

(2014) 01 DEL CK 0268
In the Delhi High Court
Case No : ITA 298 of 2013

Commissioner Income Tax-I

APPELLANT

Vs

CHD Developers Ltd.

RESPONDENT

Date of Decision : 22-01-2014

Acts Referred:

Citation : (2014) 3 AD 165 : (2014) 266 CTR 360 : (2014) 362 ITR 177

Hon'ble Judges : S. Ravindra Bhat, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Rohit Madan and Mr. P. Roy Chaudhuri, for the Appellant; S. Krishnan, for the Respondent

Judgement

S. Ravindra Bhat, J.—The substantial question of law urged in this appeal by the revenue pertains to Section 80IB(10), particularly Section 80-IB(10)(a)(ii) read with the Explanation. It is urged that the Income Tax Appellate Tribunal (ITAT) fell into error in granting the benefit of Section 80IB(10), having regard to the fact that the project completion certification had not been issued, in the facts of this case, by the authority prescribed by Explanation (ii).

2. The assessment year is 2007-08. The assessee, a real estate developer, launched a project known as "Krishna Lok" in Vrindavan. It obtained the approval of the project on 16.03.2005 from the Mathura Vrindavan Development Authority. At the relevant time i.e. on 16.03.2005 when the approval was granted the provision of Section 80IB read as follows:-

Section 80-IB(10) prior to the amendment of 1.4.2005:

Sub s. by Finance (No. 2) Act, 2004 (23 of 2004), sec. 18(d), for sub-section (10) w.e.f. 1-4-2005). Earlier subsection (10) was amended by the Finance Act, 2000 (10 of 2001), sec. 39(e)(i) and (ii) (w.e.f. 1.4.2001), by Finance Act, 2003 (32 of 2003), Sec (c)(i) and (ii) (w.e.f. 1.4.2002). Sub-section (10), before substitution by Finance (No. 2) Act, 2004, stood 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;

(b) the project is on the size of a plot of land which has minimum area of one acre; and

(c) the residential unit has a minimum 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 kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place.

3. Soon after the Finance (No. 2) Act of 2004; this was brought into force w.e.f. 01.04.2005. The effect of this amended provision read as follows:-

Section 80IB(10) in the post-amendment period:-

(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 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 cities 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;

(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 of five thousand square feet, whichever is higher.

4. The Income Tax Officer for the assessment year 2007-08 sought to disallow the benefit claimed by the assessee on the reasoning that the completion certificate in terms of Explanation (ii), had not been granted so as to enable it to avail the benefit, provided by Section 80IB(10). The assessee had then relied upon the letter appearing for the issue of the completion certificate written on 05.11.2008. The CIT(A) rejected the assessee's appeal. The assessee accordingly approached the Tribunal which after due consideration of the arguments, granted the benefit claimed by it.

5. Counsel for the revenue urges that the Tribunal fell into error in not giving effect to the Explanation (ii) which mandates that the completion envisioned by Section 80IB(10)(a)(ii) is that the completion certificate should be issued before the end of the relevant period i.e. 4 years from the end of the financial year in which the housing project is approved by the local authority. Elaborating on this, counsel submitted that since the approval was granted on 16.03.2005 in this case, the period by which the completion certificate ought to have been issued by the local authority was 31.03.2009. That the assessee claimed completion certificate on 05.11.2008 was of no avail to it because of the terms of Explanation (ii). Counsel submitted that having regard to these circumstances the Tribunal fell into error in granting the benefit instead of upholding the order of CIT(A).

6. The ITAT in the impugned order took note of the facts and analysed them as follows:-

8. Now we shall take up the appeal of the assessee (ITA no. 4694/Del/10 for A.Y. 2007-08). Though the assessee has raised as many as seven grounds for appeal, but if all the grounds are summarized, the only ground remains which pertains to the disallowance of deduction u/s. 80-IB(10). Learned counsel for the assessee

also fairly explained that the issue pertains to only 80-IB(10) and the remaining grounds are only argumentative.

8.1. The crux of argument on behalf of the assessee is that the vide letter dated 5-11-2008 the assessee had applied for completion certificate but the completion certificate was not issued to the assessee which is beyond the control and power of the assessee. Our attention was also invited to page 22 of the paper book containing a certificate signed by the Architect of the assessee i.e. Candid Design Consortium Pvt. Ltd., in which the total area of the Type-A flat has been mentioned at 1492.43 sq. Ft. Ld. Counsel submitted that for A.Y. 2006-07 deduction was allowed to the assessee and it is the same sanction plan which could not be denied for the next year. It was emphatically argued that the total built up area is below the prescribed limit of 1500 sq. Ft. And there is no violation of the Act. It was also pleaded that the project was approved on 16-3-2005 which is well before 1-4-2005 and the assessee was to complete the project on or before 31-3-2009. The Id. counsel also relied on the decisions of Visakhapatnam & Delhi Benches of the ITAT as also the decision of Hon''ble Gujarat High Court, which we will discuss while coming to a particular conclusion. The crux of the argument is that requirement of completion certificate was merely directory and not mandatory. Reliance was placed upon the decision dated 29-2-2012 of Hon''ble Karnataka High Court (ITA no. 138 of 2010) to the effect that it is prospective in nature.

8.2. On the other hand, Id. Sr. DR took us to various pages of the assessment order by submitting that the case laws relied upon by the assessee are not applicable to the facts of the present appeal and even no such certificate was issued to the assessee till date, therefore, deduction was rightly denied to the assessee.

8.3. In reply, the learned counsel for the assessee contended that for AY. 2006-07 on identical facts deduction was granted to the assessee on some of the flats, therefore, for the sake of consistency no "U turn" is permissible for the next year, specially when the facts are same.

8.4. We have considered the rival submissions and perused the material available on record. The facts in brief are that the assessee declared taxable income of Rs. 5,97,15,620/- in its return filed on 31-10-2007. The case of the assessee was selected for scrutiny. The assessee claimed deduction of Rs. 5,19,92,472/-u/s. 80-IB(10). The Assessing Officer asked the assessee to give justification for claiming such deduction. Ld. Assessing Officer denied the claim on two counts- firstly, the built up area of the unit is above prescribed limit of 1500 sq. Ft. And secondly for earlier assessment order identical deduction was claimed by the assessee and the assessee violated the conditions stipulated u/s. 80-IB(10) in Type-A flats. Ultimately, the Id. Assessing Officer denied such deduction to the assessee. The assessee filed various documents before the Assessing Officer and the same were examined by her. Finally the Id. Assessing Officer concluded that the conditions laid down u/s. 80-IB(10) were not satisfied, therefore, the claim of

deduction could not be allowed to the assessee.

8.5. On appeal before the Id. CIT(A) the claim of the assessee was examined and ultimately the assessment order was upheld. The aggrieved assessee is in appeal before this Tribunal.

8.6. If the totality of facts available on record and the assertion made by the Id. respective counsels are kept in juxtaposition, broadly the Id. CIT(A) is influenced by the sale transactions with Rajasthan Global Securities Ltd., it was confirmed that the amount of Rs. 5,36,89,920/- was paid to the assessee as advance for purchase of 37 flats in Krishnalok project. However, what it may be the moot issue to be adjudicated by us pertains to sec. 80-IB(10). We further find that as contained in para 1.2 (page 5) of the impugned order, the Id. CIT(A) has examined the submissions of the assessee and the reason of denial of deduction to the assessee by the Id. Assessing Officer. The relevant portion from the impugned order is reproduced hereunder:

It was further submitted that Addl. CIT wrongly tries to prove that sale with M/s. Rajasthan Global Securities Ltd. 9 RGSL) are not accounted for properly and undue profit has arisen on account of 80-IB whereas these are normal business transactions undertaken by assessee company with M/s. Rajasthan Global Securities Ltd. having no mutual relation whatsoever. The Assessing Officer has objected to the issue of preferential shares and its valuation. The assessee company has issued preferential shares to various persons as per SEBI guidelines and approval of Bombay Stock Exchange. The assessee company is a listed company and does not have any discretion about the issue price and require to issue shares through preferential allotment only at the rate as per SEBI guidelines and approved by stock exchange. During the year the assessee company has calculated average market price as per general meeting, certification by statutory auditor etc., has submitted to Bombay Stock Exchange and has issued the preferential share after getting approval from Bombay Stock Exchange. These are normal business transactions because these are issued as per SEBI and Stock Exchange guidelines. These shares are issued to a number of companies and individuals and not only to RGSL. Valuation of these shares are done as per SEBI and Stock Exchange guidelines which were as per average market rates and approved by Board of Directors and General Meeting of CHD, statutory auditor and Bombay Stock exchange approval. There is no close or remote nexus between CHD and RGSL. There is no common relation among the directors or major share holders. Since CHD is listed company it has no control over market rate or guidelines of SEBI and Stock Exchange. It is immaterial for CHD what its shareholder does not with their investments. As regard Assessing Officer's observation that the assessee has booked substantial sales with respect to non 80-IB project, it was submitted that there are normal business transactions which CHD has undertaken during this year for earning profits in 80-IB project as well as non 80-IB projects.

8.7. If the aforesaid is analyzed, we find that the grievance of the revenue is that

the sales made to M/s. Rajasthan Global Securities Ltd. are not properly accounted for and undue profit has arisen on account of sec. 80-IB, whereas the claim of the assessee is that it is a normal business transaction and the assessee has no mutual relation what-so-ever with M/s. Rajasthan Global Securities Ltd. So far as the built up area is concerned, as has been alleged by the revenue that it is beyond the prescribed limit of 1500 sq. Ft., we have perused the sanction plan, submissions before the Assessing Officer as well as before the Id. CIT(A) and the break up dimensions adduced by the assessee. Such break up even has been reproduced at pages 7 & 8 of the impugned order, as per which the total area has been claimed by the assessee at 1492.43 sq. Ft.

8.8. Another point mentioned in the assessment order for denying deduction by the Assessing Officer is that the assessee did not file the bifurcation. However, we find that such bifurcation was duly filed by the assessee that too room-wise of all the units. Still the deduction was denied on the presumption that the basis of arriving at such figure was not adduced by the assessee. We are not in agreement with the finding of the Assessing Officer on two counts-firstly, the approval was granted by the Competent Authority; and secondly such bifurcation is as per sanctioned plan which was filed before the Assessing Officer. Uncontrovertedly such bifurcation was filed during assessment stage, first appellate stage and even before us. It is also not in dispute that the approval was granted by the Competent Authority to the assessee on 16-3-2005 meaning thereby the project was approved before the amendment inserted/substituted by Finance (No. 2) Act of 2004, w.e.f. 1-4-2005. Prior to its substitution, sub-section (10), as amended by the Finance Act, 2000, w.e.f. 1-4-2001 and Finance Act 2003 with retrospective effect from 1-4-2002, 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;

(b) the project is on the size of a plot of land which has a minimum area of one acre; and

(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 kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place.

8.9. If the aforesaid position of law existing at the time when the plan was sanctioned/approval was granted to the assessee is analyzed, there was no condition like production of complete certificate. This is a settled legal proposition of law that the law existing at the particular point of time will be applicable unless and until it is specifically made retrospective by the legislature. The

substitution so made, is therefore, applicable prospectively and not retrospectively. There is an uncontroverted fact that approval was granted to the assessee on 16-3-2005, consequently the assessee was expected to complete the project on or before 31-3-2009. Now the question arises whether the project was completed by the assessee within time. As is evident from the letter of the assessee dated 5-11-2008 addressed to the Vice Chairman Mathura Vrindavan Development Authority, on which the seal and signature of the concerned authority is affixed (page 28 of the paper book), it has been specifically requested that the construction has been completed and further request has been made for grant of completion certificate of Phase-I, meaning thereby, if not earlier, the project was presumed to be complete as on 5-11-2008 because the concerned development authority has neither said that the project was not complete nor completion certificate was issued to the assessee. In the absence of any variation or allegation if such certificate is not issued to the assessee, whether the assessee can be penalized for the act of an authority on which it has no control, the obvious reply is that for the fault of others anybody should not be penalized, more specifically when the project was approved on 16-3-2005. Therefore, the law applicable as on date will be applicable to the assessee. It is not expected that the assessee will demolish the construction work which is already in progress and again comply with the direction of the law which was inserted on a later date which is prospective in nature. If the intention of the legislature would have been to make it effective from retrospective effect, nothing prevents the legislature to do so.

8.10. If the issue is analyzed in the light of case laws cited before us, we find that the Hon'ble Karnataka High Court vide judgment dated 29th February 2012 in the case of CIT & another Vs. Ms. Anriya Project Management Services Pvt. Ltd. (ITA no. 138 of 2010), considered the decision like CIT & ors. Vs. G.R. Developers (ITA no. 355/2009) and held that definition of built up area was inserted by Finance (No. 2) Act of 2004, which came into effect from 1-4-2005, is prospective in nature and has no application to the housing projects which were approved by local authority prior to that date, strongly supports the case of the assessee. It was held by the Hon'ble High Court that the assessee was entitled to hundred per cent benefit of sec. 80-IB(10).

8.11. Another case cited was from Visakhapatnam Bench of the ITAT in the case of Ms. Vishnu Builders Vs. ACIT (ITA nos. 178, 179 & 180/Vizag/2011), order dated 27th July 2011. In that case also, completion certificate was not filed before the Assessing Officer and the proof of municipal tax assessment of various flat owners establishing that the housing project was completed before September 2008 was filed. Since there was no practice of issuing the project completion certificate, therefore, it was held that it was not a condition precedent of filing the completion certificate for allowing deduction u/s. 80-IB(10) of the Act.

8.12. In the case of CIT Vs. Tarnetar Corporation (Tax appeal no. 1241 of 2011),

the Hon"ble Gujarat High Court vide judgment dated 12-9-2012, observed that the confirmation issued by municipal authorities was filed on 15-2-2006 and was rejected on 1-7-2006. The assessee also paid penalty for regularization of the units. Since construction was completed well before 31st March 2008, the outer limit for such construction and the permission was not granted by they municipal authority, it was held that fulfilling of every condition is not mandatory and if there is a substantial compliance, the minor deviation thereof would not vitiate the very purpose of deduction.

8.13. The ITAT Delhi Bench "G" in the case of ACIT Vs. Surendra Developers etc. (ITA nos. 2743 to 2745 & ITA nos. 3056 to 3058/Del/2010) vide order dated 1-8-2012, held that wherein the assessee applied for completion certificate before the lower authorities in time and such certificate was not issued by the local authority, such non-issuance was beyond the control of the assessee. While coming to this conclusion the Bench also considered another case of Ms. Girija Colonizers (ITA nos. 2417 to 2422/Del/11 order dated 9-12-2011).

8.14. The Id. Sr. D.R. also placed reliance upon the decision of the Tribunal of Chennai Bench i 2010 (5) ITR (Trib) 449 on the issue of built up area not exceeding 1500 sq. ft. It was held that if this condition is not fulfilled, the assessee is not eligible for deduction. However, we find that in the present appeal, the built up area is below the prescribed limit of 1500 sq. ft. Therefore, this decision may not help the revenue being distinguishable on facts.

8.15. If this issue is analyzed with the view point of rule of consistency, we are of the considered opinion that though the principle of res-judicata is not applicable to the income tax proceedings, yet for the sake of consistency and for the purposes of finality in all litigations, including litigation arising out of fiscal statutes, earlier decisions on the same question should not be reopened unless some fresh facts are brought on record in subsequent assessment year. For A.Y. 2006-07, even the Id. CIT(A) decided the issue in favour of the assessee, which was confirmed by the Tribunal (supra), therefore, unless and until any new material facts are brought on record, the revenue is not permitted to take a "U turn", while denying the claimed deduction to the assessee, that too on same facts and circumstances. Our view is fortified by the decision of Hon"ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs. A.R.J. Security Printers, and the ratio laid down in Commissioner of Income Tax Vs. Neo Poly Pack (P.) Ltd., Berger Paints India Ltd. Vs. Commissioner of Income Tax, Calcutta, Commissioner of Income Tax-V Vs. Lagan Kala Upvan, ; and Union of India and Others Vs. Kaumudini Narayan Dalal and Another, . From this angle also, the assessee is having a strong case in its favour.

8.16. Leave apart, we are of the considered opinion that the assessee is expected to complete the project as per the approved plan at a particular point of time and the assessee is not expected to do or to fulfil the conditions which are not in existence at the relevant point of time or made compulsory after making some amendment in the Act from the future date. Since the assessee

was to complete the project on or before 31-3-2009 and request was duly made with the Competent Authority on 5-11-2008 mentioning that the project has been completed and completion certificate may be issued and if the same is not issued by the Competent Authority the assessee should not be penalized for the same unless and until some contrary facts are brought on record evidencing that the assessee contravened the conditions contained in the approval granted by such Competent Authority. As per sub-section (10) of Sec. 80-IB, the housing project which were approved before 31st day of March, 2008, the benefit will be hundred per cent subject to fulfilment of certain conditions. However, this condition was substituted by the Finance (No. 2) Act of 2009 with effect from 1-4-2009, which has been further explained by sub-clause (ii) to the Explanation regarding completion certificate. However, since the approval was granted to the assessee on 1-4-2005, therefore, the assessee is not expected to fulfil the conditions which were not on the statute when such approval was granted to the assessee. Therefore, the appeal of the assessee deserves to be allowed.

9. Finally, the appeal of the revenue is allowed in part and that of the assessee is allowed.

7. The impugned order relies upon several rulings such as one by the Karnataka High Court in CIT vs. Anriya Project Management Services Pvt. Ltd. and various Benches of the Tribunal itself and thereafter held as follows:-

8.6. If the totality of facts available on record and the assertion made by the Id. respective counsels are kept in juxtaposition, broadly the Id. CIT(A) is influenced by the sale transactions with Rajasthan Global Securities Ltd., it was confirmed that the amount of Rs. 5,36,89,920/- was paid to the assessee as advance for purchase of 37 flats in Krishnalok project. However, what it may be the moot issue to be adjudicated by us pertains to sec. 80-IB(10). We further find that as contained in para 1.2 (page 5) of the impugned order, the Id. CIT(A) has examined the submissions of the assessee and the reason of denial of deduction to the assessee by the Id. Assessing Officer. The relevant portion from the impugned order is reproduced hereunder:

It was further submitted that Addl. CIT wrongly tries to prove that sale with M/s. Rajasthan Global Securities Ltd. (RGSL) are not accounted for properly and undue profit has arisen on account of 80-IB whereas these are normal business transactions undertaken by assessee company with M/s. Rajasthan Global Securities Ltd. having no mutual relation whatsoever. The Assessing Officer has objected to the issue of preferential shares and its valuation. The assessee company has issued preferential shares to various persons as per SEBI guidelines and approval of Bombay Stock Exchange. The assessee company is a listed company and does not have any discretion about the issue price and require to issue shares through preferential allotment only at the rate as per SEBI guidelines and approved by stock exchange. During the year the assessee company has calculated average market price as per general meeting, certification by statutory auditor etc., has submitted to Bombay Stock Exchange

and has issued the preferential share after getting approval from Bombay Stock Exchange. These are normal business transactions because these are issued as per SEBI and Stock Exchange guidelines. These shares are issued to a number of companies and individuals and not only to RGSL. Valuation of these shares are done as per SEBI and Stock Exchange guidelines which were as per average market rates and approved by Board of Directors and General Meeting of CHD, statutory auditor and Bombay Stock exchange approval. There is no close or remote nexus between CHD and RGSL. There is no common relation among the directors or major share holders. Since CHD is listed company it has no control over market rate or guidelines of SEBI and Stock Exchange. It is immaterial for CHD what its shareholder does not with their investments. As regard Assessing Officer's observation that the assessee has booked substantial sales with respect to non 80-IB project, it was submitted that there are normal business transactions which CHD has undertaken during this year for earning profits in 80-IB project as well as non 80-IB projects.

8. This Court has considered the submissions. The Court notices that besides Anriya Project Management Services (P.) Ltd. (supra) there are other decisions of other High Courts such as The Commissioner of Income Tax-II Vs. Brahma Associates, Manan Corporation Vs. Asstt Commissioner of Income Tax, Circle-5, . In the last decision referred to above, Gujarat High Court considered the effect of the law as it stood prior to the amendment i.e. 01.04.2005 and after the amendment and held as follows:-

21. Neither the assessee nor local authority responsible to approve the construction projects are expected to contemplate future amendment in the statute and approve and/or carry out constructions maintaining the ratio of residential housing and commercial construction as provided by the amended Act being 3% of the total built up area or 5000 sq. feet whichever is higher (now in post 2010 period) or 5% of the aggregate built up area or 2000 sq. feet whichever is less. Revenue is also in error to suggest that even if such conditions are onerous, they are required to be fulfilled. The entire object of such deduction is to facilitate the construction of residential housing project and while approving such project when initially there was no such restriction in taxing statute and the permissible ratio for commercial user made 5% to the total built up area by way of amendment and reduction of which by further amendment to 3% of the total built up area, has to be necessarily construed on prospective basis.

22. As is very apparent from the record, there was no criteria for making commercial construction prior to the amended Section and the plans are approved as housing projects by the local authority for both the projects of the appellant. Permission for construction of shops has been allowed by the local authority in accordance with rules and regulations, keeping in mind presumably the requirement of large townships. However, the projects essentially remained residential housing projects and that is also quite apparent from the certificates issued by the local authority and, therefore neither on the ground of absence of

such provision of commercial shops nor on account of such commercial construction having exceeded the area contemplated in the prospective amendment can be made applicable to the appellant assessee whose plans are sanctioned as per the prevalent rules and regulations by the local authority for denying the benefit of deduction of profit derived in the previous year relevant to the assessment year as made available otherwise under the statute.

23. It would be worthwhile to note at this stage that even though the facts before the Bombay High Court were different than those emerging from the present case, Revenue's submissions before the Bombay High Court that the amendment of Section 80IB(10) and the insertion of clause (d) with effect from 1.4.2005 should be applied retrospectively was held to be without any merit in following words, in paragraph 32 of the Bombay High Court, which is reproduced as under:

Lastly, the argument of the Revenue that section 80-IB(10) as amended by inserting clause (d) with effect from April 1, 2005 should be applied retrospectively is also without any merit, because, firstly, clause (d) is specifically inserted with effect from April 1, 2005 and, therefore, that clause (d) seeks to deny section 80-IB(10) deduction to projects having commercial user beyond the limit prescribed under clause (d), even though such commercial user is approved by the local authority. Therefore, the restriction imposed under the Act for the first time with effect from April 1, 2005 cannot be applied retrospectively. Thirdly, it is not open to the Revenue to contend on the one hand that section 80-IB(10) as it stood prior to April 1, 2005 did not permit commercial user in housing projects and on the other hand contend that the restriction on commercial user introduced with effect from April 1, 2005 should be applied retrospectively. The argument of the Revenue is mutually contradictory and hence liable to be rejected. Thus, in our opinion, the Tribunal was justified in holding that clause (d) inserted to Section 80-IB(10) with effect from April 1, 2005 is prospective and not retrospective and hence cannot be applied to the period prior to April 1, 2005.

24. Karnataka High Court in the case of Commissioner of Income Tax, Central Circle 1(2) Vs. Anriya Project Management Services (P.) Ltd., was also examining this provision where the question was whether the definition of "built-up area" inserted by Finance (No. 2) Act, which became effective from 1.4.2005 is prospective or retrospective in nature and it held that the same to be prospective in nature. It held that amendment provision would have no application to housing projects, which were approved by the local authority prior to 1.4.2005 in calculating 1500 sq. feet of residential unit and it further held that once such housing project of assessee is approved by local authority prior to 1.4.2005, it would be entitled to 100% benefit of Section 80IB(10). While so holding, it relied on the judgment of the Karnataka High Court in the case of CIT v. G.R. Developers [IT Appeal No. 355 of 2009].

25. Corollary to this is one more aspect that requires reference here. The Government of India Ministry of Finance, Department of Revenue to all Chief

Commissioners of income tax and all Director Generals of income tax issued Instruction No. 4 of 200 dated 30.6.2009 in respect of Section 80IB(10) of the Act would be available on year to year basis where the assessee is showing profit on partial completion or the same would be available on the year of completion of the project, which is clarified as under:-

3. The above issue has been considered by the Board and it is clarified as under:-

(a) The deduction can be claimed on a year to year basis where the assessee is showing profit from partial completion of the project in every year.

(b) In a case it is late, found that the condition of completing the project within the specified time limit of 4 years as started in section 80-IB(10) has not been satisfied, the deduction granted to the assessee in the earlier years should be withdrawn.

26. From the reading of the above instruction, it can be also said that the Government being aware of both the accounting methods has expected either of them to be followed in cases of individual assessee. However, in post amendment period, strict adherence to completion period of four years is insisted upon where project completion method is followed. This limitation of period did not exist prior to the amendment, what is vital to draw from this is that the amendment cannot discriminate those following project completion method if in the interregnum period, amendment is brought in the statute. The say of the assessee therefore gets further fortified when it says that only because it chose to follow the method of accounting of project completion basis, whose completion date falls after 1.4.2005, they can be denied the deduction on profits derived and those assessee who claim deduction on work-in-progress basis, they would be entitled to such deduction. However, it necessitated strict compliance of the provisions and completion of the same within the stipulated time period.

27. The entire object of such deduction is to facilitate construction of residential housing project and while approving such project when initially there was no restriction and by amendment as stated permissible ratio for construction is 5% of the total built up area, reduction of this ratio to 3% of the total built up area has to be necessarily on prospective basis.

9. In the present case concededly the approval for the project was given by the Mathura Vrindavan Development Authority on 16.03.2005. Clearly the approval related to the period prior to 2005, i.e. before the amendment, which insisted on issuance of the completion certificate by the end of the 4 year period was brought into force. We are in full agreement with the Gujarat High Court that the application of such stringent conditions, which are left to an independent body such as the local authority who is to issue the completion certificate, would have led to not only hardship but absurdity. As a consequence, we are of the opinion that the reasoning and conclusions of the Karnataka High Court and the Gujarat High Court are fully applicable to the facts of this case. The Tribunal was not, therefore, in error of law while holding in favour of the assessee. In view of the

above no substantial question of law arises for consideration. The appeal is accordingly dismissed.