

agk

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

**INCOME TAX APPEAL NO.3633 OF 2009**  
**WITH**  
**INCOME TAX APPEAL NO.4361 OF 2010**

The Commissioner of Income Tax -25,  
C/11, Room no.209, 2<sup>nd</sup> Floor,  
Pratyaksha Kar Bhavan, Bandra Kurla  
Complex, Bandra (East), Mumbai – 400 051 ..Appellant.

Versus

M/s.Vandana Properties,  
602-B, Prem Nagar, Off. S V P Road,  
Borivali (West), Mumbai – 400 092 ..Respondent.

Mr.Suresh Kumar with Ms.Suchitra Kamble for the appellant.  
Mr.S.N. Inamdar, Senior Advocate with Mr.Atul K Jasani for the respondent.  
Mr.J.D. Mistri, Senior Advocate with Mr.Atul K Jasani for the intervenors.  
Mr.Vipul Joshi with Mr.Sameer G Dalal for the intervenors.

**CORAM : J.P. Devadhar & A.R. Joshi, JJ.**

**RESERVED ON : 25<sup>th</sup> January 2012**  
**PRONOUNCED ON : 28<sup>th</sup> March 2012.**

**ORAL JUDGMENT : (Per J P Devadhar, J.)**

1. These two appeals are admitted on the following common substantial question of law and taken up for hearing by consent of both the parties.

*“Whether on the facts and circumstances of the case and in law, the Income Tax Appellate Tribunal was justified in holding that the assessee firm was eligible for claiming deduction under Section 80IB (10) of the Act wherein the assessee failed to fulfill the primary conditions laid down under Section 80IB (10) of the Act such as commencement of construction, area of plot and size of the flats constructed by the assessee ?”*

2. The assessment years involved herein are AY 2004-2005 and 2005-2006.

3. Since several appeals are filed in this Court raising similar questions, we have heard counsel for various parties as intervenors.

4. The respondent – assessee is a registered partnership firm engaged in the business of construction and development of housing projects.

5. For the sake of convenience, we set out the facts in Income Tax Appeal No.3633 of 2009. The relevant facts in that appeal are that on a plot of land, ad-measuring 2.36 acres situated at Kandivali (West), Mumbai, the assessee had constructed buildings A, B, C and D over a period of years. Intimation of disapproval in respect of those buildings were granted during the year 1993 to 1996. By following the work in progress method of accounting, the assessee offered to tax the income earned by constructing buildings A, B, C and D from time-to-time. Deduction under Section 80IB (10) of the Act on the income earned from buildings A, B, C and D buildings was not claimed as the approval for construction of those buildings were granted prior to 1<sup>st</sup> October 1998. Pursuant to an order passed by the State

Government in the year 2001 permitting conversion of the status of the land, the assessee became entitled to construct an additional building 'E' on the aforesaid plot of land. Accordingly, building plan for construction of building 'E' with several residential units on the said plot of land was submitted by the assessee.

6. By an Intimation of Disapproval dated 11<sup>th</sup> October 2002, the building plan for 'E' building consisting of various residential units was approved by the Municipal Corporation subject to various conditions set out therein. Thereafter, commencement certificate for construction of the 'E' building was issued on 10<sup>th</sup> March 2003.

7. In the returns of income filed for AY 2004-2005 and 2005-2006, the assessee estimated its profits from 'E' building by following the work in progress method of accounting and claimed deduction under Section 80IB (10) at Rs.71,42,590/- and Rs.71,73,660/- respectively.

8. On 11<sup>th</sup> October 2005, survey action under Section 133A of the Income Tax Act, 1960 ('Act' for short) on the business premises of the assessee as also at the project site was conducted to ascertain the allowability of deduction under Section 80IB (10) of the Act. During the course of survey and thereafter statement of the Site Supervisor and Architect were recorded.

9. In the assessment order passed for AY 2004-2005, on 28<sup>th</sup> December 2005, the assessing officer disallowed the claim for deduction

under Section 80IB (10) for the following reasons :-

- a) The approval for 'E' building was granted on 11<sup>th</sup> October 2002 as an extension of the approvals granted for A, B, C and D buildings commencing from 9<sup>th</sup> June 1993 and, therefore, 'E' building being continuation of A, B, C and D buildings, the project must be held to have commenced prior to 1<sup>st</sup> October 1998 and, hence, not eligible for 80IB (10) deduction.
- b) A, B, C, D and E buildings are constructed on a plot ad-measuring 2.36 acres and if 2.36 acres of land is proportionately divided between five buildings, the land pertaining to 'E' building would be less than one acre and, hence, deduction under Section 80IB (10) cannot be allowed.
- c) During the survey, it was noticed that Flat Nos.138 and 153 on the ground floor of 'E' building were found to be merged into one flat and since the area of the merged flat exceeds 1000 square feet, the deduction under Section 80IB (10) cannot be granted.

For the identical reasons, the deduction under Section 80IB (10) was disallowed for AY 2005-2006.

10. The appeals filed by the assessee against the dis-allowance of the claim under Section 80IB (10) were dismissed by the Commissioner of Income Tax (Appeals).

11. On further appeals filed by the assessee, the Tribunal by its <http://www.itatonline.org>

orders dated 29<sup>th</sup> April 2009 and 27<sup>th</sup> May 2009 held that the assessee is entitled to the deductions under Section 80IB (10). Challenging the aforesaid order, the present appeals are filed by the Revenue.

12. Mr.Suresh Kumar, learned Counsel for the Revenue argued before us that the amount of deduction under Section 80IB (10) of the Act is available to an undertaking where the development and construction of the housing project has commenced on or after 1<sup>st</sup> October 1998 and is completed within the time stipulated therein. In the present case, approval for construction of 'E' building was granted on 11<sup>th</sup> October 2002 as and by way of extension of the approval granted to the earlier housing project consisting of A, B, C and D buildings. Since approval to the housing project consisting of A, B, C, D and E building was first granted in the year 1993, it must be held in view of the Explanation to Section 80IB (10)(a) of the Act that the housing project has commenced development and construction when the first approval was granted in the year 1993 and to such a housing project which has commenced prior to 1<sup>st</sup> October 1998, the deduction under Section 80IB (10) could not be granted.

13. Counsel for the Revenue further submitted that for claiming deduction under Section 80IB (10), the housing project must be on the size of a vacant plot of land which has a minimum area of one acre. The submission is that, unless the housing project has commenced development / construction on or after 1<sup>st</sup> October 1998 on a vacant plot of land of the size

having a minimum area of one acre, the benefit of deduction under Section 80IB (10) would not be available. In the present case, the assessee has construed 'E' building on the size of a plot of land ad-measuring 2.36 acres on which four buildings viz. A, B, C and D were already constructed and even if the land is proportionately divided between the five buildings viz. A, B, C, D and E, the area of the land pertaining to 'E' building would be less than one acre which would be in contravention of the conditions set out in Section 80IB (10) and, therefore, the Tribunal could not have extended the benefit of Section 80IB (10) to the assessee.

14. Lastly, counsel for the Revenue submitted that in the present case, the assessee has merged two flats on the ground floor of 'E' building into one flat as a result whereof the size of the residential unit in the housing project exceeded 1000 square feet which is in contravention of Section 80IB (10)(c) of the Act and, hence, the benefit of that Section could not be granted to the assessee. Accordingly, it is submitted that the appeals filed by the Revenue be allowed by answering the question raised in the appeal in favour of the Revenue and against the assessee. Counsel for the assessee as also the counsel for the intervenors have made elaborate arguments supporting the order passed by the Tribunal and the same are considered in the subsequent paras of this judgment.

15. Before considering the rival submissions, we may reproduce **Section 80IB (10)** as it stood *prior to its* substitution by the Finance (No.2)

Act, 2004 with effect from **1<sup>st</sup> April 2005** herein below :

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

- (a) such undertaking has commenced or commences development and construction of the housing project on or after the 1<sup>st</sup> day of October, 1998;*
- (b) the project is on the size of a plot of land which has a minimum area of one acre; and*
- (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 and five hundred square feet at any other place.”*

16. **Section 80IB (10)** substituted **with effect from 1<sup>st</sup> April 2005**,

to the extent relevant herein, reads thus :-

*“(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31<sup>st</sup> day of March, 2007 by a local authority shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if, -*

- (a) such undertaking has commenced or commences development and construction of the housing project on or after the 1<sup>st</sup> day of October, 1998 and completes such construction, -*
  - (i) in a case where a housing project has been approved by the local authority before the 1<sup>st</sup> day of April, 2004, on or before the 31<sup>st</sup> day of March, 2008;*
  - (ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1<sup>st</sup> day of April, 2004, within four years from the end of the financial year in which the housing project is approved by the local authority.*

*Explanation. - For the purposes of this clause, -*

- (i) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority;*
- (ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority;*
- (b) the project is on the size of a plot of land which has a minimum area of one acre;*

***Provided .....***

- (c) .....*
- (d) ....."*

17. The first question to be considered herein is, whether, in the facts of the present case, construction of 'E' building constitutes building a 'housing project' under Section 80IB (10) of the Act.

18. The expression 'housing project' is neither defined under Section 2 of the Act nor under Section 80IB (10) of the Act. Even under the Mumbai Municipal Corporation Act, 1988 as also under the Development Control Regulations for Greater Mumbai, 1991, the expression 'housing project' is not defined. Therefore, the expression 'housing project' in Section 80IB (10) would have to be construed as commonly understood.

19. As rightly contended by Mr.Inamdar, learned Senior Advocate appearing on behalf of the assessee and Mr.Mistri, learned Senior Advocate



and Mr. Joshi, learned Advocate appearing on behalf of the intervenors, the expression 'housing project' in common parlance would mean constructing a building or group of buildings consisting of several residential units. In fact, the Explanation in Section 80IB (10) supports the contention of the assessee that the approval granted to a building plan constitutes approval granted to a housing project. Therefore, it is clear that construction of even one building with several residential units of the size not exceeding 1000 square feet ('E' building in the present case) would constitute a 'housing project' under Section 80IB (10) of the Act.

20. The question, then, to be considered is, whether construction of 'E' building is an independent housing project or extension of the housing project already existing on the plot in question. It is the contention of the Revenue that since the approval for construction of 'E' building was granted by the local authority subject to the conditions set out in the first approval granted on 12<sup>th</sup> May 1993 for construction of A and B building, construction of 'E' building must be considered to be the extension of the earlier housing project for which approval was granted prior to 1<sup>st</sup> October 1998 and, therefore, the benefit of Section 80IB (10) cannot be granted. There is no merit in the above argument, because, when the plans for A, B, C and D buildings were approved during the period from 1993 to 1996, construction of 'E' building was not even contemplated on the plot in question. It is only in the year 2001 when the status of the land was converted from surplus

vacant land into within the ceiling limit land by the State Government, an additional building could be constructed on the plot in question and accordingly building plan for construction of 'E' building was submitted and the same was approved by the local authority on 11<sup>th</sup> October 2002.

21. The fact that the local authority, namely the Municipal Corporation approved the building plan for 'E' building on the condition that all the objections raised in the Intimation of Disapproval dated 12<sup>th</sup> May 1993 relating to the earlier housing project on the same plot of land shall be applicable and should be complied with, cannot be a ground to hold that 'E' building is extension of the earlier housing project because the earlier housing project was completed prior to 1<sup>st</sup> October 1998 and the housing project for construction of 'E' building was approved for the first time on 11<sup>th</sup> October 2002. Nowhere in the Intimation for Disapproval granted for construction of 'E' building on 11<sup>th</sup> October 2002, it is stated that building 'E' constitutes extension of the earlier housing project which is already completed. The fact that the objections raised while approving the earlier housing project on the same plot of land were made applicable to the housing project in question, it cannot be inferred that the housing project in question constitutes extension of the earlier housing project. Therefore, in the facts of the present case, where, neither the assessee had sought approval of the building plan for construction of 'E' building as extension of the earlier housing project, nor the Municipal Corporation has granted approval for the

housing project consisting of 'E' building as extension of the earlier housing project, it is not open to the income-tax authorities to contend that approval to the housing project granted by the Municipal Corporation on 11<sup>th</sup> October 2002 constitutes extension of the housing project which was approved in the year 1993.

22. Reliance placed by the Revenue on the Explanation to Section 80IB (10)(a) which was introduced with effect from 1<sup>st</sup> April 2005 is also misplaced. What the said Explanation contemplates is that where the approval in respect of a housing project is granted more than once, then, that housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority. For example, in respect of a housing project, the assessee may seek amendment of the building plan at several stages of the construction and the same may be approved. In such a case, the explanation provides that for the purposes of Section 80IB (10) the housing project shall be deemed to have been approved on the date on which the first approval was granted by the local authority. Thus, the Explanation to Section 80IB (10)(a) refers to the approval granted to the same housing project more than once and the said Explanation would not apply where the approval is granted to different housing projects. In the present case, as noted earlier, construction of 'E' building constitutes an independent housing project and, therefore, the date on which the earlier housing project had commenced construction could not

be applied to the housing project consisting of 'E' building merely because the conditions set out while granting approval to the earlier housing project have also been made applicable to the housing project in question.

23. The next argument of the Revenue is that to avail the deduction under Section 80IB (10), the housing project must be on the size of a vacant plot of land which has minimum area of one acre. In the present case, there are five buildings (A, B, C, D and E) on a plot ad-measuring 2.36 acres, hence, the proportionate area for each building would be less than one acre and, therefore, the benefit of Section 80IB (10) could not be granted in respect of the housing project consisting 'E' building.

24. As rightly contended by the counsel for the assessee and the intervenors, Section 80IB (10)(b) specifies the size of the plot of land but not the size of the housing project. The size of the plot of land, as per Section 80IB (10) must have minimum area of one acre. The Section does not lay down that the plot having minimum area of one acre must be a vacant plot.

25. The question, therefore, to be considered is, whether the Revenue is justified in reading the expression 'plot of land' in Section 80IB (10)(b) as 'vacant plot of land' ?

26. The object of Section 80IB (10) in granting deduction equal to one hundred per cent of the profits of an undertaking arising from developing and constructing a housing project is with a view to boost the

stock of houses for lower and middle income groups subject to fulfilling the specified conditions. The fact that the maximum size of the residential unit in a housing project situated within the city of Mumbai and Delhi is restricted to 1000 square feet clearly shows that the intention of the legislature is to make available large number of medium size residential units for the benefit of the common man. However, in the absence of defining the expression 'housing project' and in the absence of specifying the size or the number of housing projects required to be constructed on a plot of land having minimum area of one acre, even one housing project containing multiple residential units of a size not exceeding 1000 square feet constructed on a plot of land having minimum area of one acre would be eligible for Section 80IB (10) deduction. If the construction of Section 80IB (10) put forth by the Revenue is accepted, it would mean that if on a vacant plot of land, one housing project fulfilling all conditions is undertaken, then deduction would be available to that housing project and if thereafter several other housing projects are undertaken on the very same plot of land, the deduction would not be available to those housing projects as the plot ceases to be a vacant plot after the construction of the first housing project. Such a construction if accepted would defeat the object with which Section 80IB (10) was enacted.

27. Moreover, plain reading of Section 80IB (10) does not even remotely suggest that the plot of land having minimum area of one acre must be vacant. The said Section allows deduction to a housing project (subject to

fulfilling all other conditions) constructed on a plot of land having minimum area of one acre and it is immaterial as to whether any other housing projects are existing on the said plot of land or not. In these circumstances, construing the provisions of Section 80IB (10) by adding words to the statute is wholly unwarranted and such a construction which defeats the object with which the Section was enacted must be rejected.

28. Apart from the above, the Central Board of Direct Taxes (CBDT) by its letter dated 4<sup>th</sup> May 2001 addressed to the Maharashtra Chamber of Housing Industry has stated thus :

*“The undersigned is directed to refer to your letter No.MCHI:RSA:m:388/19799/3 dated 1<sup>st</sup> January 2001 and to state that the additional housing project on existing housing project site can qualify as infrastructure facility under Section 10(23G) and 80IB (10) provided it is taken up by a separate undertaking, having separate books of accounts, so as to ensure that correct profits can be ascertained for the purpose of Section 80IB and also to identify receipts and repayments of long term finances under the provisions of Section 10(23G), separately financing arrangements and also, if it separately fulfills all other statutory conditions listed in Sections 10(23G) and 80(B(10)). With regard to your query regarding the definition of Housing Project, it is clarified that any project which has been approved by a local authority as a housing project should be considered adequate for the purpose of Section 10(23G) and 80IB (10).”*

29. From the aforesaid letter of CBDT, it is clear that for the purposes of Section 80IB (10) it is not the mandate of the Section that the housing project must be on a vacant plot of land having minimum area of one acre and that where a new housing project is constructed on a plot of land having minimum area of one acre but with existing housing projects would qualify

for Section 80IB (10) deduction. Even otherwise, the argument of the Revenue does not stand to reason because, in the city of Mumbai where there is acute space crunch, it is difficult to find a vacant plot having minimum area of one acre and even if few such plots are existing it cannot be said that Section 80IB (10) deduction was intended to give benefit only to the undertakings who construct housing projects on those few plots. Therefore, it is clear that on a plot of land having minimum area of one acre, there can be any number of housing projects and so long as those housing projects are approved by the local authority and fulfill the conditions set out under Section 80IB (10), the deduction thereunder cannot be denied to all those housing projects. Section 80IB (10) while specifying the size of the plot of land, does not specify the size or the number of housing projects that are required to be undertaken on a plot having minimum area of one acre. As a result, significance of the size of the plot of land is lost and, therefore, the assessee subject to fulfilling other conditions becomes entitled to Section 80IB (10) deduction on construction of a housing project on a plot having area of one acre, irrespective of the fact that there exist other housing projects or not. In these circumstances, the decision of the Tribunal in rejecting the contention of the Revenue regarding the size of the plot cannot be faulted.

30. The last argument of the Revenue in declining to grant deduction under Section 80IB (10) is that two flats on the ground floor of

building 'E' were merged in to one flat, as a result whereof the maximum size of the residential unit exceeded 1000 square feet which is in violation of the condition set out in Section 80IB (10) and, therefore, the assessee is not entitled to the deduction. The Tribunal on appreciation of the facts and the evidence on record arrived at the conclusion that there was no merger of flats and in fact both the flats in question were neither sold nor any application was made before the local authority seeking merger of two flats on the ground floor of 'E' building. Thus, no fault can be found with the decision of the Tribunal in rejecting the argument of the Revenue relating to the merger of the flats.

31. In the result, the common question of law framed in these two appeals are answered in favour of the assessee and against the Revenue.

32. Both the appeals are disposed off accordingly with no order as to costs.

(A.R. Joshi, J.)

(J.P. Devadhar, J.)