ITEM NO.1 COURT NO.5 SECTION IV-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) Nos. 34997-35001/2015 (Arising out of impugned final judgment and order dated 21-08-2015 in ITA No. 41/2012, ITA No. 42/2012, ITA No. 43/2012, ITA No. 34/2012 and ITA No. 39/2012 passed by the High Court of M.P. Principal Seat at Jabalpur)

M/S GLOBAL ESTATES Petitioner(s)

VERSUS

COMMISSIONER OF INCOME TAX Respondent(s)

(ONLY APPLICATION FOR STAY IN SLP NOS. 35004-05/2015 TO BE LISTED)

WITH

SLP(C) No. 35004-35005/2015 (IV-A)
(With IA No. 3/2016 - PERMISSION TO FILE ANNEXURES and IA No. 53548/2019 - STAY APPLICATION)

Date : 08-07-2019 These petitions were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN
HON'BLE MR. JUSTICE SURYA KANT

For Petitioner(s) Mr. Arvind P. Datar, Sr. Adv.
Ms. Surekha Raman, Adv.
Ms. Viddusshi, Adv.
Mr. Akhil A. Roy, Adv.
Mr. Sahil Singh, Adv.
M/S. K J John and Co, AOR

For Respondent(s) Mr. K. M. Nataraj, ASG.
Ms. Shweta Garg, Adv.
Mr. Sharath Nambiar, Adv.
Mrs. Anil Katiyar, AOR

UPON hearing the counsel the Court made the following
O R D E R

SLP (C) Nos. 34997-35001/2015
SLP(C) No. 35004-35005/2015

There shall be stay of the impugned judgment in both the aforementioned special leave petitions.

Application for stay stands disposed of.

(NIDHI AHUJA) (RENU DIWAN)
COURT MASTER (SH) ASSISTANT REGISTRAR

HIGH COURT OF MADHYA PRADESH : JABALPUR

I.T.A. No.34/2012, I.T.A. No.39/2012
I.T.A. No.41/2012, I.T.A. No.42/2012 &
I.T.A. No.43/2012

Commissioner of Income Tax .....Appellant

Versus

M/s Global Estate. ....Respondents

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***Coram*:**

Hon'ble Shri Justice A. M. Khanwilkar, Chief Justice
Hon'ble Shri Justice K.K.Trivedi, J.

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Shri Sanjay Lal and Shri Rajesh Pandey, Advocates for the appellant/Commissioner of Income Tax.

Shri G.N. Purohit, learned Senior Counsel with Shri L.L. Sharma and Shri Abhishek Oswal, Advocate for the respondent.

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Reserved On : 21.07.2015

Date of Decision : 21.08.2015

J U D G M E N T

{ 21st August, 2015 }

Per: A.M. Khanwilkar, Chief Justice:

These appeals are filed by the Department qua single assessee, regarding five separate Assessment Years i.e. 2002-03 to 2006-07, bearing I.T.A. Nos.41, 43, 42, 39 and 34 of 2012

respectively. Moreover, these appeals emanate from a common order passed by the Income Tax Appellate Tribunal, Indore Bench, at Indore dated 29.09.2011 in respect of another assessee (M/s Global Reality). Since common substantial question of law arises for consideration, all appeals were heard analogously and, therefore, are being disposed of by this common judgment. Even in these appeals only issue pressed by the Department is in relation to the deduction under Section 80IB(10)(a) of the Income Tax Act.

2. In the leading I.T.A. No.40/2012 and connected cases decided today by a separate Judgment, the substantial question of law has been answered in favour of the Department. For the reasons stated in the said judgment, even these appeals filed by the Department must succeed on the same terms.

3. Accordingly, these appeals are **allowed** by setting aside the impugned judgment of the Tribunal with regard to the deduction claimed by the assessee under Section 80IB(10)(a) of the Income Tax Act and instead the decision of the Assessing Officer to disallow the said deduction is upheld. No order as to costs.

(A.M. Khanwilkar)
Chief Justice

(K.K.Trivedi)
Judge

psm

HIGH COURT OF MADHYA PRADESH : JABALPUR

I.T.A.No.40/2012

The Commissioner of Income Tax,
Bhopal .....Appellant

Versus

M/s Global Reality ....Respondent

I.T.A.No.36/2012

The Commissioner of Income Tax,
Bhopal .....Appellant

Versus

M/s Global Reality ....Respondent

I.T.A.No.35/2012

The Commissioner of Income Tax,
Bhopal .....Appellant

Versus

M/s Global Reality ....Respondent

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Coram:

Hon'ble Shri Justice A. M. Khanwilkar, Chief Justice
Hon'ble Shri Justice K.K.Trivedi, J.

Whether approved for reporting : Yes

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Shri Sanjay Lal, learned counsel for the appellant.

Shri G.N. Purohit, learned Senior counsel with Shri L.L.Sharma and Shri Abhishek Oswal, learned counsel for the respondent.

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Reserved On : 21.07.2015
Date of Decision : 21.08.2015

J U D G M E N T

{ 21st August, 2015}

Per: A.M. Khanwilkar, Chief Justice:

These appeals pertain to the same assessee, filed by the Department against the common judgment of the Income Tax Appellate Tribunal, Indore Bench, Indore dated 29.09.2011; and involve identical substantial question of law.

2. Briefly stated, the assessee, a partnership firm engaged in construction and sale of houses, claimed deduction for the respective assessment years under Section 80IB (10) in particular Clause (a), for Rs.35,42,526/- (AY 2004-05), Rs.23,42,464/- (AY 2005-06) and Rs.9,62,915/- (AY 2006-07). According to the assessee, after the approval was granted by the Municipal Corporation, the housing project was started before 31.03.2004. The assessee submitted application to the Municipal Corporation on 16.01.2008, claiming that the housing project was completed. The site was inspected by the Inspector of the Municipal Corporation on 27.02.2008. Admittedly, the

completion certificate was not issued before the cut off date (i.e. 31.03.2008). It was so issued by the Local Authority on 04.05.2010 which, however, did not mention the date of completion of the project. The Local Authority later on, clarified vide letter dated 23.03.2011, that the date of completion of the project was 27.02.2008. Relying on the said clarification, the assessee contended that the project was in fact completed on 27.02.2008, before the cut off date; and for which reason the assessee was entitled for deduction within the meaning of Section 80IB (10) (a). The Assessing Officer, however, disallowed the claim of the assessee on the finding that inspite of repeated opportunity given to the assessee during the course of assessment proceedings, the completion certificate was not produced before 31.03.2008. That fact was admitted by the assessee in its letter dated nil furnished to the Assessing Officer on 24.12.2008. Further, a letter was issued by the Municipal Corporation dated 18.12.2008, pursuant to the enquiry made in that behalf stating that completion certificate has not been issued to the assessee till that date and that the application of the

assessee was still being processed. On these facts the Assessing Officer proceeded to complete the Assessment proceedings and disallowed the deduction claimed by the assessee under Section 80IB (10) (a). Notably, the completion certificate issued by the Local Authority is of subsequent date and not issued within the stipulated date.

3. Being dissatisfied, the assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals)-II, Bhopal and thereafter before the Income Tax Appellate Tribunal, Indore Bench, Indore by way of appeals being I.T.A.Nos.145/Ind/ 2011, 434/Ind/2010 and 86/Ind/2011.

4. The Tribunal by the impugned judgment decided all the three appeals of the present assessee as also of another assessee (M/s Global Estates) together.

5. The Assessee's claim for deduction under the amended provision of Section 80IB on other count was also allowed on the finding that the built up area of the bungalows was more than the prescribed permissible limits. So far as finding with

regard to the built up area, the Supreme Court in the case of **Commissioner of Income Tax Vs. Veena Developers**[1] has opined that the provisions inserted in Section 80IB w.e.f. 1st April, 2005, are prospective and not retrospective; and hence cannot be applied for the period prior to 1st April, 2005. That legal position has been restated in the case of **Commissioner of Income Tax Vs. Sarkar Builders**[2] .

6. During the hearing of these appeals, counsel for the department, in all fairness, submitted that since the housing project of the assessee was sanctioned by the Municipal Corporation on 22.03.2001, the amended provisions which have come into effect from 01.04.2005, will be of no application qua the issue of built up area.

7. Thus, the challenge in the present appeals filed by the Department is limited to the opinion of the Tribunal on the scope and application of Section 80IB (10) (a), as amended w.e.f. 01.04.2005. According to the Department, the Tribunal

[1] **(2015) 277 CTR Reports 297**
[2] **(2015) 277 CTR Reports 301**

has misconstrued the effect of amended Section 80IB (10) (a). That benefit is available only to the specified housing projects (approved prior to 01.04.2005), completed within the prescribed time.

8. Accordingly, in all these appeals, the substantial question of law is about the sweep of the amended Section 80IB (10) (a); and consequently the correctness of disallowance of assessee's claim in that behalf, due to non-submission of the completion certificate issued by the Local Authority before 31.03.2008.

9. According to the Department, the express provision introduced in the form of amended clause (a) in Section 80IB(10) must be construed on its own and not on the logic applicable to other situations mentioned in the same section. The stipulation contained in clause (a) as amended, is in the nature of withdrawal of benefit of deduction in respect of projects which have not or could not be completed within the stipulated time, as per the amended provision. The date of completion of construction has been defined to be "the date on which the

completion certificate is issued by the Local Authority". For that, sufficient time was provided to the developer to complete the project and to obtain completion certificate from the Local Authority well within time. In that, in the case of housing project approved before 1st April, 2004, it was required to be completed before 31.03.2008 irrespective of the date of approval. In respect of housing projects approved on or after 01.04.2004, the same were required to be completed within four years from the end of the financial year in which the housing project is approved by the Local Authority. As per clause (ii) of the Explanation below Section 80IB (10) (a), compliance of this condition has been made mandatory. Any other interpretation would result in rewriting the amended provision and render the legislative intent of expressly providing for "the date on which completion certificate is issued by the Local Authority", otiose. By the very nature of this amended provision, it cannot be construed as having retrospective effect. Further, the developers of the concerned housing projects have been treated evenly by giving four years' time frame from the coming into force of the

amendment to complete their project(s) and for obtaining completion certificate from the Local Authority within the same time. Any other interpretation would be flawed, as it would result in treating similarly placed persons unequally. In that, housing projects approved prior to 01.04.2005 would get undefined extended period to obtain completion certificate from the Local Authority to avail deduction. By providing identical cut off period for obtaining completion certificate to similarly placed persons, no hardship whatsoever is or has been caused. Whereas, the scale has been applied evenly to similarly placed persons engaged in construction and sale of housing projects, approved by the Municipal Corporation during the same (specified) time. It is always open to the legislature to provide benefit of deduction, to be availed during specified period on fulfilment of certain conditions. Four years' time frame given to the respective class of developers, by no standards, can be said to be asking them to do something which was impossible. It is not a case of withdrawal of benefit or of any vested rights in the concerned assessee. No developer can claim vested right to

continue with the project for indefinite period. Any such argument must be eschewed, being opposed to public policy and larger public interest of giving incentive with a hope of timely completion of construction of houses for the common good. The amended provision of Section 80IB (10) (a) can neither be termed as amounting to change of any condition already specified nor can be said to be unreasonably harsh or producing absurd results. Notably, contends the learned counsel for the Department, the legislative competence or the validity of the amended provision of Section 80IB (10) (a) has not been put in issue by the assessee.

10. The assessee on the other hand, primarily relies on the exposition of the Supreme Court to contend that it is well settled position that Section 80IB (10) as a whole has prospective application and would not apply to housing projects approved by the Local Authority before 01.04.2005. In any case, the assessee who maintains Books of Accounts on work in progress method, as in this case, would not be covered by the condition of obtaining completion certificate before the cut off date. It is

then contended that it would be a case of substantial compliance of stipulation, if completion certificate issued by the Local Authority even after the cut off date, unambiguously records the date of completion of project before the cut off date. For, the assessee has no control over the working of the Local Authority. Thus, in cases where the housing projects approved prior to 01.04.2014, if the assessee had submitted application to the Local Authority prior to 31.03.2008 for issuance of completion certificate and the Local Authority finally issued completion certificate after 01.04.2008 indicating that the project was in fact completed before the cut off date, must be accepted on its face value for considering the claim for deduction. Even such cases will and must get the benefit under Section 80IB(10)(a). Taking any other view would result in asking the assessee to do something which is impossible and not within his control. The delay caused by the Local Authority in processing and issuing completion certificate cannot be the basis to deny the benefit to the assessee. It is also contended that in cases where it was impossible for the assessee to complete the project for good

reason, the benefit of deduction offered to the housing project under the unamended provision cannot be taken away. Besides relying on two Supreme Court decisions, the assessee also relied on the decisions of different High Courts in the case **Commissioner of Income Tax Vs. Happy Home Enterprises**[3], **Commissioner of Income Tax Vs. M/s Brahma Associates**[4], **CIT, Central Circle Vs. Anriya Project Management Services (P) Ltd.**[5], **CIT & Another Vs. G.R. Developers**[6], **CIT Vs. Radhe Developers**[7], **CIT Vs. Tarnetar Corporation**[8], **CIT Vs CHD Developers**[9].

11. We may first, usefully refer to the decision of the Supreme Court in **Sarkar Builders's** case – which has noticed the legislative history of Section 80IB. Section 80IB has been there on the statute book for quite some time. A new Section 80IB was introduced by the Finance Act, 1999 w.e.f. 01.04.2000. Section 80IB (10) stipulated that any housing project approved

[3] (2015) 372 ITR 1 (Bom)
[4] (2011) 333 ITR 289 (Bom)
[5] TAXMAN – Volume 209 (2012) 209 TAXMAN
[6] (2013) 353 ITR 1 (Karn.)
[7] (2012) 341 ITR 403 (Guj)
[8] (2014) 362 ITR 174 (Guj)
[9] (2014) 362 ITR 177 (Delhi)

by the Local Authority before 31.03.2001, was entitled to a deduction of 100% of the profits derived in any previous year relevant to any assessment year from such housing project provided - (i) the construction/development of the said housing project commenced on or after 1st Oct.,1998 and **was completed before 31st March, 2003**; (ii) the housing project was on a size of a plot of land which has a minimum area of one acre; and (iii) each individual residential unit had a maximum built-up area of 1000 sq.ft., where such housing project was situated within the cities of Delhi or Mumbai or within 25 kms. from the municipal limits of these cities, and a maximum built-up area of 1500 sq.ft. at any other place. For the first time, a stipulation was added with reference to the date of approval, namely, that approval had to be accorded to the housing project by the Local Authority before 31st March, 2001. Before this amendment, there was no date prescribed for the approval being granted by the Local Authority to the housing project. Prior to this amendment, as long as the development/construction commenced on or after 1st Oct.,1998 and was completed before 31st March, 2001, the

assessee was entitled to the deduction. By this amendment, the date of completion was also changed from 31st March, 2001 to 31st March, 2003. Rest of the provision remained the same. Later, by Finance Act, 2003, further amendments were made to Section 80-IB(10), which read as under:-

> "(10) The amount of profits in case of an undertaking developing a 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 or after 1st 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 kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place."
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> (emphasis supplied)

12. Section 80IB (10) was again amended by Finance Act No.2 (2004) w.e.f. 01.04.2005. The amended provision reads thus :-

> "(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st 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 1st 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 1st day of April, 2004, on or before the 31st 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 1st 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 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 that nothing contained in clause (a) or clause (b) shall apply to 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 in areas declared to be slum areas under any law for the time being in force 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 city of Delhi or Mumbai or within twenty-five kilometers from the municipal limits of these cities and on thousand and five hundred square feet to any other place; and

> (d) the built-up area of the shops and other commercial establishments included in the housing projects does not exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet, whichever is less."
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> (emphasis supplied)

13. As noted earlier, the Department has not advanced any argument with regard to non-compliance of any other condition in sub-Section 10 of Section 80IB, which issue stands conclusively answered by the two decisions of the Supreme Court. In the present appeals, however, the controversy is in relation to the sweep of amended clause (a) of the provision. As per unamended clause (a), as was in force prior to 01.04.2005, the assessee was entitled for deduction of profits in case of housing projects approved before 31.03.2005 by the Local Authority. The only condition in clause (a) at the relevant time was, that the development and construction of the housing project had commenced or commences on or after 01.10.1998. This stipulation has been modified by the amended clause (a). As per amended clause (a), with which we are concerned, the housing project approved before 31.03.2007 by a Local Authority would receive the benefit of deduction – provided the

development and construction of the housing project has commenced or commences on or after 01.10.1998 and is completed within specified time. In that, housing projects approved by the Local Authority before 01.04.2004 must be completed before 31.03.2008; and the housing project approved on or after 01.04.2004 but before 31.03.2007 should be completed within four years from the end of the financial year in which the housing project was approved by the Local Authority. The amendment further postulates that, the "date of completion of construction" of the housing project shall be reckoned on the basis of "the date on which" the completion certificate in respect of such housing project "is issued" by the Local Authority.

14. Reverting to the decisions of the Supreme Court, it is noticed that the substantial question considered by the Supreme Court was in the context of Section 80IB 10 (d) of the Act. Therefore, the exposition of the Supreme Court in those decisions, would govern the cases referable to clause (d), as introduced for the first time w.e.f. 01.04.2005. This has been made amply clear in the case of **Sarkar Builders** (supra). The

Supreme Court noticed that clause (d) has been introduced because of the consistent view taken by the Courts that an element of commercial activity permitted under the Development Control Rules of the Local Authority would not change the character of the project. It must still be treated as a housing project. In the case of **Sarkar Builders,** in paragraph 7, the Court has noted that in the cases before it all other conditions were fulfilled by the assessee, namely, the date by which approval was to be given and the date by which the projects were to be completed. The Court also noticed that the earlier decision of the Supreme Court with reference to claim under section 80IB and of different High Courts and in particular the Bombay High Court, were essentially in relation to claim set up by the concerned assessee of having undertaken development of the housing project – which also included permissible area of commercial units, as per the D.C. Rules of the Local Authority. The Court noticed that if clause (d) of sub-Section 10 was to be applied to the projects approved prior to 1st April, 2005 and completed within the specified time, it would

result in absurd situation and also expecting the assessee to do something which was almost impossible. On that conclusion, the Court opined that the provisions such as clause (d) will have prospective application and not to the projects approved within the specified period. The Court noted that Clause (d) is to be treated as inextricably linked with the approval and construction of the housing project and the assessee cannot be called upon to comply with a new condition, which was not incontemplation either of the assessee or even the legislature, when the housing project was given approval by the Local Authority and more so when the housing project was dependent on the provisions of the relevant DC Rules. For such projects, which were commenced and completed within the specified time, the position would become irreversible. In paragraph 20 (a) to (g) of the decision, the Court observed thus :-

> "20. Having regard to the above, let us take note of the special features which appear in these cases :
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> (a) In the present case, the approval of the housing project, its scope, definition and conditions, all are decided and dependent by the provisions of the relevant DC Rules. In contrast, the judgment in Reliance Jute and Industries Ltd. (supra) was concerned with income-tax only.

(b) The position of law and the rights accrued prior to enactment of Finance Act, 2004 have to be taken into account, particularly when the position becomes irreversible.

(c) The provisions of s.80-IB(10) mention not only a particular date before which such a housing project is to be approved by the local authority, even a date by which the housing project is to be completed, is fixed. These dates have a specific purpose which gives time to the developers to arrange their affairs in such a manner that the housing project is started and finished within those stipulated dates. This planning, in the context of facts in these appeals, had to be much before 1st April, 2005.

(d) The basic objective behind s.80-IB(10) is to encourage developers to undertake housing projects for weaker section of the society, inasmuch as to qualify for deduction under this provision, it is an essential condition that the residential unit be constructed on a maximum built up area of 1000 sq.ft. Where such residential unit is situated within the cities of Delhi and Mumbai or within 25 kms. From the municipal limits of these cities and 1500 sq.ft. At any other place.

(e) It is the cardinal principle of interpretation that a construction resulting in unreasonably harsh and absurd results must be avoided.

(f) Clause (d) makes it clear that a housing project includes shops and commercial establishments also. But from the day the said provision was inserted, they wanted to limit the built up area of shops and establishments to 5 per cent of the aggregate built up area or 2000 sq.ft., whichever is less. However, the legislature itself felt that this much commercial space would not meet the requirements of the residents. Therefore, in the year 2010, the Parliament has further amended this provision by providing that it should not exceed 3 per cent of the aggregate built up area of the housing project or 5000 sq.ft., whichever is higher. This is a significant modification making complete departure from the earlier yardstick. On the one hand, the permissible built up area of the shops and other commercial shops is increased from 2000 sq.ft. To 5000 sq.ft. On the other hand, though the aggregate built up area for such shops and establishment is reduced from 5 per cent to 3 per cent,

what is significant is that it permits the builders to have 5000 sq.ft,. Or 3 per cent of the aggregate built up area, 'whichever is higher'. In contrast, the provision earlier was 5 per cent or 2000 sq. ft., 'whichever is less'.

(g) From this provision, therefore, it is clear that the housing project contemplated under sub-s. (10) of s. 80-IB includes commercial establishments or shops also. Now, by way of an amendment in the form of cl.(d), an attempt is made to restrict the size of the said shops and/or commercial establishments. Therefore, by necessary implication, the said provisions has to be read prospectively and not retrospectively. As is clear from the amendment, this provision came into effect only from the day the provision was substituted. Therefore, it cannot be applied to those projects which were sanctioned and commenced prior to 1st April, 2005 and completed by the stipulated date, though such stipulated date is after 1st April, 2005."

(emphasis supplied)

15. The Supreme Court approved the dictum of the Bombay High Court in the case of **Happy Home Enterprises** (supra) which had noted as follows :-

"36. There is yet another reason for coming to the aforesaid conclusion. Take a scenario where an Assessee following the project completion method of accounting, has completed the housing project approved by the local authority complying with all the conditions as set out in section 80-IB(10) as it stood prior to 1st April, 2005. If we were to accept the argument of the Revenue, then in that event, despite having completed the entire construction prior to 1st April, 2005 and complying with all the conditions of section 80-IB(10) as it stood then, the Assessee would be disentitled to the entire deduction claimed in respect of such housing project merely because he offered his profits to tax in the A.Y. 2005-06. In contrast, if the same Assessee had followed the work-in-progress method of accounting, he would have been entitled to the deduction under section 80-IB(10) upto the A.Y. 2004-05, and denied the same from A.Y. 2005-06 and thereafter. It

could never have been the intention of the Legislature that the deduction under section 80-IB(10) available to a particular Assessee would be determined on the basis of the accounting method followed. This, to our mind and as rightly submitted by Mr. Mistry would lead to startling results. We therefore have no hesitation in holding that section 80-IB(10)(d) is prospective in nature and can have no application to a housing project that is approved before 31st March, 2005. As the deduction sought to be claimed under section 80-IB(10) is inseparably linked with the date of approval of the housing project, it would make no difference if the construction of the said project was completed on or after 1st April, 2005 or that the profits were offered to tax after 1st April, 2005 i.e. in A.Y. 2005-06 or thereafter. We therefore find no substance in the argument of the Revenue that notwithstanding the fact that the housing project was approved prior to 31st March 2005, if the construction was completed on or after 1st April, 2005 or if the profits are brought to tax in the A.Y. 2005-06 or thereafter, the said housing project would have to comply with the provisions of clause (d) of section 80-IB(10). To our mind, we do not think that the condition/restriction laid down in clause (d) of section 80-IB(10) has to be revisited and / or looked at and complied with in the assessment year in which the profits are offered to tax by the Assessee. When the Assessee claims a deduction under section 80-IB(10), the Assessee is required to comply with such a condition only if it is on the statute-book on the date of the approval of the housing project and it has nothing to do with the year in which the profits are brought to tax by the Assessee. We have come to this conclusion only because we find that clause (d) of section 80-IB(10) is inextricably linked to the date of the approval of the housing project and the subsequent development/construction of the same, and has nothing to do with the profits derived therefrom. We may hasten to add that if a particular condition is not inseparably linked to the date of approval of the housing project, different considerations would arise. However, we are not called upon to decide any such condition and hence we are not laying down any general proposition of law, save and except that clause (d) of section 80- IB(10) being a condition linked to the date of the approval of the housing project, would not apply to any housing project that was approved prior to 31st March, 2005 irrespective of the fact that the profits of the said housing project are brought to tax after the said provision was brought into force."

(emphasis supplied)

16. The other decisions of the Bombay High Court as well as Karnataka High Court relied by the assessee also deal with the issue ascribable to Clause (d) of Section 80IB, for which it is not necessary to dilate any further on those authorities. The only decision, on the scope of Section 80IB (10) (a), in particular, clause (ii) of the explanation relied by the assessee, is of the Delhi High Court in the case of **CHD Developers Limited** (supra) and of Gujarat High Court in the case of **CIT vs. Tarnetar Corporation** (supra).

17. Reverting to the decision of the Delhi High Court, it is seen that the Court extensively referred to the exposition in cases dealing with the efficacy of clause (d) of sub-section 10, as was considered by the Supreme Court in the case of **Veena Developers** (supra) and **Sarkar Builders** (supra). The Delhi High Court finally followed the principle stated by the Gujarat High Court in the case of **Manan Corporation Vs. Asst. CIT** [10], and has reproduced excerpts from the said decision to

[10] **(2013) 356 ITR Page 44 (Guj.)**

conclude and agree with the same – that the application of stringent condition which are left to an independent body such as the Local authority who is to issue completion certificate would result in causing hardship to the assessee but also in absurdity. The Delhi High Court followed the reasoning and conclusion of the Karnataka High Court and Gujarat High Court as fully applicable to the case before it. The Gujarat High Court in the case of **Tarnetar Corporation** (supra), no doubt considered the matter, in which the Department had asserted that the assessee did not complete the housing project within the statutory time frame. The Court, however, found that the assessee completed the construction well before the last date, namely, 31.03.2008 and also sold several units which was completed and actually occupied and it had also applied for BU permission to the Local Authority. The Court proceeded on the basis of the finding recorded by the Tribunal that the construction was completed in the year 2006 and the application for BU permission was submitted by the assesse to the Municipal Authority on 15.02.2006. In the facts of

that case, the Court noted that the assessee had completed the construction well before 31st March, 2008, which was indisputable. The Court then after noting the Explanation (ii) below clause (a) to Section 80IB (10), went on to observe that not every condition of statute can be seen as mandatory. Further, if substantial compliance of such condition is substantiated in a given case, the Court may take the view that minor deviation thereof would not vitiate the very purpose for which deduction was being made available. With utmost respect, the decisions of the Delhi High Court and Gujarat High Court referred to above, do not persuade use to agree, for the reasons which we may allude to hereinafter.

18. In our opinion, however, the Supreme Court decisions in the case of **Veena Developers** and **Sarkar Builders** will have to be understood only in the context of a new condition stipulated regarding the built up area of the project by way of amendment, which the assessee could not have complied at all; and even though the construction of his housing project was otherwise in full compliance of all conditions set out in the

approval given by the Municipal Authority as per the relevant Rules in that behalf.

19. The provision such as clause (a) as amended, *sensu stricto,* cannot be considered as a new condition and that too incapable of compliance. Inasmuch as, clause (a) deals with the time frame within which the housing project was expected to be completed, to get the benefit of the prescribed deduction. Notably, the amended Section 80IB (10) (a) extends the benefit even to the housing projects approved by the Local Authority before 31.03.2007, instead of 31.03.2005 – as was provided in the unamended provision. Therefore, necessity was felt to make distinction between the two classes of housing projects for specifying the time frame for completion. The one approved by the Local Authority before 1st day of April, 2004; and the other class of housing project approved by the Local Authority on or after 1st April 2004 till 31.03.2007. In either case, the time frame for completion of project has been prescribed as four years. In that, the project approved before 1st April, 2004 has been given time to complete before 31.03.2008; and in the latter category

within four years from the end of the financial year in which the housing project was approved by the Local Authority.

20. Thus understood, similar time frame for completion of housing project has been given to both class of housing projects. Moreover, the explanation below clause (a), in particular (ii), applies to both class of housing projects uniformly. It postulates that "the date of completion of construction of housing project" shall be taken to be "the date on which completion certificate" in respect of such housing project "is issued by the Local Authority". If Explanation (ii) is superimposed on the expression "completes such construction" in Clause (a) of Section 80IB(10), it would mean that the housing projects commenced on or after 01.10.1998 must possess completion certificate issued by the Local Authority on or before the cut off date, as may be applicable – to become eligible for tax deduction. As per Explanation (ii), therefore, the synonym of "completes such construction" would be the date on which completion certificate is issued by the Local Authority. No more and no less. Thus, enough indication and also sufficient time has

been given to both the class of housing projects to fulfill that condition. The provision is in the nature of limiting the benefit of deduction to the specified housing projects, and not to those who fail to fulfill the requirement of completion of construction in time frame specified for the respective category of housing projects. This has been done in larger public interest – to ensure that the benefit is given only to such projects who would further the goal of providing low cost economic houses to the deserving persons in reasonable time.

21. Concededly, it is within the domain of Parliament to extend benefit or privilege to certain class of persons and also to withdraw the same for just reasons. That cannot be questioned, unless shown to be unconstitutional in form or its substance. It was thus open to the Parliament, to provide for a cut off date for completion of the housing projects, as a condition precedent to avail benefit of deduction. In the past, such stipulation was in place, but, later on, it was done away with. However, by amendment which came into effect from 1st April, 2005, the condition for completion of project within specified time has

been reintroduced, while giving sufficient time (four years) to the assessee to comply for being entitled to get deduction.

22. A priori, it is not a case of imposing new condition, much less, with retrospective effect as has been argued before us; unlike introduction of new condition in the shape of clause (d) – which obviously could be applied only prospectively, as held by the Supreme Court in the aforesaid decisions. Clause (a) stands on a completely different pedestal. It cannot be treated as a new condition linked to the approval and construction or having retrospective effect as such. For, it gives at least four years' time frame to both class of housing projects; to wit, housing projects approved prior to 1st April, 2004 or after 1st April, 2004. The four years period obviously has prospective effect, albeit limiting the period for completion of the project, to avail of the benefit. Four years' time frame for completion of the project, by no standards, can be said to be unreasonable, harsh, absurd or incapable of compliance. It is also not a case of withdrawal of vested right of the developer, as such. No developer can claim vested right to complete the housing project

in indefinite period. The right arising from Section 80IB, is coupled with the obligation or duty to complete the project in specified time frame. If the developer does not complete the housing project within specified time, will not receive that benefit. There is no compulsion on him to complete the project in four years. Notably, even the approvals to the construction of housing project granted by the Local Authority specify the date within which the construction must be completed, as per the time frame specified in the permission. If the project is not completed within the stipulated time, the developer is free to get that period renewed or extended from the Local Authority as per the applicable Rules and Regulations. The provision for claiming tax deduction from profits, can certainly prescribe for reasonable conditions and more so time frame for completion of the project, in larger public interest.

23. Suffice it to observe that, no comparison can be drawn between the new condition prescribed in terms of clause (d) and that of clause (a). Condition in Clause (a), neither operates retrospectively nor can be said to be absurd, unjust or expecting

the assessee to comply with something which is impossible to achieve.

24. The next question that needs to be answered, is, whether the stipulation in Section 80IB(10)(a) can be said to be directory. Considering the prodigious benefit offered in terms of Section 80IB to the assessee (hundred per cent of the profits derived in any previous year relevant to any assessment year); and the purpose underlying the same – which is *inter alia* burden on the public exchequer due to waiver of commensurate revenue – the stipulation for obtaining completion certificate from the Local Authority before the cut off date, must be construed as mandatory. The fact that compliance of that condition is dependent on the manner in which the proposal is processed by the Local Authority, the provision cannot be construed as a directory requirement. It is a substantive provision mandating issuance or grant of completion certificate by the Local Authority before the cut off date or specified time, as a precondition to get the benefit of tax deduction. Else, it will then be open to the assessee to rely on other circumstances or

evidence to plead that the housing project is complete – requiring enquiry into those matters by the Tax Authorities – *sans* a completion certificate issued by the Local Authority in that behalf. A priori, the argument of substantial compliance is sufficient, would lead to uncertainty about the date of completion of the project which is the hallmark for availing of the benefit of tax deduction. Only with this intent the legislature in its wisdom has predicated that, "the completion of construction" of the housing project is taken to be "the date on which" the completion certificate "is issued" by the Local Authority. To interpret it to include an *ex post facto* certificate or such certificate issued by the Local Authority after the cut off date, would not only result in rewriting of the express provision and run contrary to the unambiguous position pronounced in the Section, but also doing violence to the legislative intent. For, Explanation (ii) will then have to be read as "date of completion of construction of the housing project shall be taken to be the date as certified by the Local Authority in that behalf", irrespective of the date of issuance of such certificate by the

Local Authority. Indeed, in a given case if the assessee is able to substantiate that the completion certificate "was in fact issued" by the Local Authority before the cut off date, but could not be produced by him within time due to reasons beyond his control, the argument of substantial compliance of the provision can be tested. Any other interpretation would result not only in uncertainty (in finalization of assessment proceedings due to non-issuance or delayed issuance of such certificate by the Local Authority and prone to manipulations at the end of the Local Authority); but also have to yield to the subjective satisfaction of the Assessing Authority and of investing wide discretion in that Authority, which, eventually, may only end up in getting embroiled in litigation. If the assessee has failed to comply with the condition of obtaining completion certificate from the Local Authority before the cut off date, he must take the consequence therefor and of denial of the benefit of tax deduction offered to him on that count.

25. We cannot be oblivious of the fact that the Municipal Laws of different States are not uniform in respect of procedure for

issuance of completion certificate. To wit, in some States, the dispensation provided is to issue partial or full occupation certificate; and thereafter issue completion certificate after removal of all the deficiencies pointed out by the Local Authority. In some States, the Municipal Law may provide for issuing partial or full completion certificate. The requirement of completion certificate issued by the Local Authority, as envisaged in Section 80IB(10)(a) of the Income Tax Act, which is a Central enactment dealing with the special subject of taxation, however, is, of only one certificate – which is full completion certificate issued by the Local Authority before the cut off date. That is to lend credence to the factum of completion of the entire housing project in all respects as per the approval granted by the Local Authority. It can be safely assumed that the legislature was conscious of this position, for which, express provision has been made as to the meaning of the date of completion of the housing project linked to the "date on which" completion certificate "is issued" by the "Local Authority", as predicated in Explanation (ii) thereunder.

26. We accordingly hold that issuance of completion certificate, after the cut off date by the Local Authority but, mentioning the date of completion of project before the cut off date, does not fulfill the condition specified in clause (a) of Section 80IB (10) read with Explanation (ii) thereunder. We reject the argument of the assessee that the effect of amended clause (a) of sub-Section 10 of Section 80IB, which has come into force with effect from 1st April, 2005, has retrospective effect or that it is unjust in any manner or incapable of compliance at all. Similarly, the requirement of securing completion certificate issued by the Local Authority before the cut off date is not directory, in view of the express provision in Section 80IB(10)(a) and the Explanation (ii) thereunder. The completion certificate granted by the Local Authority must bear the date of having been issued before the cut off date.

27. That takes us to the argument of the assessee that the stipulation in Section 80IB(10)(a) of completion certificate issued by the Local Authority before the cut off date, cannot be applied in the case of assessee following the work in progress

accounting method. In our opinion, the provision in the form of Section 80IB(10)(a), applies uniformly to all the assessees – be it following work in progress accounting method or otherwise. The benefit of deduction under this provision can be availed by the assessee following the work in progress accounting method, provided he has complied with the stipulation of having produced completion certificate issued by the Local Authority before the cut off date, as may be applicable in his case. In other words, if the housing project was approved by the Local Authority before 1st April, 2004, he must submit completion certificate issued by the Authority having been issued before the 31st March, 2008. Whereas, in the case of housing project approved on or after 1st April, 2004, the assessee can avail of the benefit provided completion certificate issued by the Local Authority is within four years from the end of the financial year in which the concerned housing project was approved by the Local Authority. If this condition is not fulfilled, the assessee who maintains work in progress accounting method and has claimed deduction under Section 80IB(10)(a) must suffer the

consequence of disallowance or withdrawal of the benefit claimed by him on that count.

28. Accordingly, these appeals **succeed.** The impugned judgment of the Tribunal is set aside; and in the facts of the present case, the decision of the Assessing Officer to disallow deduction under Section 80IB(10)(a) of the Income Tax Act is upheld. No order as to costs.

(**A.M. Khanwilkar**)
Chief Justice

(**K.K.Trivedi**)
Judge

AM/psm.