

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No.263 of 2016 (O&M)
Date of decision: 20.7.2017**

The Pr. Commissioner of Income Tax, Patiala

....Appellant

Vs.

M/s Ambey Developer Pvt. Ltd.

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL**

Present: Mr. Zora Singh Klar, Sr. Standing Counsel for the appellant.

Mr. Jagmohan Bansal, Advocate for the respondent.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA No.263, 271 of 2016 and 177 of 2017 as according to the learned counsel for the appellant-revenue, the issue involved in all these appeals is identical. However, the facts are being extracted from ITA No.263 of 2016.

2. ITA No.263 of 2016 has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 14.3.2016 passed by the Income Tax Appellate Tribunal, Division Bench, Chandigarh (in short, "the Tribunal"), in ITA No.852/Chd/2014 for the assessment year 2010-11, claiming following substantial question of law:-

“Whether on the facts and circumstances of the case and in law, the Hon’ble ITAT was justified in relying upon the

order of Hon'ble Gujarat High Court in the case of ***CIT vs. Tarnetar Corporation***, (2014) 362 ITR 174 and holding that approval has been granted at a later date without raising any objection whereas the completion certificate was given by Municipal Corporation after expiry of five years from date of approval?"

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.263 of 2016 may be noticed. The assessee is a builder. During the assessment year under consideration, the assessee claimed deduction under Section 80IB of the Act amounting to ₹ 92,14,936/-. The Assessing officer noticed that the assessee had filed completion certificate from Municipal Town Planner, Municipal Corporation, Patiala dated 30.12.2011 alongwith a letter written to Commissioner, Municipal Corporation, Patiala dated 29.3.2010 requesting for completion certificate. It was further noticed that the housing project approved on 1.4.2005 should have been completed within five years from the end of the month in which the same was approved i.e.. 31.3.2010. The assessee submitted that grant of completion certificate after verification on subsequent date would relate back to the date on which application is made. The Assessing Officer disallowed the deduction under Section 80IB(10) of the Act and added back the same to the assessee's taxable income. Aggrieved by the order, the assessee filed appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 29.8.2014, the CIT(A) allowed the appeal holding that the assessee company applied for completion certificate alongwith architect's certificate in the prescribed form on 29.3.2010 i.e. within the stipulated period of five years as prescribed under section 80IB(10) of the Act. However, the local authority granted certificate only on 30.12.2011 on

account of various stages involved in the process and thus the delay in issuance of completion certificate was beyond the control of the assessee and was not attributable to him. Not satisfied with the order, the department filed appeal before the Tribunal. Vide order dated 14.3.2016, Annexure A.3, the Tribunal dismissed the appeal and confirmed the findings recorded by the CIT(A). Reliance was placed on judgment of the Gujarat High Court in ***Tarnetar Corporation's*** case (supra). It was held that approval had not been refused by the local authority to the assessee but had been granted to it on a later date and that too without raising any objection. Hence the instant appeals by the revenue.

4. Learned counsel for the appellant-revenue relied upon Explanation (ii) to Section 80IB(10)(a) of the Act to submit that the date of the 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. Reliance was also placed on Full Bench judgment of this Court in ***CIT vs. Punjab Financial Corporation***, (2002) 254 ITR 6 to urge that the word 'shall' has to be interpreted as mandatory.

5. We have heard learned counsel for the appellant-revenue.

6. The primary question that arises for consideration in these appeals is the interpretation of Explanation (ii) to Section 80IB(10) (a) of the Act, which reads thus:

“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.”

It has been categorically recorded by the CIT(A) that the assessee applied for completion certificate alongwith architect's certificate in the

prescribed form on 29.3.2010 i.e. within the stipulated period of five years as prescribed under section 80IB(10) of the Act. The Assessing Officer in his report submitted that the explanation of the assessee was plausible with respect to procedural delay at the end of the Municipal authorities. The assessee also referred to the possession certificate issued to the flat owners upto 31.3.2010, registered sale deeds, no objection certificate from fire safety officer, Punjab State electricity Board etc. Further, the Municipal Corporation Patiala had also accepted that the approval was granted on the basis of application filed by the assessee on 29.3.2010 and the delay in issuing completion certificate was on account of various stages involved in the process. The delay in issuance of completion certificate was beyond the control of the assessee. Thus, it was clear that the project was completed before the due date as envisaged under Section 80IB(10) of the Act. The relevant findings recorded by the CIT(A) read thus:-

“4.6. It is further noted that in the immediately next assessment year i.e. A.Y.2010-11, the Assessing Officer made enquiry with the Municipal Corporation, Patiala regarding the date of completing the project. The Assessing Officer during the course of assessment proceedings submitted a copy of the reply given by the Municipal Corporation, Patiala which is reproduced as under:-

“As per the clarification demanded by your office, it is hereby stated that ***M/s Ambey Developers Pvt. Limited*** undertook the approved housing project and had applied for the completion certificate vide this application dated 29.3.2010 alongwith the certificate of architect dated 29.3.2010. It is further stated that each constructed flat was physically inspected, compared with the approved map, physically check the civic amenities availability as approved, after that the developer's file is sent to the Chief Town

Planner (CTP) Local Govt. for the technical clearance from the government who after carefully considering all the compliances issues the technical clearance certificate. After getting the technical clearance certificate from the government the completion certificate was issued to the developers by the Municipal Corporation, Patiala. The process of issuing completion certificate and technical certificate passes through many stages as such it generally takes time as stated above.”

4.7. In the present case, therefore, it is an admitted fact that the appellant applied for the completion certificate alongwith architect's certificate in the prescribed form, copy of approved map etc. on 29.3.2010 i.e. within stipulated period of five years as enumerated in Section 80IB(10) of the Act. It is also observed during the course of assessment proceedings that the assessee has sold flats and same were occupied by some of the owners NOC was also obtained from various departments. The Assessing Officer in his report has submitted that the explanation of the assessee is plausible with respect to procedural delay at the end of Municipal authorities. Further, the appellant has submitted that the completion certificate issued clearly refers to the request letter of appellant dated 29.3.2010, and that the completion certificate was issued with reference to the appellant's application dated 29.3.2010. There is no mention of any defect or discrepancy in the project on record. The appellant has also referred to the possession certificate issued to the flat owners upto 31.3.2010, the registered sale deeds, no objection certificate from Fire Safety Officer, Punjab State Electricity Board etc. Permanent Electricity connection has been given by Punjab State Electricity Board in the names of the respective buyers before 31.3.2010. Further the approving authority i.e. Municipal Corporation, Patiala has also accepted that the approval was granted on the basis of application filed by the appellant on 29.3.2010 and the delay in issuing completion certificate is because of the various

stages involved in the process. The delay in issuance of completion certificate is beyond the control of the appellant and is not attributable to him. Thus from the submission of the Assessing Officer, the appellant and from the letter of the municipal authorities, it is amply clear that the project was completed before the due date as envisaged under section 80IB(10) of the Act and the completion certificate was also awarded on the basis of certificate dated 29.3.2010. Under the facts of the case, I am of the opinion that the ratio of various decisions discussed above is squarely applicable to the facts of the present case. Therefore, looking into submission made and the facts of the case and respectfully following the decisions as discussed above, the deduction claimed under Section 80IB(10) is allowed and the addition made by the Assessing Officer is hereby deleted.”

7. The findings recorded by the CIT(A) were upheld by the Tribunal. Relying upon the judgment of the Gujarat High Court in ***Tarnetar Corporation's*** case (supra), it was recorded that every condition of the statute cannot be seen as mandatory. If substantial compliance thereof is established on record 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. The approval in the present case had been granted to the assessee on a later date but without raising any objection. Thus, the Tribunal rightly upheld the view taken by the CIT(A) granting deduction claimed under section 80IB of the Act and deleting the addition made by the Assessing officer. The relevant findings recorded by the Tribunal read thus:-

“8. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. Though there are a number of judgments in favour of the assessee in the said

circumstances, we would like to refer to the judgment of Gujarat High Court in the case of ***CIT vs. Tarnetar Corporation***, reported in (2014) 362 ITR 174(Gujarat) Where the Hon'ble High Court observes as under:-

‘In the present case, therefore, the fact that the assessee had completed the construction well before 31st March 2008 is not in doubt. It is, of course, true that formally BU permission was not granted by the Municipal authority by such date. It is equally true that explanation to clause (a) to Section 80IB(10) links the completion of the construction to the BU permission being granted by the local authority. However, not every condition of the statute can be seen as mandatory. If substantial compliance thereof is established on record, 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. In the present case, the facts are peculiar. The assessee had not only completed the construction two years before the final date and had applied for BU permission. Such BU permission was not rejected on the ground that construction was not completed but on some other technical ground. In that view of the matter granting benefit of deduction cannot be held to be illegal.’

9. The facts of the present case are on a strong footing, in the sense that the approval has not been refused to it and in fact has been granted to it on a later date, that too without raising any objection. Since the facts are the same, respectfully following the order of the Hon'ble High court, we confirm the order of the learned CIT(Appeals).”

8. Adverting to the interpretation and meaning to be assigned to Explanation (ii) to Section 80IB(10(a) of the Act, essentially it has to be seen whether the term “shall” used therein is to be treated as mandatory or it is in the nature of a directory requirement. In our opinion, though the

word used in Explanation (ii) to Section 80IB(10)(a) of the Act is “shall”, but it would not necessarily mean that in every case, it shall be taken to be mandatory requirement instead would depend upon the intent of the legislature and not the language in which the provision is clothed. The meaning and the intent of the legislature would be gathered not on the basis of the phraseology of the provision but keeping into consideration its nature, its design and the consequences which would follow from interpreting it in a particular way alone. The purport of the said Explanation (ii) to Section 80IB(10)(a) of the Act is to safeguard the interest of the revenue wherever the construction has not been completed within the stipulated period. Thus, it cannot mean that the requirement is mandatory in nature and would disentitle an assessee to the benefit of Section 80IB(10)(a) of the Act even in respect of those cases where the assessee had completed the construction within the stipulated period and had made an application to the local authority within the prescribed time. The issuance of the requisite certificate was within the domain of the competent authority over which the assessee had no control. From the findings recorded by the CIT(A) as affirmed by the Tribunal, it was clear that the construction had been completed before the stipulated date i.e. 31.3.2010. It was also not disputed that the certificate of completion was applied on 29.3.2010 which was issued to the assessee on 31.12.2011. The assessee in such circumstances could not be denied the benefit of Section 80IB(10)(a) of the Act. The CIT(A) and the Tribunal had rightly adjudicated the issue in favour of the assessee-respondent. Learned counsel for the appellant revenue has not been able to show any illegality or perversity in the findings recorded by the CIT(A) as well as the Tribunal, warranting interference by this Court.

9. In *Punjab Financial Corporation's* case (supra) the issue before the Full Bench of this Court was whether Section 32AB(5) of the Act was mandatory or directory and delayed filing of audit report would disentitle an assessee from claiming the benefit of deduction under section 32AB(1) of the Act. It was held that Section 32AB(5) of the Act is not mandatory and the Assessing Officer has the discretion to entertain the audit report even though the same had not been filed with the return and give benefit of deduction to the assessee in terms of Section 32AB(1) of the Act. The proposition of law enunciated therein is unexceptionable. In the facts and circumstances of the case as noticed hereinabove, it does not advance the case of the revenue.

10. In view of the above, no substantial question of law arises and the appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

July 20, 2017
'gs'
Whether speaking/reasoned
Whether reportable

(Amit Rawal)
Judge
Yes
Yes