefore, of the view that there would be no justification to deny benefit of statutory provisions to case where 90% or more of the total area has been utilised for building dwelling units of specified area and other conditions of the section are fulfilled. The purpose of the legislature in such case is clearly met. To sum up, we hold that a housing project would fulfil the requirement of section 80IB if 90% of the area is utilised for building of dwelling units and utilisation of commercial building is restricted to 10% of the built up area. Such project should be held to be predominantly residential project and, therefore, satisfying description of “housing projects” as envisaged under the statutory provision prior to assessment year 2005-06. It will not be just and fair or even legal to deny exemption of the section to the aforesaid type of projects carried by an undertaking.

115. There may be cases where the total built up commercial area is more than 10%, of total area. These projects, in our opinion, normally should not get benefit of exemption unless such undertaking can show that income from construction of residential dwelling units can be worked out separately and even after excluding the commercial use of plot, the project satisfies all the requirements of section 80IB(10) of the Income-tax Act. In other words, in order that the profits from dwelling unit segment of the project is eligible for deduction under section 80IB (10) in such a case, size of the plot, excluding portion under commercial unit,

must be more than minimum area of one acre and residential units built on such area must satisfy condition of clause (c) of the provision. In our considered opinion, above income of undertaking from project referred to above should be granted exemption under the statutory provision, as such income satisfy the purpose of the enactment. In any case, denial of deduction is such cases will be purely based on hyper technical ground, because instead of seeking approval as residential cum commercial project for the entire project, the assessee could have as well taken separate approval for residential segment which, even on standalone basis, would have satisfied all the requisite conditions. As we have already pointed out, approval as residential project was not a condition precedent for grant of deduction under section 80 IB, and in city like Pune, there was no provision in the local regulation to approve project as a 'housing project'. There would be no legal justification to deny exemption to residential segment of such a housing project, which satisfies conditions of Section 80 IB (10) on standalone basis, merely because their project has been approved by local authority as a residential cum commercial project. If the income of the project pertaining exclusively to the construction of the residential units can be separately worked and other requirements of section are satisfied, there is no good reason to withhold grant of incentive to such income of the undertaking. Apart from the above, other undertakings exceeding above limit i.e. those with commercial built up of more than 10% of area, in our opinion, are not entitled to benefit of exemption as those undertakings have not worked in accordance with spirit and intendment of the statutory provision.

116. An apprehension is raised by the Revenue, which has also been expressed by the Division Bench in Laukik Developer's case (supra), that if we are to hold that there is no ceiling for commercial use of built up area so far as the assessment years prior to 2005-06 are concerned, even if a person has built a predominantly commercial or business complex and just a few residential units , he will still be eligible to deduction under section 80 IB(10) and such an eventuality will be clearly contrary to the scheme of the Act. In Laukik's Developers' case (supra), the Division Bench observed that "If the argument of the assessee is accepted, then it shall nullify the very object of introducing the provisions of Section 80IB (10) in the statute book for promotion of housing in the country since there shall be no limit to the total built up area devoted to the construction of shops and other commercial establishments".

117. In our considered view, however, these apprehensions are ill conceived inasmuch as, even though there is no ceiling on the limit of commercial use of built up area, wherever Assessing Officer can demonstrate that the project built by the assessee is not a genuine housing project but the façade of housing project is given only to claim tax benefits under section 80 IB(10), and that the real object of the assessee is to build commercial or business units, it will be open to the Assessing Officer to decline deduction under section 80 IB(10) on the ground that the project of the assessee is not a housing project in character. In any event, in the preceding paragraphs, we have discussed at length as to what will be permissible limit of commercial use of built up

area, so as to leave the character of the housing project intact. As we have discussed above, commercial use of upto 10% built up area, in the years prior to the assessment year 2005-06 when 5% limit was not in force, will clearly not vitiate the predominant purpose of the housing project i.e. augmenting supply of dwelling units. In such cases, and in the light of the detailed discussions we had in the preceding paragraphs, the projects will continue to predominantly residential projects and legitimately be entitled to deduction under section 80IB(10). The apprehensions about misuse of the provisions are thus unfounded.

118. In view of the above discussions, we are not inclined to infer that a ceiling over commercial use of built up area @ 5% exists in the assessment year before us in which admittedly no such restriction finds place in the statute. We have also held that notwithstanding the inapplicability of this limit of 5% limit in the assessment year in appeal before us, it cannot be inferred that commercial use of built up area could be allowed to any limit and yet the project will continue to be treated as a housing project. We have held that as long as the residential use of built up area is 90% or more, it can not be said that the project is not a predominantly housing project and, accordingly, deduction under section 80 IB (10) cannot be declined.

119. As regards Shri Kapila's reliance on Allied Motors case (supra), in support of the proposition that one has to take into account the intent of legislature and construe the provision accordingly, it is not even the case of the Revenue that the provisions of Section 80IB(10)(d) is retrospective

in application, and the aforesaid judgment lays down that when a proviso is inserted to remedy unintended consequences, make the provision workable, supplying an obvious omission in the section and required to be read into the section to give it reasonable interpretation, it has to be "treated as retrospective in operation". There is an inherent contradiction in the approach of the Revenue. Either Section 80IB(10)(d) is retrospective in application or it is not. If it is not retrospective, one can not proceed on the basis that the ceiling of 5% on non residential use of aggregate built up area is applicable in pre- amendment years as well.

120. As regards Shri Kapila's reliance on Hon'ble Supreme Court's judgment in the case of Indian Sugar Mills Association (supra), we are unable to find any merits in the same. The decision was in the context of charitable institutions and it was held by the Hon'ble Supreme Court that private gain was inconsistent with the object of general public utility, and since there was admittedly an element of personal gain inasmuch as rules of the trust permitted distribution of profits, the trust could not be considered to be charitable in nature. In the case of charitable trusts, when even one of the objectives is non charitable, the trust cannot be considered to be for charitable purposes. Quite to the contrary, there is not much conflict in various objectives of a housing project. As a matter of fact, even according to the Revenue, to some extent, having commercial use of built up area, such as by way of convenience shopping, is incidental to the main objective of providing affordable dwelling units. This situation cannot be compared with that of a charitable institution in which even one non charitable objective vitiates

the nature of trust. We are, therefore, of the considered view that merely because a part of the built up area is used for commercial or non residential purposes it cannot be said that the objective of providing residential units is vitiated.

121. We have also noted Revenue's plea that as long as it is use of built up area for commercial purposes is confined to convenience shopping within permissible limits and subject to the conditions as per Development Control Rules, eligibility for deduction under section 80IB(10) remains intact and that the moment such usage goes beyond what is permissible as convenience shopping as per Development Control Rules, the eligibility for deduction under section 80IB (10) is lost. We are unable to approve this plea either, as it goes well beyond the limitations set out even post 2004 amendments. Clause (d) of Section 80IB (10), which was introduced vide Finance (No. 2) Act, 2004, provides that **"the built up area of the shops and other commercial establishments, included in the housing project, does not exceed five percent of aggregate built up area or two thousand square feet, whichever is less"** . This has nothing to do with convenience shopping which not only restricts the size of each shop to 20 sq mtrs but also limits the purposes for which these shops can be used. Take for example a situation in which a housing project has only one commercial unit of 185 sq mtr which is clearly not permissible in terms of the provisions of convenience shopping which restricts the size of unit to 20 meters, but it is just within 2,000 sq ft limit laid down under section 80IB(10)(d). This does not violate the requirement of Section 80IB(10), but, if we are to accept the proposition

advanced by the learned special counsel, will render assessee's claim for deduction under section 80IB(10) inadmissible. It also demolishes the theory that by the virtue of introduction of clause (d) in Section 80 IB (10), what was implicit (i.e. permission to build convenience shopping) in a housing project has been made explicit in the section itself. There can also be situations in which even minimum requirement of convenience shopping could render the project ineligible for deduction under section 80IB (10), say, for example, in cases in which total plot area is more than 1,00,000 sq ft. In view of these discussions, in our considered view, linkage of convenience shopping to the limitation on use of built up area as commercial space is a legally unsustainable proposition.

122. In view of the above discussions, we are of the considered view that deduction under section 80 IB (10), as applicable prior to 1st April 2005, is indeed admissible in case of a 'housing project' comprising residential housing units and commercial establishments. Question No. 1, therefore, must be answered in the affirmative. Accordingly, we approve decisions of the Division Benches in the cases of Arun Excello Foundation Pvt Ltd (supra), Harshad Doshi (supra) and Saroj Sales Organization (supra) in this respect, and we decline to concur with the view expressed in the case of Laukik Developers (supra). As a matter of fact, the view expressed by the Division Bench in the case of Laukik Developers (supra), as we have noted earlier in this order, has not even been canvassed before us by the revenue.

123. The next question is whether or not the deduction under section 80 IB (10) is to be granted in respect of only of such profits as are attributable to the residential units.

124. There is not much of a dispute on this aspect also. Learned representatives agree that there are no enabling provisions so far as allocation of profits into profits relatable to residential units and commercial units are concerned. We have noted that Section 80 IB (10) categorically refers to the "**profits derived** in the previous year, relevant to any assessment year, **from such housing project**". What is deductible is **'profit of the housing project'**, and not the profit attributable to the residential units". Once, therefore, we hold that the project in question is a housing project, entire profits of the housing project are deductible under section 80IB(10). The question of proportionate deduction is, therefore, not at all relevant in this context.

125. We have also take note of the fact that in Arun Excello Foundation Pvt Ltd's case (supra), Chennai Division Bench has granted proportionate deduction @ 90.69% based on the percentage of residential units in the housing project, but, interestingly, that was the alternate plea raised by the assessee and the Division Bench proceeded to accept the alternate plea without dealing with the main plea at all. The question of dealing with alternate plea arises only when the main plea is rejected. Neither we approve such an approach of the Division Bench in principle, nor, as discussed above, are we inclined to approve, on merits, the decision of

Division Bench in the case of Arun Excello Foundation Pvt Ltd (supra) on the question of grant of proportionate deduction.

126. An exception, however, will have to be made out in a case where commercial use of built up area is more than 10% of the total area, and yet, in terms of our observations in paragraph 115 above, the assessee is eligible for deduction in respect of profits of the residential units segment of the project. In such a situation, since residential unit segment is being treated on a standalone basis for eligibility to deduction under section 80 IB(10), the eligibility for such deduction can only be for the profits which are in respect of residential unit segment of the overall project, because, in the light of the discussions, only that part of the overall project can be said to be housing project. Accordingly, eligibility for deduction under section 80IB (10) must remain confined to the same.

127. The answer to question no. 2 is thus in negative, though with the rider as set out above.

128. The last question before us is the limit under clause (d) of Section 80 IB (10) will operate retrospectively and will also apply for the assessment year before us.

129. There is no dispute on this question also. Learned representatives have agreed that clause (d) is not to be treated as retrospective in application. That aspect of the matter is also not in dispute before us.

We, accordingly, hold that the limit under clause (d) of Section 80IB (10) will not apply.

130. To sum up, the conclusions arrived at by this Special Bench are as follows :

(a) The deduction under section 80 IB (10), as applicable prior to 1st April 2005, subject to and in the light of the observations made in the preceding paragraphs, is admissible in case of a 'housing project' comprising residential housing units and commercial establishments. In case these projects are approved as housing projects by the local authority, such an approval as housing project is sufficient for the purposes of eligibility. In any other case, where 90% or more of the total built up area is used for dwelling units, in accordance with the scheme of section 80 IB(10), the benefit of deduction under section 80 IB(10) will not be declined. In case commercial use of built up area is more than 10% but the residential segment of the project satisfies requirements of Section 80 IB(10) on standalone basis, i.e. (i) the size of the plot, excluding portion under commercial unit, is more than minimum area of one acre , (ii) residential units built on such area must satisfy condition of clause (c) of the provision, and (iii) other necessary conditions are fulfilled, and where income from construction of residential dwelling units can be worked out on standalone basis, deduction under section 80 IB (10) will be available in respect of residential segment of the project.

(b) The deduction under section 80IB(10) is available in respect of profits of housing project as a whole, and, as such, it is not relevant as to what is the portion of profits which can be said to be attributable to residential units. This is subject to the rider that in case commercial use of built up area in a project is

more than 10% and, for this reason the project can not be said to be a predominantly housing project, but, in terms of observations made in paragraph 115 above, the assessee is entitled to deduction in respect of residential unit segment of the overall project on fulfillment of necessary conditions, the entitlement of incentive deduction will be confined to only to the profits to the residential segment of the overall project.

(c) The limit on commercial use of built up area as prescribed by clause (d) of Section 80 IB (10) has no retrospective application, and it applies only w.e.f the assessment year 2005-06.

131. The matters will now to go to the Division Benches for disposing of the appeals in the light of, inter alia, our above conclusions.

Sd/xx	*Sd/xx*	*Sd/xx*
(Mukul Shrawat)	**(Vimal Gandhi)**	**(Pramod Kumar)**
Judicial Member	**President**	**Accountant Member**

Dated : 6 th day of April, 2009

Copy of the order is forwarded to :

1. *The Assessee*
2. *The Assessing Officer*
3. *The CIT(A)*
4. *The CIT*
5. *The Departmental Representative*
6. *Interveners*

True copy

By order

Assistant Registrar
Income Tax Appellate Tribunal
Pune