Proportionate deduction u/s 80IB(10) when only some of the residential units exceed maximum built-up area prescribed

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SJR Builders v.ACIT [2010] 3 ITR(TRIB.) 569 (BANG.)

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10. In the premises of the above facts the assessee's representative further submitted briefly as under. Section 80-IB(10) provides for deducting from the total income the profit and gains derived from a housing project, if the conditions prescribed in clauses (a) to (d) are fulfilled. He submitted that even according to the Revenue authorities the assessee has fulfilled all the . conditions specified in the said clauses including the one in clause (c) to the extent of built-up area as defined in section 80-IB(14)(a). The premises was inspected by the DVO for measurement purposes on July 5, 2007 after more than one year from the date of issue of occupancy certificate on October 16, 2006. There could be every possibility of the occupants themselves making certain changes which is not attributable to the assessee at all. He further submitted that while sanctioning the plan it was evident that the assessee never envisaged any unit with a built-up area of more than 1500 sq.ft. The fact that the occupancy certificate was issued in the month of June, 2006 indicates that the assessee had adhered to the plan. A perusal of the occupancy certificate shows that it relates to 152 residential apartments of which 38 are duplex units. The total area of the duplex units may exceed 1500 sq.ft. The total area of each of the duplex apartment may exceed 1500 sq.ft but the area of such apartment when viewed within the meaning of the definition of "built-up area within the ambit of section 80-IB(14)(a) does not exceed 1500 sq.ft Actually the DVO has not physically measured any of the apartment discussed in the assessment order. The DVO's conclusion that each of the unit exceeds 1500 sq.ft is based on the assumption that they are penthouses and hence must have exceeded the prescribed area of 1500 sq.ft The only unit measured by the DVO in the Redwood project does not fit into the definition of built-up area as defined in the section. He argued that it is pertinent to note that the inspection was made only after the passing of the assessment order. The DVO has considered the total area of the duplex apartment and not at the floor level which is required to be considered for the purposes of section 80-IB(14)(a). A

reconciliation statement has been enclosed at page 14 of the paper book No. 1. The assessee also brought our attention to the decision of the Tribunal in I.T.A. Nos. 668 and 669/Bang/2006 in the case of M/s. G.R. Developers which was decided in the assessee's favour on similar set of facts. The assessee's representative submitted that none of the residential apartments had, therefore, contravened the provisions of section 80-IB(10). Therefore, he submitted that the claim for deduction amounting to Rs. 2,02,08,690 should be allowed.

11. The learned representative further submitted that alternatively, even if some of the residential units exceeded 1500 sq.ft then the deduction permissible must be residential unit-wise deduction and, therefore, proportionate deduction should be allowed. As per clause (c) of section 80-IB(10), the residential unit should have a maximum built up area of 1500 sq.ft. The assessee's representative reiterated that clause (c) of section 80-IB(10) refers to area of "the residential unit". The residential unit means deduction should operate and be computed unit-wise and, therefore, a particular unit satisfied the condition of section 80-IB, deduction should be automatically allowed in respect of that unit. It is only in respect of those units which have not fulfilled the stipulated condition the deduction is to be denied. He further submitted that if the law had wanted all the units to be within the specified limits, it would have stated that "all the residential units" should have a maximum built-up area of 1500 sq.ft In the absence of such all pervasive condition, deduction should be allowed in respect of profits for the units that fulfil the condition. Law prescribes maximum permissible size with reference to each residential unit. It does not do so qua the commercial units. Instead, it provides for the maximum overall size and all such commercial area together. This differentiation in stipulation indicates that exemption for residential apartment should be computed unit-wise. For the above proposition, he relied on the decision of the Bangalore Bench of the Tribunal in the case of Brigade Enterprises (P.) Ltd., in I.T.A. No. 1198/Bang/07, dated August 29, 2008, particularly to paragraph 5.1. He also relied on the decision of the Special Bench of the Income-tax Appellate Tribunal, Pune in the case of Brahma Associates v. Joint CIT in I.T.A. 1417/PN/06, dated April 6, 2009 [2009] 315 ITR (AT) 268, wherein the Tribunal held that the tax incentives by way of deduction under section 80-IB(10) is predominantly for the purpose of augmenting affordable dwelling units and it must be interpreted in that light only. The assessee's representative submitted that profits from units are to be allowed on the basis of method of accounting employed by the assessee. Accounting principles mandate recognition of profits from each unit separately and deduction should be allowed as such.

12. In support of the above, the assessee's representative submitted that the provisions relating to exemption, allowance and deduction,

rebate or relief should be interpreted liberally and broadly. For the above proposition he relied on the case of Union of India v. Wood Papers Ltd. [1991] 83 STC 251 ; AIR 1991 SC 2049. The assessee's representative particularly relied on the following observation (page 254 of STC) :

> "Literally exemption is freedom from liability, tax or duty. Fiscally it may assume varying shapes, specially in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective, etc. That is why its construction, unlike charging provision, has to be tested on a different touchstone. In fact an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augument State revenue. But once exception or exemption becomes applicable, no rule or principle requires it to be construed strictly. Truly speaking, liberal and strict construction of an exemption provisions are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction."

13. For the above proposition he relied further on the case CIT v. Gwalior Rayon Silk Manufacturing Co. Ltd., AIR 1992 SC 1782. In Bajaj Tempo Ltd. v. CIT [1992] 196 ITR 188 (SC) and also on the case of Controller of Estate Duty v. R. Kanakasabai [1973] 89 ITR 251 (SC). The assessee's representative summed up that where there is a partial noncompliance of the requirements of the law, there should not be complete disallowance of the deductions. Disallowance, if any, the assessee's representative submitted will have to be restricted to the extent of non-compliance of the provisions. This rule of proportionality is well founded in the income-tax law and is recognised under various sections of the Act. For e.g., the assessee's representative submitted that sections 10A(4), 10B(4), 10BA(4), 80HHC(3)(c)(i), 80HHD(3), 80HHE(3) and 80HHF(3), allow deduction in proportion of the export turnover to the total turnover. Further, under section 54EA, 54EB, 54EC, 54ED and 54F, exemption towards capital gains and under section 115F(1)(b), the benefit is available in proportion of the net consideration utilised to acquire new consideration arising out of transfer of old assets. In the present case, the profits attributable to the eligible residential units out of 152 residential units should be allowed as a deduction.

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16. Considering the rival submissions, we are of the view that the appeal by the assessee is to be allowed to the extent of the flats the built-up area of the flat is not more than 1500 sq.ft. We agree with the submission of the learned representative for the assessee that while considering the built-up area of 1500 sq.ft for the purpose of exemption under section 80-IB(10), the mezzanine floor and common areas are to be excluded. The Assessing Officer is directed accordingly. We hold that in respect of the penthouses the built-up area of which is more than 1500 sq.ft, they may be excluded for exemption. However, in the light of the decision of the Special Bench in the case of Brahma Associates v. Joint CIT [2009] 315 ITR (AT) 268 (Pune), merely because some flats are larger than 1500 sq.ft, the assessee will not lose the benefit in its entirety. Only with reference to the flats which have more than the prescribed area, the assessee will lose the benefit.

ITO v Air Developers [2009] 123 TTJ 959(NAG.)

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5. We have carefully considered the arguments of both the sides and perused the materials before us. The only dispute, in this appeal, is whether the assessee is entitled to deduction under Section 80-IB(10). At the relevant time Section 80-IB(l) read as under :

> "(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005 by a local authority, shall be hundred per cent of the profits derived in any 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;
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> (b) the project is on the size of a plot of land which has a minimum area of one acre; and
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> (c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometers from the municipal limits of these cities and one thousand and five hundred square feet at any other place."

Let us examine whether the assessee has fulfilled the conditions prescribed by Section 80-IB(10). There is no dispute about the fulfillment of the conditions prescribed under clause (a) of Section 80-IB(10) i.e., the project was commenced after the first day of October, 1998.

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5.6. The next question is whether the built-up area of the residential unit constructed by the assessee exceeded 1,500 sq. ft.

5.7. From the perusal of the assessment order, it is evident that the AO has worked out the built-up area after including the area of the balcony. The CIT(A) has also agreed with the above view of the AO that the area of the balcony is to be included in the built-up area. The IT Act did not define the term "built-up" area till the Finance (No. 2) Act, 2004 inserted clause (a) in the Section 80-IB(14). This clause defines the built-up area as under :

(a)"built-up area" means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units;

5.8. The learned CIT(A) is of the opinion that this definition of built-up area is clarificatory in nature and therefore would be retrospective in operation. He has, therefore, applied the same to the assessment year under consideration. We are unable to agree with the above view of the CIT(A) because the Finance (No. 2) Act of 2004 itself has made the provision effective from 1st April, 2005, i.e., from asst. yr. 2005-06. The legislature has the power to give retrospective effect to any provision and wherever the legislature intends to make any provision effective from back date, a specific mention is made in the Act with regard to the date from which the provision is intended to be effective. In respect of the definition of the built-up area, we find that the provision is made effective from 1st April, 2005. We find that the Hon'ble apex Court in the case of Virtual Soft Systems Ltd. v. CIT [2007] 207 CTR (SC) 733 : [2007] 289 ITR 83 (SC) held as under :

> "It is a well-settled legal position that an amendment can be considered to be declaratory and clarificatory only if the statute itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory. Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement made in the statute but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods. It is only in the Notes on Clauses relating to the 2002 amendment that it has been stated that the said amendment is clarificatory. There is no such mention of the said amendment being clarificatory,

anywhere in the statute itself. Such a statement in the Notes on Clauses cannot possibly bind the Court when even a statement in the statute itself is not regarded as binding or conclusive. The statute expressly states that the amendment would take effect only from 1st April, 2003."

5.9. Applying the ratio of the above decision of the Hon'ble apex Court, we find that sub-clause (a) of Section 80-IB(14) has been made effective by the legislature from 1st April, 2005. There is no mention in the Act that the insertion of the definition of the built-up area as above is clarificatory or declaratory. In view of above, we, relying up the decision of the Hon'ble apex Court in the case of Virtual Soft Systems Ltd. (supra) hold that the above definition would be applicable from 1st April, 2005 i.e., for the asst. yr. 2005-06 onwards.

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6.5. In the case of Bengal Ambuja Housing Development Ltd. (supra), the Tribunal, Kolkata Bench held as under :

"It is apparent from the perusal of Section 80-IB(10) that this section has been enacted with a view to provide incentive for businessmen to undertake construction of residential accommodation for smaller residential units and the deduction is intended to be restricted to the profit derived from the construction of smaller units and not from larger residential units. Though the AO has denied the claim of the assessee observing that larger units were also constructed by the assessee, at the same time, it is also a fact on record that the assessee had claimed deduction only on account of smaller residential units which were fulfilling all the conditions as contained in Section 80-IB(10) and the same has not been disputed by the AO also. We have also noted down the fact that even the provision as laid down in Section 80-IB(10) does not speak regarding such denial of deduction in case of profit from a housing complex containing both the smaller and large residential units and since the assessee has only claimed deduction on account of smaller qualifying units by fulfilling all the conditions as laid down under Section 80-IB(10), the denial of claim by the assessee is on account of rather restricted and narrow interpretation of provisions of clause c of Section 80-IB{10) while coming to such conclusion, we also find support from the order of the Hon'ble Supreme Court in case of Bajaj Tempo Ltd. v. CIT (supra), wherein it was held that provisions should be interpreted liberally and since in the present case also, the assessee by claiming pro rota income on qualifying units has complied with all the provisions as contained in the said section, in our considered opinion, such claim of the assessee was rightly allowed by the learned CIT(A) by reversing the order of AO."

6.6. The above decision of the Tribunal, Kolkata Bench is also upheld by the Hon'ble Tribunal, Calcutta High Court in IT Appeal No. 453 of 2006 wherein the Hon'ble High Court vide order dt. 5th Jan., 2007 held as under:

> 'The appeal is now taken up for hearing and after hearing the learned counsel for the parties and perusing the order passed by the Tribunal, we find that no substantial question of law is involved in this matter. Hence we dismiss the appeal."

6.7. The ratio of the above decision of the Tribunal, Kolkata Bench would be squarely applicable to the case under consideration before us because the facts are identical. Moreover, even if it is held that in view of the above two decisions of the Tribunal, two views are possible with regard to interpretation of Section 80-IB(10), it is a settled law that the view favourable to the assessee should be adopted. Sec. 80-IB(10) is a beneficial provision and it has been held by the Hon'ble apex Court in the case of Bajaj Tempo Ltd. v. CIT [1992] 104 CTR (SC) 116 : [1992] 196 ITR 188 (SC) that a beneficial provision should be interpreted liberally. If an assessee has developed a housing project, wherein the majority of the residential units has a built-up area of less than 1, 500 sq. ft. i.e., the limit prescribed by Section 80-IB(10) and only a few residential units are exceeding the built-up area of 1,500 sq. ft., there would be no justification to disallow the entire deduction under Section 80-IB(10). It would be fair and reasonable to allow the deduction on proportionate basis i.e. on the profit derived from the construction of the residential unit which has a built-up area of less than 1,500 sq. ft. i.e. the limit prescribed under Section 80-IB(10). In view of the above, we direct the AO that if he finds that the built-up area of some of the residential units is exceeding 1,500 sq. ft., he will allow the proportionate deduction under Section 80-IB(10). Accordingly, the appeal of the Revenue is dismissed and cross-objection of the assessee is deemed to be partly allowed as above.

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ACIT v. Bengal Ambuja Housing Development Ltd. ITA No. 1735/Kol./2005 (Cross appeal ITA No. 1595/Kol./2005)

Facts :

The assessee was engaged in the business of development and construction of residential apartments. One of its projects consisted of 261 residential units and the individual flat size varied between 800 sq.ft to 3,000 sq.ft. It had claimed deduction u/s.80IB(10) of the Act with reference to the profit attributable to the built-up area, which was occupied by the residential units having individual flat size of less

than 1,500 sq.ft. The profit was computed on a proportionate basis — based on the ratio of the built-up area of the eligible sized flats to the total area of the project. Similar deduction was also claimed with reference to the income earned on account of the forfeited amount on cancellation of the agreement by the prospective buyers and on the sale of scrap ('other income').

According to the AO, the deduction was allowable only where each and every residential unit comprised in the project had maximum built-up area of 1,500 sq.ft. Further, in respect of the other income, since the said income was not derived directly from the project itself, according to him, no deduction could be allowed. Thus, the assessee's claim was rejected. On appeal, the CIT(A) gave partial relief by allowing deduction in respect of the profit derived on sale of flats. However, in respect of the other income, he upheld the order of the AO. So both the parties filed appeal before the Tribunal.

Held :

The Tribunal noted that the provisions of S. 80IB(10) do not provide for denial of deduction, if a housing complex contains both, the smaller and larger residential units. Following the decision in the case of Bajaj Tempo Ltd., where the Supreme Court had observed that such provisions should be interpreted liberally, it upheld the order of the CIT(A) qua the deduction claimed with reference to the profit on sale of residential units.

In respect of the income earned on account of the forfeited amount on cancellation of the agreement by the prospective buyers, the Tribunal found that the said receipts by the assessee were directly related to the construction and development of the housing complex, and hence, eligible for deduction u/s.80IB(10). As regards the income from scrap, it was noted that it was not the case of the Revenue that such scrap was from the business, other than the business of construction and development of residential complex. Thus, according to it, the scrap was generated from the construction and development activity only. Thus, according to the Tribunal, the CIT(A)'s action in denying the deduction was not correct, accordingly, the assessee's cross appeal on the point was allowed.
(Contents taken from BCA website)

ACIT v.Sheth Developers (P.) Ltd. [2009] 33 SOT 277 (MUM.)

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22. Coming to the last of the three projects, namely, Aishwariya, apart from the common reasonings for rejecting assessee's work out of the built-up area, Assessing Officer has also noted that in the workings

submitted, assessee itself showed a built-up area exceeding 1000 sq. ft. in one flat each of first to eighth floors of Wing 'A'. We have already ruled against considering any part of the balcony area for calculating the built-up area and also held that measurement based data furnished by the assessee with regard to the built-up area, is in accordance with commonly understood meaning of the term 'built-up area'. In the case of Aishwariya project, no doubt assessee's own workout show that some of the flats had built-up area exceeding 1000 sq. ft. Even the DVO's work-out show that built-up area of flats in Block A and built-up area of eight flats out of sixteen flats in respect Block B exceeded 1000 sq. ft. However in blocks C to E which consisted of 96 flats, the built-up area were less than 1000 sq. ft. in each of the case. Thus, without doubt by assessee's own admission, at least in a few cases, the built-up area exceeded 1000 sq. ft. Now the question is whether the benefit of section 80-IB(10) can be given to a project even where some of the units exceeded 1000 sq.ft. of built-up area. As aforesaid assessee was denied deduction under section 80-IB(10) only for a reason that it failed the test of limit in 1000 sq. ft. In the case of Bengal Ambuja Housing Development Ltd. (supra), we find that a similar issue had arisen. The question referred by the revenue before the Tribunal, was as under :

> "(i)That on the facts and in the circumstances of the case, the ld. CIT(A) has erred in directing the Assessing Officer to allow deduction of Rs. 1,85,81,905 under section 80-IB(10) in respect of the profits of housing project Udita-III in spite of the fact that built up area of 111 residential units of the said project are above 11500 sq. ft."

The Tribunal at para 22 after considering various arguments put forward by both the parties held as under :

> "It is apparent from the perusal of section 80-IB(10) that this section has been enacted with a views to provide incentive for businessmen to undertake construction of residential accommodation for smaller residential units and the deduction is intended to be restricted to the profit derived from the construction of smaller units and not from larger residential units. Though the Assessing Officer has denied the claim of the assessee observing that larger units were also constructed by the assessee, at the same time, it is also a fact on record that the assessee had claimed deduction only on account of smaller residential units which were fulfilling all the conditions as contained in section 80-IB(10) and the same has not been disputed by the Assessing Officer also. We have also noted down the fact that even the provisions as laid down in section 80-IB(10) does not speak regarding such denial of deduction in case of profit from a housing complex containing both the

smaller and large residential units and since the assessee has only claimed deduction on account of smaller qualifying units by fulfilling all the conditions as laid down under section 80-IB(10), the denial of claim by the assessee is on account of rather restricted and narrow interpretation of provisions of clause (c) of section 80-IB(10) while coming to such conclusion, we also find support from the order of the Hon'ble Supreme Court in case of Bajaj Tempo Ltd. (supra), wherein it was held that provisions should be interpreted liberally and since in the present case also, the assessee by claiming pro rata income on qualifying units has complied with all the provisions as contained in the said section, in our considered opinion, such claim of the assessee was rightly allowed by the ld. CIT(A) by reversing the order of the Assessing Officer."

Again in the case of Brigade Enterprises (P.) Ltd. (supra) decided by the Bangalore Bench of this Tribunal, it was held that where some of the residential units in a bigger housing project if treated independently were eligible for relief under section 80-IB(10), then relief should be given pro rata and should not be denied by treating the bigger project as a single unit. Again we find that a similar issue had come up before the Nagpur Bench of this Tribunal in the case of ITO v. AIR Developers [IT Appeal No. 447 (Nag.) of 2007, dated 21-5-2008]. After referring to the decision in Bengal Ambuja Housing Development Ltd.'s case (supra), it was held by the Tribunal at para 6.7 of its decision dated 21-5-2008 as under :

"The ratio of the above decision of the ITAT, Kolkata Bench would be squarely applicable to the case under consideration before us because the facts are identical. Moreover, even if it is held that in view of the above two decisions of the ITAT, two views are possible with regard to interpretation of section 80-IB(10), it is a settled law that the view favourable to the assessee should be adopted. Section 80-IB(10) is a beneficial provision and it has been held by the Hon'ble Apex Court in the case of Bajaj Tempo Ltd. 196 ITR 188 that a beneficial provision should be interpreted liberally. If an assessee has developed a housing project, wherein the majority of the residential units has a built-up area of less than 1500 sq.ft. i.e., the limit prescribed by section 80-IB(10) and only a few residential units are exceeding the built-up area of 1500 sq. ft., there would be no justification to disallow the entire deduction under section 80-IB(10). It would be fair and reasonable to allow the deduction on proportionate basis i.e., on the profit derived from the construction of the residential unit which has a built-up area of less than 1500 sq.ft. i.e., the limit prescribed under section 80-IB(10). In view of the above, we direct the Assessing Officer that if he finds that the built-up area of some of the residential units is exceeding 1500 sq.ft., he will allow the proportionate deduction under section 80-

IB(10). Accordingly, the appeal of the revenue is dismissed and cross objection of the assessee is deemed to be partly allowed."

Here, the learned Assessing Officer as well as the CIT(A) had declined to give the assessee the benefit of section 80-IB(10) for the Aishwariya project for the sole reason that some of the units exceeded 1000 sq. ft. and therefore the stipulation contained in clause (c) of sub-section (10) of section 80-IB of the Act was not satisfied. However, as aforesaid the Kolkata, Bangalore and Nagpur Benches of this Tribunal had clearly held even where some of the units exceeded the area limit relief had to be given on pro rata basis. We also find that Special Bench of the Tribunal in the case of Brahma Associates (supra) allowed pro rata relief, even where assessee had utilized space for commercial purpose up to the extent of 10 per cent in an approved housing project. Following these, we are of the opinion that assessee is eligible for relief on pro rata basis in respect of the flats which did not have a built up area exceeding 1000 sq.ft. in respect of Aishwariya project. Thus, the quantum of deduction under section 80-IB(10) in respect of the Aiswariya project for the flats which have built-up area less than 1000 sq. ft., has to be worked out on pro rata basis in line with our discussion in the preceding paras.

DCIT v.Brigade Enterprises (P.) Ltd. [2009] 28 SOT 7 (BANG.)(URO)

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5. We have heard rival submissions and perused the records. The assessee had filed compilation of documents numbering from pp. 1 to 30 which contain proceedings of the Government of Karnataka, proceedings of the Bangalore Development Authority (BDA), BESCO approval, BWSSB approval, commencement certificates, occupancy certificates and other documents. The new housing policy of the Government of Karnataka provided for development of lands in cases where the same were notified for acquisition but not acquired subject to certain directions and conditions as contained in that order. The new housing policy was notified under Notification No. HUD/341/MNX/95, dated 17-11-1995. This document is found at pp. 29-30 of the paper book. The assessee had clearly identified and demarcated land in respect of each project within Brigade Millennium independently. From the facts submitted by both the Revenue and the assessee, following facts emerge :

(i)Approval for group housing project was secured from BDA on 24-5-2002.

(ii)Plan approval for construction from BDA was obtained on 14-2-2003, and 20-6-2003, for blocks 'C' and 'A' respectively.

(iii)Commencement certificates had been issued by the authorities.

(iv)The assessee obtained clearance from BWSSB for block 'A' on 17-2-2004, and block 'C' on 18-8-2005.

(v)The assessee obtained permission from BESCOM for block 'A' on 18-6-2003, and block 'C' on 13-1-2005.

(vi)The assessee also obtained clearance from the Fire Service Department for block 'A' on 12-3-2004, and block 'C' on 13-1-2006.

5.1 From the facts it transpires that the authorities like BESCOM, BWSSB and Fire Service Department duly inspected the plot and sanctioned plans for each of the blocks separately, after satisfying themselves. Further, it is seen that the group housing approval was a master plan. It was an approval of a concept. The components of projects like residential area, school, and civic amenities were detailed therein. As per clause (c) of section 80-IB(10), a residential unit should have a maximum built-up area of 1,500 sq. ft. Clause (c) refers to "area" of "residential unit". The use of words "residential unit" means that deduction should be computed unit-wise. Therefore, if a particular unit satisfies the condition of section 80-IB, the assessee is entitled for deduction. So considered, it is only in respect of those units which have not fulfilled the stipulated conditions, deduction should be denied. The law prescribes maximum permissible area with reference to each residential unit. In the case in hand, each of the blocks 'A' and 'C' constructed by the assessee, after obtaining plan sanction from the local authority namely BDA and plan approval from other departments, are within the conditions stipulated under the Act. This fact is not denied by the Revenue. Further, in view of the fact that the assessee was granted approval separately for each of the blocks 'A' and 'C' by the BDA shows that though it was a group project, the consideration therefrom is a separate and independent unit.

5.2 Further, it is to be seen that plan for development was only a work order and not final plan sanctioned by the local authority. For any project, there could not have been a plan without submission of the detailed building plans by the architects and all the requisite details required to be submitted for approval of the building plans by the local authorities. This has been submitted to the local authority by the assessee subsequent to the receipt of work order. Further, it is seen that the assessee had sought for approval from the BDA only as an independent and individual plan for each of the blocks including commercial part of the project. Further, from the sanction order issued by the BDA dated 14-6-2002, for 'Mayflower', dated 5-2-2003, for 'Cassia', it is apparent that the plan sanctions were approved for each of the blocks independently. We have had the benefit of each of the approvals, plan sanction and certificates issued by the

Government authorities. Even though the projects of the assessee are bigger ones consisting of independent units, the assessee had claimed the benefit under section 80-IB only in respect of blocks 'A' and 'C' namely 'Mayflower' and 'Cassia', In respect of other units viz., Magnolia, Jacaranda and Laburnum the assessee did not avail or claim the benefit under section 80-IB. The learned CIT(A), after having considered the facts in detail, is justified in concluding that 'Mayflower' and 'Cassia' are independent projects for the purposes of section 80-IB. Further, profits from the units will have to be arrived, based on the method of accounting employed. Accounting principles would mandate recognition of profits from each unit separately. It is with reference to such profits that the deduction under section 80-IB would be allowed. The manner of accounting for profits would also support a conclusion that the deduction under section 80-IB is to be computed qua each residential unit.

6. The cardinal rule for interpretation of any provision relating to exemption, allowance, deduction, rebate or relief is that they should be interpreted liberally and broadly so as to advance the object sought to be achieved and not frustrate it.

6.1 In the case of Union of India v. Wood Papers Ltd. AIR 1991 SC 2049 the Supreme Court, in the context of interpreting exemption provisions held as under :

> "...Literally exemption is freedom from liability, tax or duty. Fiscally it may assume varying shapes, specially in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective etc. That is why its construction, unlike charging provision, has to be tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly, speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction." (p. 2051)

6.2 In CIT v. Gwalior Rayon Silk Mfg. Co. Ltd. [1992] 196 ITR 149 (SC), the Supreme Court observed as under :

"The contextual meaning has to be ascertained and given effect to. A provision for deduction, exemption or relief should be construed reasonably and in favour of the assessee."

6.3 In the case of Bajaj Tempo Ltd. v. CIT [1992] 196 ITR 188 (SC), approving decisions of Bombay High Court reported in Capsulation Services (P.) Ltd. v. CIT [1973] 91 ITR 566 (Bom.) and Punjab and Haryana High Court in Phagoo Mal Sant Ram v. CIT [1969] 74 ITR 734 (Punj.&Har.), the Apex Court held :

"A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate it." (p. 189)

This would thus mean where there is partial or nominal non-compliance of the requirements of law there should not be a complete disallowance of deductions. The disallowance, if any, will have to be restricted to the extent of non-compliance of the provisions. This rule of proportionality is well-founded in the income-tax law and is recognized under various provisions of the Act.

6.4 The Chennai Bench of the Tribunal in the case of Arun Excello Foundations (P.) Ltd. v. Asstt. CIT [2008] 166 Taxman 53 (Chennai) (Mag.) held as follows :

"...The learned Authorized Representative of the assessee has already raised alternative plea in this regard that the deduction under section 80-IB(10) on the residential units constructed by the assessee be given on pro rata basis. Here, we agree with the plea taken by the assessee and accordingly, we direct the Assessing Officer to allow the claim of the assessee on the residential units constructed on pro rata basis..." (p. 83)

6.5 The Kolkata Bench of the Tribunal, in the case of Asstt. CIT v. Bengal Ambuja Housing Development Ltd. [2007] 39-D BCAJ 546, was faced with a case involving a project consisting of 26 residential units wherein the individual flat sizes varied between 800 to 3,000 sq. ft. Deduction under section 80-IB(10) was claimed with reference to profit attributable to the built-up area, which was occupied by the residential units having individual flat size of less than 1,500 sq. ft. The Tribunal, upholding the order of the CIT(A) noted that the provisions of section 80-IB(10) do not provide for denial of deduction, if a housing complex contains both the smaller and larger residential units. It concluded that profits attributable to eligible residential units are entitled for deduction in spite of the fact that other residential units are greater than 1,500 sq. ft. built-up area.

6.6 The Mumbai Bench of the Tribunal, in the case of Saroj Sales Organisation v. ITO [2008] 115 TTJ (Mum.) 485 granted deduction for two blocks comprising of 9 wings out of total 11 wings on the ground that each such block complied with the conditions of section 80-IB(10). The Tribunal held as under :

> "In our view, combining these two projects into one will lead to a result which manifestly will be unjust and absurd and defeat the very provisions of deduction sections. Unless there is a clear intention of the legislature the Revenue cannot be permitted to do so. After all the assessees have obtained different commencement certificates and started on different period of time. They are separate by time, space and statutory approvals and even in designs, maintenance of separate books of account. The Revenue in our view, is not right in treating both the projects as one and integrated without the facts warranting for such conclusion."

7. On the facts and in the circumstances of the case, the deduction under section 80-IB(10) is available in respect of both the blocks and the learned CIT(A) was justified in upholding the claim of the assessee. It is ordered accordingly.

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G.V. Corporation v. ITO [2010] 38 SOT 174 (MUM.)

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11. So far as the other condition, namely, that each residential unit in the housing project shall not exceed built-up area of 1,000 sq.ft. as defined in clause (a) of sub-section (10) of section 80-IB, the stand taken by the CIT is that the assessee has not produced the relevant details and proved that the condition has been satisfied and further that the Assessing Officer has not verified the actual measurements of each flat. In this connection, it is necessary to refer to the assessee's letter dated 15-12-2006 written to the Assessing Officer, the copy of which is placed in the paper book. The assessee has furnished, inter alia, the total lay out plan of Hari Om Nagar and other details relating to the project and has stated therein that the residential units were of built-up area of less than 1,000 sq.ft. each. In support of the claim, the assessee had furnished annexure V to the aforesaid letter containing the details of the sales in building Nos. 1 to 4 in Millennium Park. This annexure contained the building No., flat No., carpet area of each flat, its built-up area, the name of the purchaser, address and the sale value of the flat. No fault has been found in these details which show that each flat was of built-up area less than 1,000

sq.ft. Paragraph 9 of the order of the CIT also shows that before the completion of the assessment, the Assessing Officer had made enquiries under section 131 of the Act with regard to the built-up area of the residential units. It is better to reproduce the observations of the CIT himself in this connection:—

> "No reference was made by the Assessing Officer at all to have an authentic measurement. The assessee's contention that the Assessing Officer 'deputed' an independent architect is also not borne out from the records/order sheet. The details were filed by the assessee during the assessment proceedings on 27-12-2006 and the assessment completed on 29-12-2006. Earlier some enquiries were made under section 131 of the Income-tax Act. Mr. Girish S. Parwatkar vide his letter dated 4-12-2006 stated that at the time of possession, the adjacent self-contained room (i.e., flat No. 404) is enclosed to the flat No. 405 by the builder. One Shri Mukesh Mohanlal Mishra, deposed under section 131 on 8-12-2006 before the Assessing Officer in reply to the question 'Have you joined the flat Nos. 705/03 and 706/03' that 'for security reason we have made an extra window'. This resulted in coverage of some area of some passage. In reply to question No. 6, Shri Bhagawat Wani in examination under section 131 stated on 7-12-2006 that the Builder had joined the flat Nos. 702 and 701, by breaking the common wall of the hall."

12. The aforesaid observations are indication of the fact that Assessing Officer did apply his mind to the question whether each residential unit exceeded built-up area of 1,000 sq.ft. and had also conducted enquiries in those cases where the flats were so joined as to exceed the aforesaid limit and had also enquired into the reason why they were joined. We are not able to think of any reason as to why the Assessing Officer should have conducted the above enquiries under section 131 except for the reason that he came to know that the two flats exceeded the prescribed built-up area and wanted to know the reason for the same. Even in the proposal submitted by the Assessing Officer to the CIT inviting the letter to take action under section 263, which is reproduced in the first two pages of the order of the CIT, we find no mention of any case where the residential unit exceeded the built-up area of 1,000 sq.ft. Apparently the Assessing Officer by conducting the enquiries under section 131 of the Act was satisfied that it was due to compelling reasons of the purchasers of the units that the flats were so joined that they exceeded the aforesaid limit and that it did not constitute any violation of the basic conditions subject to which the deduction was granted to the assessee. In the course of the hearing before us, the learned counsel for the assessee stated that out of 140

flats, only 9 flats or residential units were combined by the owners into four flats for reasons that are very valid. For example, he drew our attention to flat Nos. 704 to 706 in annexure V filed by the assessee under cover of letter dated 15-12-2006 addressed to the Assessing Officer which showed that all the three purchasers of the three residential units were Sonawanes and belong to the same family and apparently they insisted that the three adjacent flats, each of less than 1,000 sq.ft. built-up area, purchased by them should be joined so that they will have a single flat of 1,602 sq.ft. of built-up area. It is common knowledge that members of the same family who purchase separate residential units adjacent or contiguous to each other often join them by breaking down a wall or by opening a door way or in many other ways so that the entire family lives together and gets more space to live. In many cases, a request is made by the purchasers to the builder or developer of the housing project to join the flats/residential units and the request is carried out by the builder. In such cases, it is not possible to hold that the builder built the residential flat of more than 1,000 sq.ft. of built-up area. There is no evidence on record to suggest that the assessee itself advertised that the flats were of more than 1,000 sq.ft. and that merely to get the benefit of section 80-IB he drew the plans in such a manner that each residential unit was shown as not more than 1,000 sq.ft. of built-up area. It is not also the case of the CIT that each flat in the housing projects undertaken by the assessee could not have been used as an independent or self-contained residential unit not exceeding 1,000 sq.ft. of built-up area and that there would be a complete, habitable residential unit only if two or more flats are joined with each other, which would ultimately exceed 1,000 sq.ft. of built-up area. In such a situation, merely because 9 out of 140 purchasers desired to join the flats purchased by them into one single unit, which exceeded 1,000 sq.ft. of built-up area, cannot disentitle the assessee to the deduction. In other words, taking the example of the flats purchased by the Sonawanes', there is no allegation that the flat No. 704 measuring 244 sq.ft. purchased by Meera Sonawane, flat No. 705 measuring 578 sq.ft. purchased by Supriya Sonawane and flat No. 706 measuring 780 sq.ft. purchased by Ethin Sonawane were not independent residential units by themselves and could become independent residential units only when they were joined or combined together. If each residential unit does not exceed the built-up area of 1,000 sq.ft., the fact that they were joined together by the purchasers for better living or for more space or for any other reason does not disentitle the assessee to the claim for deduction under section 80-IB.

13. Even assuming for the sake of argument that there was a violation of the condition (c) prescribed by section 80-IB(10), the result thereof

would not be denial of the claim for deduction as has been held by the Special Bench (Pune) in the case of Brahma Associates v. Jt. CIT [2009] 119 ITD 255. In this case, it was found that a small part of the building was built for commercial use. The condition that the entire building should have been built for residential use was, thus, not satisfied. However, the portion used for commercial purposes was minimal and less than 10 per cent of the total built-up area. In such circumstances, the Tribunal held that the deduction under section 80-IB(10) cannot be totally denied and if it is found that even if the commercial use exceeds 10 per cent, but the residential segment of the project satisfies all the requirements of sub-section (10) on stand alone basis and the income from the construction of the residential units can be ascertained on a stand alone basis, the deduction would be available in respect of the residential segment of the project. Applying, with respect, the ratio laid down in the Special Bench case, we find that in the present case the violation, if any, of condition (c) of sub-section (10) is much less than 10 per cent, say around 6.5 per cent to 7 per cent only, and, therefore, the deduction for the profits arising from the housing project cannot be denied. The extent of violation, if at all there is a violation, is so less that it would be inappropriate to deny the deduction totally. The Special Bench has further held that even if the commercial user of the built-up area of the building exceeds 10 per cent, the assessee would still get the proportionate deduction, i.e., the deduction would be confined only to the profits of the residential segment of the overall profit. Therefore, even if the assessee cannot be given the entire deduction under section 80-IB, it should be eligible for the proportionate deduction as envisaged by the Special Bench. It has been brought to our notice by the assessee that the Chennai Bench of the Tribunal in the case of Arun Excello Foundations (P.) Ltd. v. Asstt. CIT [2007] 108 TTJ (Chennai) 71 and the Bangalore Bench of the Tribunal in Dy. CIT v. Brigade Enterprises (P.) Ltd. [2009] 28 SOT 7 (URO) have held that even where the violation exceeds the limit of 10 per cent, the entire deduction cannot be denied but the same should be allowed proportionately. In this view of the matter also the grant of deduction by the Assessing Officer in the present case cannot be said to be erroneous and prejudicial to the interest of the revenue.

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M/s Aakar Associates V/s Income-tax Officer (ITA No.2903/Ahd/2008, dated 04/05/2011)

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5.5 In the light of the view taken in the aforesaid decisions, especially when the Revenue have not placed before us any contrary decision, we have no hesitation in allowing the claim of the assessee for deduction u/s. 80-IB (10) of the Act on proportionate basis i.e. on the profit derived from construction of the residential units which have a built up area of less than 1500 sq. ft.. Accordingly, the AO is directed to allow the claim for deduction u/s 80IB(10) of the Act on the profit derived from construction of the residential units which have a built up area of less than 1500 sq. ft.. The units with built area exceeding 1500 sq. ft. would not be eligible for deduction u/s 80IB(10) of the Act. Subject to these directions, ground nos.1 to 3 in the appeal are allowed to the extent indicated hereinbefore.