IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.968 OF 2016
WITH
INCOME TAX APPEAL NO.998 OF 2016

Pr. Commissioner of Income Tax-20 … Appellant

V/s.

M/s Khyati Financial Services … Respondent

Mr.Ashok Kotangle with Ms.Padma Divakar for the Appellant.
Mr.Atul Jasani for the Respondent.

CORAM : AKIL KURESHI AND
B.P.COLABAWALLA, JJ.
DATE : JANUARY 08, 2019.

P.C.:-

1. These appeals are filed by revenue challenge a common judgment of Income Tax Appellate Tribunal and concerns the same assessee. Following question was argued before us:-

> "Whether on the fact and in the circumstances of the case and in law, the Tribunal was justified in holding that the Assessee is entitled for deduction u/s 80IB of Rs.8,42,34,862/- for A.Y.2008-09 even though the commercial Built-up area exceeded 2000 sq.ft. while the maximum permissible commercial built-up area is only 2000 sq. ft., which is clearly applicable in terms of clause (d) of section 80IB(10)

effective from 01-04-2015?”

2. Short question is whether the restriction of maximum permissible unit area imposed for an assessee to claim deduction under Section 80IB(10) of the Income Tax Act, 1961. By virtue of the amendment introduced on 1st April, 2005 could be applied also to those housing projects where permission from development have been obtained long before the date of the amendment.

3. The revenue counsel relied on an order dated 20th February, 2013 passed in Income tax Appeal No.1987 of 2011 in which such a question has been admitted by the Court. The said appeal was also filed by the revenue to challenge the judgment of Income Tax Appellate Tribunal, which had liked in the present case, taken a view that such amended provision would not be applicable to the housing project where the development of possession was granted earlier. Counsel for the assessee however pointed out that such an issue has been decided by this Court in case of **Commissioner of Income Tax Vs. Happy Home**

Enterprises and anr.[1] hold that such modified requirement for claiming deduction under Section 80IB(10) of the Act cannot be enforced against those assessees where the housing project granted development permission prior to such date. Following portion of the judgment may be noted:

> "35. However, the provisions of section 80-IB(10) were substantially amended by way of Finance (No.2) Act, 2004 w.e.f. 1st April, 2005. As can be noted from the amended provisions, there were several conditions that were imposed in the newly substituted section 80-IB(10) that were absent in the said section prior to its amendment. One such condition inserted w.e.f. 1st April, 2005 was clause(d) that put a restriction on the quantum of commercial area that could be included in a housing project in order to entitle the assessee to claim the deduction as set out in the said section. It is pertinent to note that in the appeals before us, it is an admitted fact that the housing projects were approved prior to 31st March, 2005. In ITXA No.308 of 2012, in fact, the project was even completed prior to 31st March, 2005 and only the profits were offered to tax in A.Y. 2005-06. We do not think that the Legislature intended to give any retrospectivity to clause (d) of section 80-IB(10). This more so because it is clearly a condition that relates to and/or is linked with the approval and construction of the housing project. At the time when the housing project is approved by the local authority, it decides, subject to its own rules and regulations, what quantum of commercial area is to be

1 (2015) 372 ITR 1 (Bom)

included in the said project. It is on this basis that building plans are approved by the local authority and construction is commenced and completed. It is very difficult, if not impossible to change the building plans and / or alter construction midway, in order to comply with clause (d) of section 80-IB(10). It would be highly unfair to require an Assessee to comply with section 80-IB(10)(d) who has got his housing project approved by the local authority, before 31st March, 2005 and has either completed the same before the said date or even shortly thereafter, merely because the Assessee has offered its profits to tax in A.Y. 2005-2006 or thereafter. Requiring the Assessee to comply with the condition set out in clause (d) of sub-section (10) of section 80-IB merely because he has offered his profits to tax in A.Y. 2005-06 or thereafter, even though his housing project was approved before 31st March 2005, would be requiring the Assessee to virtually do a humanly impossible task. This, in our opinion, could never have been the intention of the Legislature. In fact, to our mind, it would run counter to the very object for which these provisions were introduced, namely to tackle the shortage of housing in the country and encourage investment therein by private players. It is therefore clear that clause (d) of sub-section (10) of section 80-IB cannot have any application to housing projects that are approved before 31st March, 2005. The said clause (d) being inextricably linked to the date of approval of the housing project, it will have to be held that the said clause operates only prospectively i.e. for housing projects approved after 1st April, 2005. This is notwithstanding the fact that the profits were offered to tax by the Assessee for the A.Y. 2005-06 or thereafter.

36. There is yet another reason for coming to the aforesaid conclusion. Take a scenario where an Assessee following the project completion method of accounting, has completed the housing project approved by the local authority complying with all the conditions as set out in section 80-IB(10) as it stood prior to 1st April, 2005. If we were to accept the argument of the Revenue, then in that event, despite having completed the entire construction prior to 1st April, 2005 and complying with all the conditions of section 80-IB(10) as it stood then, the Assessee would be disentitled to the entire deduction claimed in respect of such housing project merely because he offered his profits to tax in the A.Y. 2005-06. In contrast, if the same Assessee had followed the work-in-progress method of accounting, he would have been entitled to the deduction under section 80-IB(10) upto the A.Y. 2004-05, and denied the same from A.Y. 2005-06 and thereafter. It could never have been the intention of the Legislature that the deduction under section 80-IB(10) available to a particular Assessee would be determined on the basis of the accounting method followed. This, to our mind and as rightly submitted by Mr Mistry would lead to startling results. We therefore have no hesitation in holding that section 80-IB(10)(d) is prospective in nature and can have no application to a housing project that is approved before 31st March, 2005. As the deduction sought to be claimed under section 80-IB(10) is inseparably linked with the date of approval of the housing project, it would make no difference if the construction of the said project was completed on or after 1st April, 2005 or that the profits were offered to tax after 1st April, 2005 i.e. in A.Y. 2005-06 or thereafter. We therefore

find no substance in the argument of the Revenue that notwithstanding the fact that the housing project was approved prior to 31st March 2005, if the construction was completed on or after 1st April, 2005 or if the profits are brought to tax in the A.Y. 2005-06 or thereafter, the said housing project would have to comply with the provisions of clause (d) of section 80-IB(10). To our mind, we do not think that the condition/restriction laid down in clause (d) of section 80-IB(10) has to be revisited and / or looked at and complied with in the assessment year in which the profits are offered to tax by the Assessee. When the Assessee claims a deduction under section 80-IB(10), the Assessee is required to comply with such a condition only if it is on the statute-book on the date of the approval of the housing project and it has nothing to do with the year in which the profits are brought to tax by the Assessee. We have come to this conclusion only because we find that clause (d) of section 80-IB(10) is inextricably linked to the date of the approval of the housing project and the subsequent development/construction of the same, and has nothing to do with the profits derived therefrom. We may hasten to add that if a particular condition is not inseperably linked to the date of approval of the housing project, different considerations would arise. However, we are not called upon to decide any such condition and hence we are not laying down any general proposition of law, save and except that clause (d) of section 80- IB(10) being a condition linked to the date of the approval of the housing project, would not apply to any housing project that was approved prior to 31st March, 2005 irrespective of the fact that the profits of the said housing project are brought to

> tax after the said provision was brought into force."

We notice that Gujarat High Court in case of **Maran Corporation** [1] has also taken a similar view. In any case where issue has now been considered by the Supreme Court in case of **Commissioner of Income-Tax Vs. Sarkar Builders**[2] . In that view of the matter it would be worthwhile to admit these appeals since no question of law can be stated to have arisen. Both the appeals are therefore dismissed.

(B.P.COLABAWALLA,J.) **(AKIL KURESHI,J.)**

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1 356 ITR 44

2 (2015)375 ITR 392 (SC)