IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai

Before Shri D. Manmohan, Vice President
and Shri D. Karunakara Rao, Accountant Member

ITA Nos. 1922, 1923&1924/Mum/2013
(Assessment Years: 2005-06, 2006-07 & 2007-08)

D C I T - 8 (2) Room No. 209/216A 2nd Floor, Àayakar Bhavan M.K. Road, Mumbai 400020	Vs.	M/s. Prescon Builderes Pvt. Ltd. (Formerly Hopewell Builders P. Ltd.) A-232, Bldg. No. 3, Rahul Mittal Industries, Sir M V Road Andheri (E), Mumbai 4000 PAN - AAACH7816E
Appellant		**Respondent**

Appellant by: Shri Premanand J.
Respondent by: Shri Rahul Hakani

Date of Hearing: 16.04.2015
Date of Pronouncement: 16.04.2015

O R D E R

Per D. Manmohan, V.P.

These appeals by the Revenue are directed against the orders passed by CIT(A)-7, Mumbai and they pertain to assessment years 2005-06, 2006-07 and 2007-08.

2. Following grounds were urged before us: -

1. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the assessee's claim of deduction of Rs.1,97,63,000/- u/s 80IB, following and applying the decision of the Hon'ble Bombay High Court in the case of Brahma Associates 333 ITR 289, without appreciating that the said decision of the Hon'ble Court has been given in relation to the Assessment Year 2003-04 and hence, not applicable to the assessee's case and the assessment year involved is AY 2005-06.*
2. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the assessee's claim of deduction of Rs.1,97,63,000/- u/s 80IB, without appreciating that ITAT, Special Bench, Pune in the case of Brahma Associates 119 ITD 255 for AY 2003-04 has categorically held that the position with effect from AY 2005-06 would be different in view of the specific restriction introduced by S 80IB(21)(d) which provides that the commercial use*

of built-up area shall not exceed 2000 sq.ft. or 5% of the aggregate built up area, whichever is less.

3. *On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that the amended section 80IB(10)(d) would not apply to the assessee's project as they are approved and started before 01.04.2005, without appreciating the ratio of the decision of the Hon'ble Supreme Court in the case of Reliance Jute & Industries Ltd. 120 ITR 921, wherein the Apex Court has held that it is a cardinal principle of the tax law that the law to be applied is that in force in an assessment year unless otherwise provide expressly or by necessary implication""and therefore, the law prevalent as on 01.04.2005 will be applicable to the assessee.*

It may be noticed that though authorisation was for A.Y. 2005-06 to 2007-08, in the grounds of appeal for A.Y. 2007-08 the appellant AO has mechanically filed the grounds which were to be filed for A.Y. 2006-07.

3. This case has a chequered history. In the first round of litigation the AO disallowed the claim of deduction under section 80IB(10) of the Act mainly on two grounds, i.e., (a) commercial construction is in excess of prescribed limit, and (b) project was not completed by 31.03.2008 and therefore the assessee is not entitled for the benefit under section 80IB(10) of the Act. These orders were set aside by the ITAT "H" Bench, Mumbai with a clear direction to the AO for deciding the issue keeping in view the decision of the ITAT Special Bench, Pune in the case of Brahma Associates 119 ITD 255.

4. While giving effect to the order of the ITAT the AO passed an order under section 143(3) r.w.s. 254 of the Act wherein he observed that the Tribunal restored the matter for deciding the issue keeping in view the decision of the ITAT Pune Bench in the case of Brahma Associates which in turn refers to other conditions to be fulfilled but the assessee has not furnished particulars with regard to fulfilment of other conditions. It deserves to be highlighted that in the first round of litigation the AO has not disallowed the claim of deduction under section 80IB(10) on any other ground other than the two specific issues mentioned above and the said two issues having been decided in favour of the assessee by the ITAT Special Bench, Pune the matter was restored to the file of the AO to follow the view

taken by the ITAT Special Bench but the AO repeated the addition without even giving an opportunity to the assessee and by impliedly defying the direction of the ITAT.

5. Aggrieved, assessee preferred an appeal before the learned CIT(A) who in turn took note of the facts and circumstances of the case and observed that in the light of the decision of the Hon'ble Bombay High Court, wherein the decision of the ITAT Special Bench, Pune was confirmed (333 ITR 289), subsequent amendment will not affect assessee's case and the appellant having complied with all the necessary conditions, as envisaged under section 80IB(10) of the Act, assessee is eligible for deduction under section 80IB(10). He directed the AO accordingly. The operative portion of the order of the learned CIT(A) is extracted for immediate reference: -

"4.12 I have considered the A.O.'s order as well as the appellant's submissions extracted as above. Further I have also taken note of Hon'ble ITAT, Mumbai, wherein specific directions were issued to the A.O. in the light of Pune Special Bench decision (supra). Having considered the same, I find merits in the arguments of the appellant. Even I have also perused the remand report and the counter comments filed by the appellant in respect of admission of additional evidence. Having taken note Of jurisdictional Bombay High Court decision in the case of Smt. Prabhavati Shah vs. CIT (1998) 231 fl'R I (Born.) and also of the Apex Court decision in the case of Nationa1Tlierrnal Power Co. Ltd. v/s CIT [229 ITR 383 (SC)] & Jute Corporation of India Ltd. v/s CIT [187 ITR 688 (SC), the appellant's additional evidence is admitted, as the same is having full relevance on the issue involved in this appeal.

4.13 Having considered all the factual position of the case, I find that as per original order the dispute was w.r.t. commercial construction in excess of prescribed limit u/s. 801B(10) of the Act. The second dispute was that the project was not completed within 31-03-2008 and therefore the claim u/s. 80113(10) is denied by the AO. However I find that the CIT (A)-XXVII vide his order dated 15110108 has already deleted the addition and allowed the deduction u/s. 801B (10) of the Act. Further the issue was again taken by the Department before Hon'ble ITAT, Mumbai wherein through common order for the A.Y. 2005-06 and A.Y. 2006-07, the matter is restored to the file of AO to decide the dispute keeping in view the decision of Pune Special Bench of ITAT in case of Brahma Associates (supra) and to which both the departmental as well as authorized representative of the appellant have agreed upon that common issue involved in these appeals w.r.t. construction of commercial area exceeding then permitted area under clause (d) of Sec. 80IB(10) of the Act. The observation made by Hon'ble ITAT, Mumbai is noted as made in para 2 of the common order of H'ble ITAT for the A.Y.

2005-06 and 2006-07 that total built area of the project was 3,21,465 sq. ft out of which commercial area was to the extent of 9929 Sq. ft which is 3.09% of the total built up area only. This observation of Hon'ble Mumbai ITAT has also been affirmed by the A.O. in her order u/s 143(3) of the Act dated 19/12/11, which is subject matter of appeal before me.

4.14 I find that the project is in compliant of all the conditions of Sec. 80IB(10) as were applicable for the projects sanctioned on or before 01-04-2005 and therefore the prospective amendments cannot be considered to be applicable for the appellant's projects which are already approved before 01-04-2005 in view of the conditions laid down u/s. 80IB(10) of the IT Act, 1961. I also relied upon number of judgments of Hon'ble ITAT's and various Hon'ble Courts which are also relied upon by the appellant Company. I find that the jurisdictional ITAT, Mumbai has very specifically held in the case of M/s Sai Krupa Developers vs. ITO (ITA No.3661/Mum/2011) that "Since the appellant has fulfilled all the conditions for claiming deduction u/s 801B(10), the deduction cannot be denied merely because the appellant did not obtain the completion certificate on or before 31.03.2008. Moreover, the project of the appellant was approved before 31.03.2005, there was no requirement of obtaining the completion certificate. Further to that the appellant's 'Housing Project' was approved by local authority prior to 01.04.2005, which has not been disputed at all by A.O. anywhere in his order. Further to that, as the jurisdictional Bombay High Court in the case of CIT vs. Brahma Associates (supra) has very categorically held that "Housing Project - Special Deduction under section 80IB(10) - Law Applicable - Restriction inserted with effect from 01/04/2005 as to permissible limit of commercial use in project - Not retrospective - Housing Project approved by Local authority having residential and commercial units - Prior to 01/04/05 entire profits entitled to special deduction under section 80IB - Income Tax Act, 1961 - s.80IB."

4.15 Thus, the Hon'ble Bombay High Court has affirmed the decision of Special Bench in Brahma Associates vs. JCIT reported in 315 ITR. (AT) 268 (Pune) on the point that "Clause (d) was specifically inserted with effect from April 1, 2005 and, therefore, that clause cannot be applied for the period prior to April 1, 2005. Clause (d) seeks to deny section 80IB(10) 'deduction to projects having commercial use beyond the limit prescribed under clause (d), even though such commercial user is approved by the local authority. Therefore, the restriction imposed under the Act for the first time with effect from April 1, 2005, cannot be applied retrospectively.

Order the Special Bench in BRAHMA ASSOCIATES vs. JOINT CIT [2009] 315 ITR (AT) 268 (Pune) affirmed on this point.

Section 80IB(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 80IB(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 a part of the project."

4.16 Thus, having taken note of aforesaid stated facts of the case and also the submission filed by, the appellant, I am of the considered view that in the appellant's case the provisions of section 801B(10) are applicable, as the appellant's project was approved prior to 01/04/05. The subsequent amendment will not affect the appellant's case in view of jurisdictional Bombay High Court decision in the case of Brahma Associates vs. JCIT (supra). As it is evident from the appellant's submission that the appellant comply all necessary conditions as envisaged under the provisions of law for claiming deduction u/s 80IB(l0) of the Act. Hence taking note, of all the facts on record, I am of the considered view to hold that the appellant is eligible for deduction u/s 80IB(10) of the Act. Accordingly I direct the A.O. to allow the claim of deduction u/s 80IB(10) of the Act to the appellant. Thus, the appellant's these grounds of appeal are allowed."

6. Revenue is aggrieved by the order of the learned CIT(A) and hence preferred appeals in the Tribunal overlooking the fact that the AO, while passing order under section 143(3) r.w.s. 254, has exceeded the jurisdiction in giving proper effect to the directions of the Tribunal. When these appeals were listed before us the learned counsel for the assessee strongly relied upon the order passed by the learned CIT(A) to contend that the Revenue should not have preferred the appeals. At any rate, the issue stands squarely covered by the decision of the Hon'ble Bombay High Court (supra).

7. On the other hand, the learned D.R. relied upon the orders passed by the AO and fairly admitted that the issue is covered in favour of the assessee.

8. We have heard the rival submissions and carefully perused the record. As could be noticed from the order of the learned CIT(A), when there is a specific direction to the AO by the ITAT to follow the Special Bench decision of ITAT it has to be assumed that the direction is with reference to the issues which were originally objected to by the AO and the AO cannot take advantage of the order of ITAT for repeating the addition, defying the directions of the ITAT. At least the senior officer such as Commissioner of Income Tax should have carefully perused the record and CIT(A)'s order before granting authorisation. The very fact that the AO filed the appeals without even verifying the year, which was mentioned in the grounds of appeal, also indicates that the appeals were filed in a routine manner which

causes lot of inconvenience to the tax payers and such a practice should be deprecated. With these observations, for the reasons given by the learned CIT(A), we hold that the appeals filed by the Revenue deserve to be dismissed in limine. We order accordingly.

Order pronounced in the open court on 16th April, 2015.

Sd/-	Sd/-
(D. Karunakara Rao)	**(D. Manmohan)**
Accountant Member	**Vice President**

Mumbai, Dated: 16th April, 2015

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) – 7, Mumbai*
4. *The CIT– 3, Mumbai City*
5. *The DR, "D" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.