

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH
MUMBAI**

**BEFORE: MS. PADMAVATHY S, ACCOUNTANT MEMBER
&
SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER**

**ITA No. 4389/MUM/2014
(Assessment Year : 2006-07)
&**

**ITA No. 4390/MUM/2014
(Assessment Year : 2007-08)**

Bhavya Construction Co. 4, Bhide Bungalow, 37-A, M.G.Road, Vile Parle-East, Mumbai-400057.	Vs.	Assistant Commissioner of Income Tax Circle-21(1), 6 th Floor, Pratyaksha Kar Bhavan, BKC, Bandra-East, Mumbai-400051.
PAN/GIR No. AAAFB1375K		
(Appellant)	..	(Respondent)

Assessee by	Shri. DR. K. Shivram, Sr. Adv. & Nilam Jadhav
Revenue by	Ms. Monika H. Pande, SR. DR
Date of Hearing	29/11/2024
Date of Pronouncement	25/02/2025

आदेश / O R D E R

PER SUNIL KUMAR SINGH (J.M):

The facts and issues under both the appeals are similar. Hence, both these appeals are being disposed of by this common order for the sake of brevity and convenience. The facts of ITA No. 4389/MUM/2014 for A.Y. 2006-07 are only being narrated as hereunder.

ITA No. 4389/MUM/2014
(Assessment Year : 2006-07)

1. This appeal has been preferred against the impugned order dated 29.04.2014 passed in Appeal no. CIT(A)-32/ACIT 21(1)/IT-68/13-14 by the Ld. Commissioner of Income-tax(Appeals) [hereinafter referred to as the "CIT(A)"] u/s. 250 of the Income-Tax Act, 1961 [hereinafter referred to as "Act"] for the Assessment year [A.Y.] 2006-07, wherein learned CIT(A) has dismissed assessee's first appeal against the assessment order dated 12.03.2013.
2. This is the third round of litigation between the parties. Briefly stating, the appellant assessee is a partnership firm and is engaged in the business of promoter, builders and contractors. Assessee filed its return of income for A.Y. 2006-07 on 31.10.2006, declaring total income at Rs. 28,69,487/-. Subsequently, assessee filed revised return of income on 22.10.2007, declaring total income at Rs. Nil after claiming deduction of Rs. 28,69,487/- u/s. 80IB(10) of the Act in respect of the profits derived from the housing project. Learned assessing officer examined assessee's said claim and found that the scheme in respect of which deduction u/s. 80IB(10) was claimed was not notified by the CBDT. In absence of aforesaid notification., assessee's claim for deduction u/s. 80IB(10) of the Act was disallowed and the total income of the assessee was assessed at Rs. 28,69,487/- vide assessment order 30.10.2008.

3. Learned CIT(A), vide order dated 22.01.2010 passed in first appeal, confirmed the disallowance. Appellant assessee preferred an appeal before this Tribunal against the order dated 22.01.2010 passed by learned CIT(A) and produced notification No. S4 1896(E) dated 03.08.2010 issued by the CBDT, for the first time before the Tribunal. The tribunal, vide order dated 14.10.2011 passed in ITA No. 3090/MUM/2010 for A.Y. 2006-07 set aside the orders passed by the revenue authorities and restored the matter to the file of learned assessing officer for deciding the issue relating to the assessee's claim for deduction u/s. 80IB(10) afresh in light of the said notification after affording an opportunity of hearing to the assessee.
4. In the second round, learned assessing officer, examined the issue of the notification dated 03.08.2010 and came to the conclusion that the notification cannot give benefit to assessee's project as its approval was granted before 01.04.2004, whereas the cutoff date of approval in the said notification was on or after 01.04.2004 and before 31.03.2008, thus denied assessee's claim of deduction u/s. 80IB (10) of the Act vide assessment order dated 12.03.2013. Aggrieved, assessee preferred an appeal before learned CIT(A), who confirmed the second round of assessment and dismissed assessee's first appeal, vide first appellate order dated 29.04.2014. Dissatisfied by the order, aggrieved assessee approached this Tribunal. This Tribunal, vide consolidated order dated 09.12.2016 dismissed assessee's appeals.

5. Assessee preferred an appeal against the order dated 09.12.2016 passed by this Tribunal before the Hon'ble Bombay High court. Hon'ble Bombay High Court, vide order dated 30.01.2020 passed in ITA No. 1148 of 2017 set aside the order dated 09.12.2016 passed by this Tribunal with a direction for fresh hearing and decision. Hence this appeal in third round of hearing.
6. Perused the records. Heard learned representative for the appellant assessee and learned DR for the revenue.
7. The main point for determination under appeal is as to whether appellant assessee is entitled for the claim of deduction of Rs. 28,69,487/- u/s. 80IB(10) of the Act?
8. Learned representative for the appellant assessee has argued that the assessee undertook a project under the scheme of Slum Rehabilitation Authority (SRA) framed by the government of Maharashtra for carrying out a housing project in Santacruz. The assessee's claim of deduction of Rs. 28,69,487/- has been wrongly declined by the revenue authorities merely on the ground that the project was approved before 01.04.2004, whereas the amendment to section 80IB(10) (a & b), vide finance (2) Act 2004 relaxed the condition imposed by section 80IB(10)(b) by introducing the 'proviso' to section 80IB(10)(a & b). It was further submitted that the substantive provision of law cannot be overridden by the CBDT notification dated 05.01.2011 which restrict the eligibility of section 80IB(10) to housing projects approved under the slum rehabilitation scheme only on or after

01.04.2004 and before 31.03.2008. Learned assessee's representative has pointed out that the issue is squarely covered by the order dated 14.03.2014 passed by the coordinate Mumbai bench of this Tribunal in Ramesh Gunshi Dedhia Vs. Income Tax Officer, ward-21(1)(2), Mumbai, [2014] 45taxmann.com 155 (Mum-Trib.).

9. Learned DR has submitted that an appeal was preferred by the revenue against the ITAT order dated 14.03.2014 passed by the Tribunal in Ramesh Gunshi Dedhai (supra). However, the same was withdrawn due to low monetary effect. Learned DR thus submits that this Tribunal has to give a free look to the case in hand, however supported the impugned order.
10. At the very outset, it is pertinent to mention that assessee raised the grievances before Hon'ble High Court that the Tribunal order dated 09.12.2016 has been passed in breach of the principles of natural justice for the reasons, one, the decisions relied upon by the Tribunal of its own (not cited at bar) in the impugned order were not brought to the notice of the assessee. The second reason is that the Tribunal did not deal with the decisions relied upon by the appellant in support of its case. In this view of the matter, the perusal of Tribunal order dated 09.12.2016 shows that there is detailed mention of the legal position that the taxing statute has to be strictly construed with further mention of the various decisions of Indian and English courts including the decisions of House of Lords which need no repetition. Learned representative for the assessee has not submitted any adverse authoritative judicial

authority contrary to what has been referred by the Tribunal as stated hereinabove. However, the case law cited by the learned AR shall be dealt with as hereinunder.

11. The law applicable to the facts of the present case needs to be understood before further analysing the facts. The relevant section of section 80 IB(10) of the Act is reproduced as under:

“ 80IB.Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.- (1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to(11), (11A) and (11B) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.

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(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008 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 but not later than the 31st day of March, 2005, within four years from the end of the financial year in which the housing project is approved by the local authority;

(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five 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 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

(ii) the Hindu undivided family in which such individual is the karta, any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta.

Explanation.—For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State Government) xxx”

12. A cursory reading of section 80IB(10) of the Act shows that one of the condition for the eligibility of deduction in respect of derived profits in case of an undertaking developing and building housing properties, is that the construction of the project approved before the first day of April 2004, should have been completed on or before the 31st day of March 2008. It is noticed that the Slum Rehabilitation Authority approved assessee's project on 10.06.1990 vide SRA approval letter at page 56-61 of assessee's paper book commencement certificate for sale-c2 was granted by SRA on 29.06.2002 vide page 66-67 of assessee's paper book. Full occupation certificate was granted

for rehabilitation building-A on 27.04.2001 vide page 62 of assessee's paper book. Full occupancy certificate was also granted for rehabilitation building-B on 27.04.2004 vide page 65 of assessee's paper book. Full occupation certificate was granted for sale building-C on 02.06.2003 vide pages 63-64 of assessee's paper book. Full occupation certificate for sale of building C2 was granted on 17.01.2008 by SRA vide page 68-69 of assessee's paper book. The scheme of SRA contained in regulation 33(10) of development control regulation for greater Mumbai has been notified vide CBDT notification no. 67 dated 03.08.2010 which was further clarified by CBDT in notification No. 01/2011 dated 05.01.2011. The rigours of section 80IB(10) were relaxed by introduction of proviso by finance Act, 2004, wherein it was provided that the condition stipulated in clauses (a) & (b) shall not be applicable.

13. As regards, the condition/requirement of section 80IB(10)(b) in respect of the project size of the plot of 1 acre is concerned, we notice that a proviso has been added to sub clause (b) to section 80IB (10) as per amendment by finance Act (2) 2024 w.e.f 01.04.2005 , wherein the condition of 1 acre has been relaxed in the cases of Delhi or Mumbai on the condition that the relaxation was subject to the approval by local authority under slum rehabilitation scheme and notified by the CBDT. It is an undisputed fact that assessee's project has been approved with respect to the slum development and the intent of the aforesaid provision is to extend the benefit of deduction u/s. 80 IB(10) of the Act to such projects which are

approved under Slum Rehabilitation Scheme(SRA). The project of the assessee is said to have been completed before 31.03.2008. Thus the relaxation granted to slum Rehabilitation and development projects in the city of Mumbai/Delhi was for the developed on plot size of less than 1 acre, is curative in nature and intended to remove unintended hardship caused to the approved projects in the city of Mumbai/Delhi, where there is a shortage of land and the approved project sizes are less than 1 acre. Such relaxation is also available to the existing approved projects subject to the fulfilment of the other conditions. Thus an exception has been carved out by the proviso in cases of housing projects being developed in slum areas under a government scheme and the exception over rides the conditions mentioned in clause (a) & (b) above. This issue has been elaborated by the co-ordinate bench of this Tribunal as under.

14. The relevant paras 7 to 7.3 of Ramesh Gunshi Dedhai (Supra) are reproduced as under:

“ 7. As regards, the benefit of the proviso to section 801B(10) we note that the conditions enumerated in clause (a) & (b) are relaxed if the housing project is carried out in accordance with the scheme framed by the Central or State Government for reconstruction/redevelopment of slum area declared therein. However such scheme are required to be notified by the board in this behalf. It is pertinent to note that in the earlier years when this matter came before the Tribunal this scheme was not notified by the board and only on 5th January 2011, the board has notified the scheme. Therefore, this issue was not raised before this Tribunal in the earlier years. For the sake of ready reference we quote the notification dated 5th January 2011 of CBDT as under-

S.O.(E)- In exercise of the powers conferred by clauses (a) and (b) of sub-section (10) of section 801B of the Income Tax Act, 1961 (43 of 1963). The board hereby notifies, the Scheme for slum redevelopment prepared by the Maharashtra Government under sub-section (2) of Section 37 of the Maharashtra Regional Town

Planning Act, 1966 (Mah.XXXVII of 1966) and published vide notification No. TPS-1893/973/CR-49/93A/UD-13, dated the 26th February, 2004, as a scheme for the purposes of the said section subject to the condition that any amendment to the Scheme hereby notified shall be required to be re-notified by the Central Board of Direct Taxes.

This notification shall be deemed to apply to projects approved by a local authority under the aforesaid scheme on or after the 01st day of April, 2004 and before 31st day of March, 2008 thereby making the incomes arising from such Projects eligible for deduction under sub-section (10) of section 801B from the Assessment Year 2005-06 onwards."

7.1 As per this notification the board in para 2 has stated that this notification shall be deemed to apply to the projects approved by the local authority under the SRS scheme on or after 01st April 2004 and before 31st March 2008. It was further clarified that the income arising from such projects eligible for deduction u/s 801B(10) from the A.Y. 2004-05 onwards. The question arises whether while notifying the scheme the board can attach any condition for the eligibility of the project to avail the benefit of the proviso to section 801B(10) (a) & (b). At this stage we quote the relevant part of section 801B(10) as under-

"(a) Such undertaking has commenced or commences development and construction of the housing project on or after the 01 st 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 01 st 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 01st day of April, 2004 [but not later than the 31st day of March, 2005 within four years from the end of the Financial year in which the housing project is approved by the local authority

(iii) in a case where a housing project has been approved by the local authority on or after the 01st day of April, 2005, within five 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 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 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;"

7.2 The deduction u/s 80IB(10) is available to the housing project which fulfils the conditions stipulated there under. One of the conditions is that the project is on the size of plot of land which has a minimum area of 1 acre under clause (b) of section 80IB(10). An exclusion has been carved out under the proviso to clause (a) & (b) of the section 80IB(10) whereby the condition stipulated under clause (a) & (b) shall not apply to the housing project carried out in accordance with the scheme framed by the Central Government or State Government for reconstruction or redevelopment of area declared as slum area under the law. The projects of the assessee are under the slum rehabilitation scheme framed by the State Government of Maharashtra which has been notified by the board vide notification dated 05th January 2011. Thus it is clear that the requirement under the proviso to section 80IB(10) (a) & (b) for exclusion of the conditions prescribed under the said clauses is that the housing project is carried out in accordance with the scheme for reconstruction or redevelopment of slum area. Such scheme either framed by State Government or Central Government and notified-by-the board in this behalf. The plain reading of the proviso inserted by the Finance Act, 2004 to clause (a) & (b) of sub-section (10) of section 80IB clearly manifest the requirement of notification of the scheme so framed either by the Central Government or by the State Government. Therefore, there is no requirement of notification of an individual project under the scheme. It is relevant to see the intent of the legislature while amending the provisions of section 80IB(10), to relax the condition for such project under the slum rehabilitation scheme. The memorandum explaining the provisions in the Finance Bill 2004 states that; with a view to increase the redevelopment of slum dwellers it has proposed to relax the condition of minimum plot size of 1 acre in case of housing project carried out in accordance with the scheme framed by the Central Government or State Government for reconstruction or redevelopment of existing building and notified by the board in this behalf. Thus the intent of legislation is to exempt the condition of minimum of 1 acre plot size in the case where the housing project is carried out in accordance with the slum reconstruction scheme framed by the Central Government or State Government and such scheme is notified by the board. Therefore, to avail the benefit of the proviso to clause (a) & (b) of the section 80IB(10) the following requirements are to be satisfied viz. (i the housing project is carried out in accordance with the scheme of reconstruction or redevelopment of slum area (ji

such scheme is framed by the Central Government or State Government (iii) such scheme is notified by the board in this behalf.

7.3 There is no dispute that the projects in question are carried out in accordance with the scheme for redevelopment of the slum area as framed by the State Government of Maharashtra and the same has been notified by the board vide notification dated 5th January 2011. The second part of this notification contemplates a new condition which is not provided even under the clause (a) of section 801B(10). The condition inserted in the notification says that the notification shall be deemed to apply to the projects approved by the local authority on or after 01st April 2004 and before 31st March 2008. We find that this condition contemplated under the notification is repugnant to the conditions provided under section 801B(10). The proviso in question has been inserted to relax the condition provided under clause (a) & (b) of section 801B(10) and not for adding any new condition which is otherwise not required for housing projects for availing the benefit of deduction u/s 801B(10). Even otherwise the condition as stipulated in clause (a) of section 801B(10) is with respect to sanction of the project is only for the time period of completion of the project and there is not such condition that if a project is approved prior to 01.04.2004 is not entitled for the benefit u/s 801B(10). The proviso in question stipulates the requirement of notification of scheme of reconstruction or redevelopment of slum area and does not discriminate the project carried out in accordance with such scheme framed by the Central Government or by the State Government. Once the scheme is notified all projects carried out in accordance with such scheme are entitled for the benefit of the proviso whereby the conditions prescribed under clause (a) & (b) are relaxed. Thus the second part of the notification dated 5th January 2011 is inconsistent/contrary to the proviso. The Board cannot insert a new condition in the provisions of a statute which is repugnant to the provisions itself as well as against the very object and scheme of the said provision of the statute. As we have discussed above the proviso to clause (a) & (b) of section 801B(10) mandates the notification of scheme and not the project under the scheme. Therefore, putting any extra condition for discriminating the project under the scheme is outside the scope of notification under clause (a) & (b) of section 801B(10). Accordingly we hold that the assessee is entitled for benefit of the proviso to clause (a) & (b) of section 801B(10) and, therefore, is eligible for deduction u/s 801B(10) if the other conditions as prescribed under clause (c) to (e) are satisfied."

15. It is not disputed that in the instant case, the scheme for slum development has been prepared by the Maharashtra Government (SRA). Assessee's housing project is carried out in accordance with scheme of reconstruction or redevelopment of slum area. The scheme has been notified by CBDT. According to the settled legal position, the circulars or directions cannot be permitted to curtail the substantive provisions of the Act. The circular cannot therefore curtail the benefit conferred on

assessee or be contradictory to the Act. Learned CIT(A) has failed to rationally appreciate and diligently apply the law applicable to the facts of the present case. The impugned order is thus set aside. The facts of the present case are almost similar to the facts of Ramesh Gunshi Dedhai (Supra). We, therefore respectfully agree with the findings arrived at by the coordinate bench of this Tribunal. Accordingly hold that the appellant assessee is entitled to the claim of deduction u/s. 80IB(10) of the Act. The issue under consideration is determined in favour of the assessee and against the revenue. Learned assessing officer is directed to delete the said addition. The appeal is thus liable to be allowed.

ITA No. 4390/MUM/2014
(Assessment Year : 2007-08)

16. This appeal has been preferred against the impugned order dated 24.04.2014 passed in Appeal no. CIT(A)-32/ACIT 21(1)/IT-67/13-14 by the Ld. Commissioner of Income-tax(Appeals) [hereinafter referred to as the "CIT(A)"] u/s. 250 of the Income-Tax Act, 1961 for the Assessment year [A.Y.] 2007-08, wherein learned CIT(A) has confirmed the assessment order dated 12.03.2013, confirming the disallowance of deduction of Rs. 98,73,174/- u/s. 80IB(10) of the Act. The remaining facts and issues involved in this appeal are similar to that of issues involved in ITA No. 4389 of 2014 except the figures and dates of orders passed by AO/CIT(A)'s/Tribunal. Hon'ble Bombay High Court has also remanded this matter with similar directions, vide separate

order dated 30.01.2020 passed in ITA No. 1009 of 2017. The finding arrived at by us in ITA No. 4389/2014 shall mutatis mutandis apply to this ITA No. 4390/2014 also. Accordingly, the assessee is entitled for the claim of the said deduction u/s. 80IB(10) for A.Y. 2007-08 also. The impugned order is thus set aside. The appeal is liable to be allowed.

17. In the result, both the assessee's appeals ITA No. 4389/Mum/2014 for A.Y. 2006-07 and ITA No. 4390/Mum/2014 for A.Y. 2007-08 are allowed. Let the copy of this order be placed on the records of ITA No. 4390/MUM/2014.

Order pronounced in open court 25.02.2025.

Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER

Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER

Mumbai; Dated 25/02/2025
Anandi Nambi, *Steno*

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai