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

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND MS SUSHMA CHOWLA, JUDICIAL MEMBER

ITA No.583/PN/2013
Assessment Year: 2007-08

The Income Tax Officer,
Ward – 2, Ratnagiri .... Appellant

Vs.

M/s. Paras Builders,
1, Sansare Complex,
Maruti Mandir, Ratnagiri
.... Respondent

PAN: AAIFP1044M

CO No.16/PN/2014
Assessment Year: 2007-08
(Arising out of ITA No.583/PN/2013)

M/s. Paras Builders,
1, Sansare Complex,
Maruti Mandir, Ratnagiri .... Cross Objector

PAN: AAIFP1044M

Vs.

The Income Tax Officer,
Ward – 2, Ratnagiri .... Respondent

Assessee by	:	Shri Sunil Ganoo
Revenue by	:	Shri A.K. Modi & Shri B.C. Malakar
Date of hearing	:	03-02-2015
Date of pronouncement	:	31-03-2015

ORDER

PER SUSHMA CHOWLA, JM:

The Revenue has filed an appeal against the order of CIT(A), Kolhapur dated 13.12.2012 relating to assessment year 2007-08 against order passed under section 143(3) of the Income Tax Act, 1961. The assessee has also filed Cross Objection against the appeal filed by the Revenue.

2. Both the appeal and Cross Objection relating to the same assessee were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The Revenue has raised the following grounds of appeal:-

1. In facts and circumstances of the case, and in law, the Hon'ble CIT(A) is not justified in accepting the assessee's claim of “pro-rata" deduction u/s 80IB of the Act, when there is no provision for allowing such partial deduction in terms of provisions of section 80IB(10) of the Act.

2. On the facts and in the circumstances of the case, and in law, the CIT (A) is not justified in accepting the assessee's claim to allow piece-meal deduction, when the provisions of section 80IB (10) of the Act, categorically speaks of lump-sum deduction for entire profits derived from such Housing projects, subject to fulfillment of all the conditions prescribed u/s 80IB (10) (a) to 80IB (10) (f) of the Act.

3. On the facts and in the circumstances of the case, and in law, the CIT-(A), is not justified in accepting the assessee's claim, when provisions of section 80IB (10) (c) clearly lays down upper limit of each residential unit, and no such exclusion is contemplated.

4. The appellant prays that the order of the Commissioner of Income-tax (Appeals), Kolhapur be vacated and that of the Assessing Officer be restored.

5. The appellant craves leave to add, alter, amend, raise, any of the above, or any other grounds raised.

4. The assessee in CO No.16/PN/2014 has raised the following grounds of objections:-

1. In the facts and circumstances of the case and in law, the learned C.I.T.[A] who passed the impugned appellate order has acting as Commissioner of Income Tax Administration authorised the present appeal as appellant , which is contrary to the judicial propriety as the learned C.I.T.[A] himself is challenging his own order. In the circumstances the present appeal being incompetent and bad in law the same may please be dismissed.

2. The learned C.I.T.[A] ought to have allowed the deduction of Rs.46,13,477.00 as claimed by the Respondent assessee u/s 80IB[10] of the I.T. Act 1961. The learned C.I.T.[A] has grossly erred in disallowing the deduction in respect of profits arising on sale of Unit Nos.D3 *&* D4 on the alleged ground that the said tenements did not comply with the statutory requirements. The aforesaid finding being arbitrary, perverse, and devoid of merits the same may please be vacated.

3. The Respondent assessee craves the permission to add, amend, modify, alter, revise, substitute, delete any or all grounds of cross objections, if deemed necessary at the time of hearing of the appeal.

5. The issue raised by the Revenue in against the allowability of deduction under section 80IB(10) of the Act.

6. The brief facts of the case are that the assessee was engaged in the business of construction. During the year under consideration the assessee had constructed the project called “Pushpendranagar” in Nachane Grampanchyat Area, against which it claimed the deduction under section 80IB(10) of the Act. The Assessing Officer made certain enquiries from the Gramvikas Adhikari / Sarpanch of Nachane Grampanchyat, which revealed that two row units i.e. D-3 and D-4 in Plot Nos.37 and 38 had been converted into one row bungalow and its built up area was 1871 sq. ft. On further enquiries, the Assessing Officer observed that the assessee had constructed and sold one independent row bungalow having plot size of 1754 sq. ft. and built up area 1871 sq. ft. for Rs.12,00,000/-, which was not as per the approved plan of the local authority. The Assessing Officer further observed that the unit under consideration had violated the maximum permissible area of 1500 sq. ft. as specified under section 80IB(10) of the Act and as such, the whole project “Pushpendranagar” was disqualified from getting the benefit of deduction under section 80IB(10) of the Act. Further, the assessee had not constructed the housing project as per plan approved by the local authority and the same was constructed in violation of the conditions laid down under section 80IB(10) of the Act. The assessee in reply to the show-cause issued by the Assessing Officer in this regard pointed out that the building was constructed as per revised sanctioned plans and hence, had complied with the conditions laid down under section 80IB(10) of the Act. In respect of two units i.e. D-3 and D-4, the claim of the assessee was that it had constructed independent units which had been amalgamated by the buyer and hence, the assessee was entitled to the claim of deduction under section 80IB(10) of the Act in entirety. In the alternate, the assessee pointed out that pro-rata deduction under section 80IB(10) of the Act be allowed for 51 units which complied with the requirements of the Act. The Assessing Officer rejecting

the same disallowed the deduction claimed under section 80IB(10) of the Act in entirety.

7. The CIT(A) noted that the assessee had violated the provisions of the section 80IB(10) (c) of the Act in respect of the two units i.e. D-3 and D-4 constructed in the project. However, reliance was placed on series of the decisions of the various Benches of the Tribunal i.e. Mr. Johar Hassan Zojwall Vs. Addl. CIT [IT Appeal No. 5404 (Mum.) of 2008, dated 12.01.2011, M/s. Saroj Sales Organisation ITA No. 4008/M/07 order dated 24.01.2008 and Bengal Ambuja Housing Development Ltd. Vs. DCIT [ITA No. 1595/Kol/2005, assessment year 2002-03], Bench 'C' order dated 24.03.2006. All the said decisions had laid down the proposition that even as the constructed units were small and large with reference to the stipulated area, the profit derived from the construction of the smaller unit i.e. within the stipulated built up area, ought to be allowed as deduction under section 80IB(10) of the Act. The decision of the Kolkata Bench of the Tribunal in the case of Bengal Ambuja Housing Development Ltd. (supra) was approved by the Hon'ble Kolkata High Court in ITA No. 453 of 2006 vide judgment dated 05.01.2007. Further reliance was placed on the Third Member decision of Tribunal in Sanghvi & Doshi Enterprise Vs. ITO (2011) 12 taxmann.com 240 (Chennai) (TM) and it was held that even construction of one unit in respect of the row houses D-3 and D-4 would not affect the claim for deduction under section 80IB(10) of the Act on pro-rata basis.

8. The Revenue is in appeal against the order of CIT(A). The Ld. DR for the Revenue placed reliance on the order of the Assessing Officer.

9. The Ld. AR for the assessee placed reliance on the ratio laid down in the Pune Bench of the Tribunal in the case of Pharande Developers, Vs. The Income Tax Officer in ITA No. 715/PN/2009 and ITA No. 175/PN/2011 relating to assessment year 2005-06 order dated 25.06.2013.

10. We have heard the rival contentions and perused the record. The issue arising before us in the captioned appeal is against the violation of provisions of section 80IB(10)(c) of the Act by amalgamation of two units i.e. row houses D-3 and D-4 and whether deduction under section 80IB(10) of Act should be allowed for the balance eligible units constructed in the project. Admittedly, after merging of the two units i.e. row houses D-3 and D-4, the total covered area was more than 1500 sq. ft. which is the condition stipulated in section 80IB(10)(c) of the Act. The assessee had violated the said condition while constructing the said units in project "Pushpendranagar". However, the alternate claim made by the assessee was that pro-rata deduction should be allowed to the assessee in respect of the balance eligible units contained in the project. We find the similar issue arose before the Pune Bench of the Tribunal in the case of Pharande Developers (supra) and in turn reliance was placed on the ratio laid down by the Pune Bench of the Tribunal in the case of D.S. Kulkarni Developers Ltd. Vs. ACIT in ITA Nos. 1428 & 1429/PN/2008, order dated 08.08.2012 and also the subsequent judgment of the Hon'ble Madras High Court in the case of Viswas Promoters (P) Ltd. (2013) 29 taxman.com 19 (Madras) and it was held as under:-

> "10. On this aspect, we have considered the plea of the assessee in the light of the precedents. A similar situation has been considered by this Bench in the case of D.S. Kulkarni Developers Ltd. (supra) wherein the following discussion is relevant :-
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> > *"20. In this background, the alternative plea of the assessee springs up. The plea is that the deduction under Section 80-IB(10) be denied only with respect to the units which do not conform to the condition contained in Section 80-IB(10)(c) and for the balance eligible residential units, the deduction should be allowed. The Revenue has opposed the said plea on the ground that the assessee is not entitled to a proportionate deduction under Section 80-IB(10) of the Act.*
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> > *21. On this aspect, we find that the Mumbai Bench of the Tribunal in the case of M/s Ekta Housing Pvt. Ltd., ITA No.3649/Mum/2009 dated 20.05.2011 has upheld the plea of the assessee for a proportionate deduction under Section 80-IB(10) of the Act where some of the residential units in the project violated the condition contained in Section 80-IB(10)(c) of the Act. The Mumbai Bench after noticing the precedents in the case of —*
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> > *i) ITO vs. Air Developers, 25 DTR 287 (Nag.);*
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> > *ii) DCIT vs. Brigade Enterprises Pvt. Ltd., 14 DTR 371 (Bang.);*
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> > *iii) ACIT vs. Sheth Developers P. Ltd., 33 SOT 277 (Mum.);*

iv) Bengal Ambuja Housing Development Ltd. vs. DCIT;

v) SJR Builders vs. ACIT, 3 ITR 569 (Mum.)

held that the assessee would not loose the exemption under Section 80-IB(10) in entirety where some of the residential units wings had a 'built-up area' in excess of the limit prescribed in clause (c) of Section 80-IB(10) but, it would be entitled to proportionate deduction under Section 80-IB(10) of the Act with regard to the profits earned on the eligible units. Particularly, the Tribunal also considered the decision of the Hon'ble Bombay High Court in the case of Brahma Associates (supra) and held that the same does not envisage denial of proportionate deduction in such circumstances. The relevant discussion, as contained in paragraphs 8 and 9 of the order of the Tribunal in the case of M/s Ekta Housing Pvt. Ltd. (supra) reads as under : -

> *"viii) We now examine the applicability of the decision of the Hon'ble Bombay High Court in Brahma Associates (supra) to the facts of this case. On a careful reading of this judgement, we find that nowhere it is stated that proportionate deduction should be allowed, in case certain residential units had built-up area in excess of prescribed limit of 1,000 sq.ft.. In fact, this issue was not before the Hon'ble Jurisdictional High Court. The questions before the Hon'ble Jurisdictional High Court were different and, hence the judgement cannot be said to be on this issue. The only issue before the High Court is when there is a commercial element in a residential project, will be assessee be denied the entire exemption. In this case, the Hon'ble High Court has observed that when the local authority approved a plan as a housing project or a residential cum commercial project, the assessee would be entitled to claim for deduction under Section 80-IB(10) even if the project had commercial element in excess of 10%. At paras 27 and 28, the Court observed as follows :-*
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> *"27. The question then to be considered is, whether the Special Bench of the Tribunal was justified in holding that the projects having commercial area upto 10% of the built-up area of the plot are eligible for deduction under Section 80-IB(10) on the entire project upto 01.04.2005. Once the basic argument of the revenue that the housing projects with commercial user are not entitled to Section 80-IB(10) deduction is rejected, then in the absence of any restriction imposed under the Act, it was not open to the Tribunal to hold that the projects approved by the local authorities having residential buildings with commercial user upto 10% of the plot area would alone be entitled to deduction under Section 80-IB(10). As noted earlier, restriction regarding commercial user has been imposed for the first time by introducing clause (d) to Section 80-IB(10) with effect from 01.04.2005. Therefore, it was not open to the Tribunal to hold that prior to 01.04.2005, projects having commercial user upto 10% of the plot area alone would be eligible for Section 80-IB(10) deduction.*
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> *28. In the present case, though the commercial user is more than 10% of the plot area, the Tribunal has allowed Section 80-IB(10) deduction in respect of 15 residential buildings on the ground that the profits from these exclusively residential buildings could be determined on stand along basis. In our opinion, that would not be proper,*

because Section 80-IB(10) allows deduction to the entire project approved by the local authority and not to a part of the project. If the conditions set out in Section 80-IB(10) are satisfied, then deduction is allowable on the entire project approved by the local authority and there is no question of allowing deduction to part of the project. In the present case, the commercial user is allowed in accordance with the DC Rules and hence the assessee was entitled to Section 80-IB(10) deduction on the entire project approved by the local authority. However, the assessee has not challenged the decision of the Tribunal in restricting the deduction to a part of the project. Therefore, while holding that in law, the assessee was entitled to section 80-IB(10) deduction on the profits of the entire project, in the facts of the present case, since the assessee has not challenged the decision of the Tribunal, we are not inclined to disturb the decision of the Tribunal in restricting the section 80-IB(10) deduction only in respect of the profits derived from 15 residential buildings."

ix) Thus, it could be seen that the Hon'ble High Court do not approve the findings of the Tribunal that a residential building with commercial user up to 10% of the plot area would be entitled to deduction under section 80-IB(10). The issue that, in case where certain residential units are of a built-up area in excess of the prescribed limit of 1,000 sq.ft. in residential project, this would result in the entire exemption being lost, or whether the assessee would be entitled to a proportionate deduction was not before the High Court. Thus, in our opinion, the decision of Hon'ble Jurisdictional High Court in the case of Brahma Associates (supra) does not come to the rescue of the Revenue."

22. Following the aforesaid precedent, we, therefore, hold that merely because the assessee has violated the condition under Section 80-IB(10)(c) in relation to the flats on the 11th floor, the deduction under Section 80-IB(10) cannot be denied in its entirety, but, the denial shall be limited to the profits in respect of the flats on the 11th floor alone. For the balance of the residential units, the plea of the assessee for deduction under Section 80-IB(10) of the Act is justified, and the assessee succeeds on this aspect."

11. Following the aforesaid precedent, we hold that merely because assessee violated the condition prescribed under Section 80-IB(10)(c) of the Act in relation to the amalgamated Bunglow G1 & G2, the deduction under Section 80-IB(10) of the Act cannot be denied in its entirety. In other words, the denial of deduction shall be limited to the profits in respect of the amalgamated Bunglow G1 & G2 alone. For balance of the residential units, which complied with the requirements of clause (c) of Section 80-IB(10) of the Act, assessee shall be eligible for deduction. The Hon'ble Madras High Court in the case of Arun Excello Foundations (P) Ltd. vs. CIT (2013) 29 taxmann.com 149 (Madras) considered an argument on behalf of the Revenue, similar to what has been argued before us, to the effect that in the absence of any contemplation under Section 80-IB(10) of the Act for proportionate relief on partial compliance, section cannot be interpreted to granted *pro rata* relief. The aforesaid argument of the Revenue has been negated by the Hon'ble Madras High Court and therefore the claim of the assessee for proportionate deduction under Section 80-IB(10) of the Act cannot be denied.

12. Thus, on the aforesaid aspect, assessee succeeds and we direct the Assessing Officer to re-compute the deduction under Section 80-

> IB(10) of the Act in relation to the 'Lakshdweep' project by limiting the denial only to the profits in respect of Bunglow G1 & G2. For balance of the residential units, assessee shall be allowed deduction under Section 80-IB(10) of the Act."

11. Following the aforesaid ratio laid down by the Pune Bench of the Tribunal (supra) we hold that merely because the assessee had violated the provisions of section 80IB(10)(c) of the Act in respect of two units i.e. row houses D-3 and D-4, the deduction under section 80IB(10) could not be denied in entirety. The assessee is entitled to the said deduction under section 80IB(10) of the Act in respect of balance units which have been constructed as per the conditions laid down in section 80IB(10)(c) of the Act. Only in respect of two units i.e. D-3 and D-4, deduction under section 80IB(10) of the Act would be denied to the assessee. Accordingly, we uphold the order of CIT(A) in directing the Assessing Officer to re-compute the deduction under section 80IB(10) of the Act in relation to the said project by limiting the denial only in respect of row houses D-3 and D-4 and for the balance units the assessee would be entitled to the said deduction under section 80IB(10) of the Act. Thus, the grounds of appeal raised by the Revenue are dismissed.

12. Now, coming to the Cross Objection filed by the assessee. The ground No. 2 of the Cross Objection is not pressed by the assessee. As the ground No. 2 is not pressed by the assessee, the same is dismissed as not pressed.

13. The ground No.1 of the Cross Objection filed by the assessee is that there was violation of judicial propriety as the CIT(A) who had passed the impugned appellate order, had acting as Commissioner of Income Tax Administration authorized the present appeal as appellant. The Ld. AR for the assessee pointed out that after passing of the appellate order, the Commissioner of Income Tax Administration who was earlier the CIT(A) in the case of the assessee, had asked the Assessing Officer to file the appeal against his own order. Where the CIT had to apply his mind independently and the exercise of the jurisdiction in the

case of the assessee, as per the Ld. AR for the assessee, was not correct and was a case of judicial impropriety. The Ld. AR for the assessee referred to the definition of the word appeal by Law Lexicon. Further reliance was placed on the ratio laid down by the Hon'ble Allahabad High Court in Writ – C No. – 24629 of 2012 in Mohd. Chand And Another Vs. State of U.P. And Others and also upon Hon'ble Supreme Court in Ashok Kumar Yadav And Others Vs. State of Haryana And Others reported in 1985-(SC2)-GJX-0211-SC judgment dated 10.05.1985, copies of which were filed on record.

14. The Ld. DR for the Revenue on the other hand pointed out that the appellate authority had acted judicially in deciding the appeal but when he was the Commissioner of Income Tax Administration, he further acted judicially and proposed the filing of the appeal before the Tribunal. Our attention was drawn to the order sheet entries wherein reference was made to the issue arising in the present appeal and there being no decision of the Hon'ble Supreme Court or the Hon'ble Bombay High Court on the said issues, the filing of appeal was proposed.

15. We have heard the rival contentions and perused the record. Under the provisions of section 253(2) of the Act, the Commissioner if he objects to any order passed by the Commissioner (Appeal) under section 154 or 250, shall direct the Assessing Officer to appeal to the appellate Tribunal against the said order. In the facts of the present case, the Commissioner of Income Tax (Appeals) had passed the impugned appellate order and thereafter acting as Commissioner of Income Tax Administration has authorized the Assessing Officer to file an appeal against the said order, which was passed by him in the capacity of Commissioner of Income Tax (Appeals). The plea of the assessee that there was judicial impropriety in the case was not established, where the present Commissioner of Income Tax Administration as Commissioner of Income Tax (Appeals) had passed the order and decided the issues on the basis of

various case laws. However, when acting as Commissioner of Income Tax Administration and in view of the facts that there was no legal precedent by the Hon'ble Supreme Court or by the Hon'ble jurisdictional High Court on the said issue, directed the Assessing Officer to file appeal against the impugned order. It is not a case where the present person was setting in judgment of the earlier order passed by him but was acting in the capacity of administrator wherein the issues were put before higher forum to adjudicate the same.

16. The reliance by the Ld. AR for the assessee on the ratio laid down by the Allahabad High Court in the case of Mohd. Chand And Another (supra) is misplaced as in the facts before the Hon'ble High Court, the person who had passed the basic order was later sitting in appeal and was hearing the appeal against his own order. In such circumstances, the Hon'ble High Court held that the principles of natural justice that no man can be a judge in his own cause, was attracted. Further the Ld. AR for the assessee placed reliance on the ratio laid down by the Hon'ble Supreme Court in the case of Ashok Kumar Yadav and Others (supra) wherein also similar principle of jurisprudence that no man can be a judge in his own cause was looked into and it was observed that where there was a reasonable likelihood of bias then such decision should not be taken. The Hon'ble Apex Court held that *the basic principle underlying in this rule is that justice must not only be done but must also appear to be done and this rule has received wide recognition in several decisions of the Court. It is also important to note that this rule is not confined to cases where judicial power stricto sensu is exercised. It is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claims of parties.*

17. The principle propounded by the Hon'ble Supreme Court was in respect of a decision between rival claims of the parties. However, as pointed out by us in paras here-in-above, in the facts of the present case, the situation was at

variance where the CIT(A) had passed the impugned assessment order and then as Commissioner of Income Tax Administration had directed the Assessing Officer to file an appeal before the Tribunal against the said order and the decision on the rival claims of the parties had to be taken by the Tribunal and not by the Commissioner of Income Tax Administration. We have already adjudicated the issue raised in the present appeal on merits, in the paras here-in-above, in an appeal filed by the Revenue and have allowed the claim of the assessee and even otherwise issue so raised by the assessee in its Cross Objection becomes academic in nature. Accordingly, we find no merit in the ground of appeal No.1 raised by the assessee in its Cross Objection and the same is dismissed.

18. In the result, both the appeals of the Revenue and Cross Objection of the assessee are dismissed.

Order pronounced on this 31st day of March, 2015.

Sd/-	**Sd/-**
(G.S. PANNU)	**(SUSHMA CHOWLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Pune, Dated: 31st March, 2015.
RK

Copy of the order is forwarded to: -

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

//True Copy// By Order

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