IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

INCOME TAX APPEAL NO. 47 OF 2014

The Commissioner of Income Tax (Central),
Nagpur. .. **Appellant**

Versus

M/s Kasliwal Ranwara,
215-216, 1st Floor, Building No. 3,
Apna Bazar, Jalna Road, Aurangabad. .. **Respondent**

Mr Alok Sharma, Advocate for the appellant
Mr. Harshwardhan Bajaj h/f Mr. A. S. Bajaj, Advocate for the respondent.

CORAM : A.V. NIRGUDE &
V. K. JADHAV, JJ.
DATED : 09.01.2015

PER COURT :-

1. This appeal in our view does not raise any substantial question of law.

2. The facts leading to this case can be summarized as under : -

The respondent is a Developer. He developed Housing Project and claimed exemption under Section 80-IB(10) of the Income Tax Act, 1961, which reads as under: -

[5]*[(10) "*[6]*The amount of deduction in the case of an undertaking developing and building housing projects*[6a] *approved before the 31st day of March,* [7]*[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;

[8]*[(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 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 kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place; [9] *[***]*

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed three per cent of the

aggregate built-up area of the housing project or five thousand square feet, whichever is higher];]

[12]*[(e) not more than one residential unit in the housing project is allotted to any person not being an individual; and*

(f) in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely:—

(i) the individual or the spouse or the minor children of such individual,

(ii) the Hindu undivided family in which such individual is the karta,

(iii) 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.

[13]*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).”*

3. The plot which was subjected to development was admittedly not less than one acre in size but, this plot prior to its purchase by the

partner of the respondent was already subjected to a lay out providing internal roads etc. But, after the land was purchased, the earlier lay out was sought to be cancelled and the land was subsequently developed as per sanction plan given by the Corporation on 13th July, 2004. But, before the sanction plan could be issued, on 9th July, 2004 the respondent surrendered almost 1/4th area of the plot to the Corporation for developing road and open space in the plot. Because of this relinquishment, almost 1/4th area of the plot was lost. The sanction plan that was subsequently given on 13th July, 2004, showed a plot ad-measuring 2963 sq.mtrs., under development. Because of this peculiarity, the Assessment Officer disallowed claim made under Section 80IB(10) of the Income Tax Act, 1961. He held that, the land on the date of sanctioning of the plan was not having area of one acre. He rejected respondent's contention that the relinquishment made in favour of the Corporation a few days prior to sanctioning of a plan was as per the Corporation Building Bye-laws. Building Bye-laws No. 13.3 reads as under:-

"13.3 Open Spaces -

13.3.1 In any layout of sut-division of land measuring 0.4 hector or more in residential and commercial zones, 10% of the entire holding area shall be reserved, for *recreational spaces which shall be as far as possible, be provided in one place.*

13.3.1.1 *No such recreational spaces shall admeasure less than 400 sq.m.*

12.3.1.2 *The minimum dimension of such recreational space shall in no case be less 7.5 m. and if the average width of such recreational space is less than 24 m. the length thereof shall not exceed 2 ½ times the average width.*

13.3.1.3 *The structures to be permitted in the open spaces shall be as per the following provisions:*

i) *They shall be single storyed structure with the maximum area not exceeding 10% of the open space. This shall be further subject to a maximum of 200 sq.m.*

ii) *The structure shall be used for the purpose of pavilion or gymnasia or other activities which are related to open spaces; and*

iii) *No toilet block shall be permitted.*

iv) *Whenever called upon by the Planning Authority to do so, under provisions of Section*

202, 203 of BPMC Act area as under roads and open space in Byelaw Nos. 12.3 to 12.5, 13.3 shall be handed over to the planning Authority after development of the same for which nominal amount (of Re.1) shall be paid by the Planning Authority. In case of the owners who undertake to develop the open spaces for bonafide reasons as recreational community open spaces, the Authority may permit the owner to develop the open space unless the Authority is convinced that there is no misuse of open spaces in which case the Authority shall take over the land.

Note *– This would be exempted from F.A.R./built up area calculations. Every such plot and recreational open space shall have an independent means of access."*

4. Sub-clause 'iv)' quoted above contemplates that generally area under roads and open spaces as per Bye-laws No. 12.3 should be handed over to planning Authority after development of the land. In this case, curiously the relinquishment was made even prior to sanctioning of the plan. But, we are convinced that the relinquishment deed was made pursuant to Bye-laws No. 13.3 and the same is also mentioned in the Relinquishment Deed. Thus, the relinquishment is directly connected to

the sanctioning of the building plan. Both these events took place within a space of 4-5 days and, therefore, we have no difficulty to accept the contention of the respondent that this was done for the purpose of seeking sanctioned plan for building. We have also seen the sanctioned plan and are convinced that the area under the proposed roads would be useful for the project in future. The open space for recreation appears to us as a facility made available to residents of the Housing Project. In view of these circumstances, the submission made at bar and also in judgments of Assessment Officer, is erroneous. The Central Board of Direct Taxes (CBDT) has already clarified the scope of Section 80-IB of Income Tax Act by issuing a circular. The relevant part of which reads as under :

> *"This section does not specifically provide area limit for the garden, the development plan roads, internal means of access, etc. in the housing project. Therefore, the same should conform to the project plan approved by the local authority in accordance with the regulations in force. Also the area limit of the plot has to be construed with reference to the area of site on which the housing project is constructed and not with reference to the demarcation of the land, done by the Development Authority."*

5. It is clear from this Circular that for the purpose of giving benefit of this Section, the size of the plot should include area left open compulsorily as per Building bye-laws. The Commissioner of Income Tax

(Appeals) and Income Tax Appellate Tribunal have also taken the same view. We do not find it necessary to disturb the same. We find no merit in the appeal and hence stands dismissed.

[V.K. JADHAV, J.] **[A.V. NIRGUDE, J.]**

aaa/-