

(2012) 10 MAD CK 0239

In the Madras High Court

Case No : Tax Case (Appeal) No's. 1348 and 1349 of 2007

Commissioner of Income Tax

APPELLANT

Vs

Arun Excello Foundations (P.) Ltd.

RESPONDENT

Date of Decision : 18-10-2012

Acts Referred:

Citation : (2013) 259 CTR 362

Hon'ble Judges : K. Ravichandra Baabu, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : N.V. Balaji, for the Appellant; Jehangir D.J. Mistri for R. Sivaraman, for the Respondent

Final Decision : Dismissed

Judgement

Chitra Venkataraman, J.—The Revenue is on appeal as against the order of the Tribunal relating to asst. yrs. 2003-04 and 2004-05 by raising the following common question of law:

Whether in the facts and circumstances of the case, the Tribunal was right in holding that deduction under s. 80-IB(10) is allowable on a pro rata basis, where both commercial and residential houses have been built, when there is no such provision under the statute to grant the same ?

The assessee is a company engaged in the business of developing and constructing housing projects. In the returns filed for asst. yrs. 2003-04 and 2004-05, the assessee claimed deduction under s. 80-IB(10) of the IT Act, (hereinafter referred to as the "Act"), in respect of project called "Raagamalika Phase-I" and "Raagamalika Phase-II" respectively. A survey operation was carried out under s. 133A of the Act to verify the claim of deduction under s. 80-IB(10) of the Act. The AO noticed that the extent of commercial area in both the projects as per the sanctioned plan were at 974 sq. ft. and 1075 sq. ft. respectively. On a specific question put to the assessee on the project, the assessee gave the details of the persons who had purchased the unit as well as

the area, which reads as follows:

2. In the course of the statement recorded, it was further found that the directors of the company had also purchased flats. But after purchase, they had merged the flats to have a total built-up area of 1850 sq. ft. The AO pointed out that after purchase, the purchasers had converted the flats into commercial establishments. They had merged the flats as commercial units. In Raagamalika Phase I and Phase-II, there were no residential units, but three commercial units were built to an extent of 9,790 sq. ft. Thus, the Officer held that the assessee had developed three projects Raagamalika I, II and III. Raagamalika Phase I was relevant to the asst. yr. 2003-04; In Raagamalika, Phase II, since the assessee followed the project completion method of recognising revenue and does not complete during the previous year relevant to the asst. yr. 2003-04, no claim was made under s. 80-IB(10). As regards Raagamalika Phase III, at the time of survey, construction work was in progress. The approved commercial area in Raagamalika Phase I and Phase II was 924 sq. ft. and 1075 sq. ft. respectively. However, during survey, it was found that the commercial establishments were found in the ground floor and the first floor totalling to 9790 sq. ft. In the context of the abovesaid facts, the AO viewed that the provisions under s. 80-IB(10) of the Act not having been satisfied, the assessee was not entitled to the deduction claim. Aggrieved by this, the assessee went on appeal before the CIT(A). In the context of the above said facts, the AO viewed that the provisions under s. 80-IB(10) of the Act not having been satisfied, the assessee was not entitled to the deduction claim. Aggrieved by this, the assessee went on appeal before the CIT(A).

3. Before the CIT(A), the assessee contended that the AO committed serious error in disallowing the claim based on sub cl. (d) of s. 80-IB(10). which was introduced w.e.f. 1st April, 2005 only, relevant for the asst. yr. 2005-06 onwards restricting the built-up area for commercial usage on the housing project. It was further contended that being deduction provision, the view which is favourable to the assessee should be applied. The said submission was made on the ground that s. 80IB as it stood during the relevant time made no reference as regards the commercial area to be restricted for the purpose of grant of relief. The definition of "housing project" under the Act not having been defined under s. 80IB, the same has to be understood as per common parlance and has to be liberally construed. Having taken such a stand, the assessee pointed out that the flats constructed therein were principally residential units only, which satisfied sub-cl. (c) of s. 80-IB(10) of the Act. The presence of a small extent of area of commercial nature could not lead to total denial of the claim for deduction under s. 80IB of the Act. Thus, as an alternative plea, the assessee contended that as the assessee had satisfied the conditions stipulated in s. 80-IB(10), the relief be granted on pro rata basis to the extent of compliance of 80-IB(10)(c) of the Act. The assessee submitted that disallowance made by the AO in toto, hence, is not correct and the same, at best, could be restricted to the area exceeding the limit prescribed under s. 80-IB(10)(c) of the Act and the relief on pro rata basis to the

built-up area be granted.

4. The first appellate authority pointed out that the assessee had undertaken construction of housing projects for middle class segments of the society. However, considering the introduction of s. 80-IB of the Act and that the benefit being with reference to construction of 100 per cent residential units, deduction under s. 80-IB did not contemplate any flexibility till 2004-05 for grant of relief to projects, which are partly residential and partly commercial. In the circumstances, there could be no liberal construction of deduction provision even on pro rata basis. Thus, the appeal filed by the assessee was rejected by the CIT(A). Aggrieved by the same, the assessee went on appeal before the Tribunal.

5. A reading of the order of the Tribunal shows that the project undertaken by the assessee was approved by CMDA and Medavakkam Panchayat and the plinth area of each apartment constructed was less than 1500 sq. ft. and the size of the land area was more than one acre. The only dispute in the claim of the assessee related to the presence of the commercial area of 9790 sq. ft. in the project, which the AO treated it as in violation of s. 80-IB(10)(d) of the Act. The Tribunal referred to the AO's consideration that out of total constructed area of 105,135 sq. ft., the commercial area constructed accounted for 9.31 per cent. The Officer further pointed out that the persons, to whom such area was allotted, were none other than the managing director and his relatives. These persons purchased the area only as a residential unit. Thereafter, they converted the same for commercial purpose. Having regard to the fact that the Managing Director of the company as well as the relatives purchased the said area and converted the same into commercial area, s. 80-IB of the Act did not permit deduction on commercial housing project, that too for area exceeding 2000 sq. ft. As such, the claim has to be rejected. The Tribunal pointed out to the legislative history of the provision--s. 80IB(10), as it stood during the relevant asst. yr. 2003-04 and the subsequent amendment to section by insertion of Explanation and cl. (d), effective from 1st April, 2005 and held the amendment had no relevance to the case on hand, as the amendment is not retrospective in nature. The Tribunal further held that as apparent from the admitted facts, the assessee had complied with all the three conditions and the total extent used for the purpose of commercial construction was 9.31 per cent.

6. Pointing out to the alternative plea made by the assessee taken under s. 80-IB(10) of the Act, to restrict the claim in respect of residential units alone on pro rata basis, the Tribunal allowed the assessee's appeal that the deduction would be allowed on the residential units constructed on pro rata basis. The assessee was not entitled for deduction for commercial area to the extent of 9.31 per cent.

7. As regards the amendment brought forth by introduction cl. (d) of s. 80-IB(10) of the Act under Finance Act 2 of 2004, w.e.f. 1st April, 2005, the Tribunal agreed with the assessee that cl. (d) being brought into statute book w.e.f. 1st April, 2005 only, the same was prospective and not retrospective. As such, the provision as it stood during the relevant time could not be interpreted based on

the subsequent amendment. Aggrieved by the same, the Revenue has come on appeal before this Court.

8. Learned standing counsel appearing for the Revenue contended that s. 80-IB of the Act is clear enough to say that the deduction is only in respect of housing project and the conditions for grant of the deduction, viz., cls. (a), (b) and (c) to sub-cl. (10) of s. 80-IB of the Act have to be cumulatively satisfied for the purpose of grant of the relief. Learned standing counsel pointed out that the intention in bringing the provisions under s. 80-IB of the Act was only for the purpose of promoting the construction of houses to cater to middle income group. Going by the National Housing Policy, as a measure of encouraging housing projects construction for middle income group, the legislature thought it fit to have the deduction provision under s. 80-IB of the Act. Thus, when the law provided that the deduction is in respect of the housing project and the deduction is available subject to certain conditions, the meaning of the expression "housing project", though not defined specifically under the above section, is evident, that the same has to be drawn only from the policy of the Government; as such, the construction of project undertaken by the assessee must necessarily fit in with what is contemplated under the relevant provisions, namely, construction of house and it is not for the assessee to read the expression "housing project" in an extended manner to include commercial project too.

9. As regards the claim of proportionate relief, learned standing counsel pointed out that if the law contemplated proportionate relief to be granted on a partial compliance, the section itself would have provided for such a situation. However, in the absence of any such contemplation stated so in clear terms under s. 80-IB of Act, it is not open to the Tribunal to dilute the said section to grant pro rata relief.

10. Referring to the amendment brought forth under Finance (No. 2) Act, 2004 by insertion of sub cl. (d) to s. 80-IB(10) of the Act, effective from 1st April, 2005. learned standing counsel submitted that prior to the amendment, legislature did not contemplate any relief on commercial building, including a pro rata relief, to be given to the assessee during the year 2004-05 in cases of violation of the condition under s. 80-IB(10) of the Act. Thus, apart from the question as to whether the building is out and out a commercial building or mixed one, the consideration for grant of relief rested on the residential units satisfying the conditions laid down under s. 80-IB(10) of the Act. In other words, the deduction contemplated prior to 2005-06 was only for housing projects, meaning thereby, construction of residential units. Insisting on the rule of strict construction of the provisions contained under s. 80-IB(10) of the Act, learned counsel referred to the decision in Commissioner of Central Excise, New Delhi Vs. Hari Chand Shri Gopal and Others, etc. etc., and submitted that the housing project referred to therein being residential project alone, the assessee is not entitled to the relief on the admitted fact that the project is not, pure and simple,

a residential one. Thus, being a beneficial provision, the section must receive a strict construction.

11. Referring to the Development Control Rules, under which approval is granted and the contention of the assessee that even on the different zones ear-marked, a residential zone also contemplated commercial buildings too, he submitted that in interpreting s. 80-IB, no assistance could be drawn from these rules, as to what "housing project" meant. He further pointed out that zone and project being different in their content and meaning, Development Control Rules are not relevant to understand the scope of the expression "housing project". The relief contemplated under the section is for the "housing project", meaning thereby, the project of residential unit alone and not for anything else. Hence, the question of granting even proportionate relief does not arise in this case.

12. Countering the claim of learned standing counsel appearing for the Revenue, learned senior counsel appearing for the assessee pointed out that there is no definition of the expression "housing project" under s. 80-IB of the Act. The only other section wherein the definition of "housing project" is available is the Explanation to s. 80HHBA of the Act. This deduction provision under Chapter VI-A is also one for housing project, but with a difference that it related to projects undertaken on global tender and aided by the World Bank. In the absence of any definition in s. 80-IB of the Act, on the availability of a definition in a related provision concerning deduction, the definition of "housing project" under s. 80HHBA of the Act would govern the meaning of the expression "Housing Project" in s. 80-IB of the Act.

13. He further pointed out that the assessee's project is for construction of residential units and they satisfied the conditions, as had been given under s. 80-IB(10)(c) of the Act. There is no dispute on the fact that the assessee had complied with sub-cl. (a), (b) as well as sub cl. (c) of s. 80-IB(10) of the Act as to the extent of the flats. The only dispute that the Revenue had raised is as regards the small extent of the commercial area built therein. Secondly, the Revenue has also raised a dispute that after purchase of these housing units, the purchaser had converted the residential unit for a different purpose. Pointing out to the fact that it is open to the purchaser to put a unit purchased for use of his choice, he pointed out that even going by the amended provisions from the year 2005, it is clear that "housing project", read in the context of Explanation to s. 80HHBA, does not contemplate any restriction as to its character of the project to be of pure and simple a residential housing project alone and not of a mixed one for the purpose of claiming deduction.

14. Referring to s. 80-IB(10)(d), introduced w.e.f. 2005, he pointed out that the introduction of sub cl. (d), prospective in nature, supports the cause of the assessee herein. As in the case of cls. (a) and (b), legislature thought it fit to put a restriction on the extent of the area for commercial usage in a housing project limited to an extent of 5 per cent alone on the aggregate built-up area of the housing project or two thousand square feet, whichever is less. Contrary to the

assertion of the Revenue that for the first time alone, the amended provisions recognised housing project including the commercial area, learned senior counsel appearing for the assessee submitted that the amendment, in fact, supports the cause of the assessee that hitherto, the project, which could have had a commercial area unrestricted, after the amendment brought forth in 2005, is now sought to be restricted to 5 per cent of the aggregate built-up area of the housing project or 2000 sq. ft., whichever is less.

15. Referring to the Development Control Rules, learned senior counsel appearing for the assessee further referred to zones divided therein. Even in residential zone, the Development Rules contemplated construction of buildings, which may cater to the infrastructural needs of the residential zone.

16. Replying to the contention of the Revenue that the provisions should receive strict construction, he submitted that there is no quarrel over this proposition. The section needs only strict construction. Going by this, in the absence of restrictive covenants as regards the project being of only residential character, the Revenue cannot read down the expression "Housing Project" as referable to projects on construction of housing units only. He submitted that there is nothing in s. 80-IB of the Act to suggest that the housing project is restricted to residential project alone and residence is a matter of use and not of structure.

17. Learned senior counsel further pointed out to the various sub-cl. (a). (b) and (c) of s. 80-IB(10) of the Act as it stood during the relevant assessment year and submitted that irrespective of the project being pure and simple residential or mixed one as residential and commercial, sub-cl. (c) would have relevance as regards maximum built-up area for, residential units in the project of an extent of 1000 sq. ft., when such residential unit is situated within the city 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. Thus, in a given case, if the residential units in the project has built-up area of more than 1500 sq. ft., the claim for deduction would stand negated. In a case where residential project is mixed up of built-up area of 1000 or 1500 sq. ft, as the case may be, and more than 1500 sq. ft. and 1000 sq. ft., then the assessee would be entitled to pro rata relief as regards the flats within the maximum area as specified in cl. (c) alone and the claim cannot be rejected in toto. In a case where housing project is out and out a commercial one without any residential unit, in such a case, the Revenue cannot reject the claim of deduction solely based on cl. (c) of s. 80-IB(10) of the Act. In other words, wherever the project is a residential unit, which need not necessarily be so, or a mixed one, such residential unit must comply with cl. (c) of s. 80-IB(10) of the Act. Where housing project does not have any residential unit, it being a pure commercial project, per se. s. 80-IB(10)(c) would not defeat the claim of the assessee. Clause (c) has to be seen only as a negative covenant to the extent of the projects having residential units. Thus the expression "housing project" cannot be viewed in a restricted manner to refer to the residential units alone. In this

connection; learned senior counsel appearing for the assessee placed reliance on the decision in *The Tata Engineering and Locomotive Company Ltd. Vs. Gram Panchayat, Pimpri Waghere*, wherein the apex Court had given wide meaning to the expression of "housing" to include nonresidential project too. Thus, in the context of Explanation to s. 80HHBA of the Act, he submitted that the assessee would be entitled to the deduction as sought for. He further submitted that the assessee's case herein is 100 per cent compliance and hence, there could be no rejection of the claim made by the assessee.

18. As far as the Revenue placing reliance on the National Housing Policy is concerned, he pointed out that a reading of the said policy shows that the policy is not with reference to construction of the houses alone, but it is more concerned on overall infrastructural development, which means, development of residential units as well as non-residential units, to go side by side, to go for an overall development in all spheres. In the light of the above, the submission of the learned senior counsel for the assessee is that no exception could be taken to the view of the Tribunal.

19. He further pointed out that the reliance placed by the Revenue on the decision of the apex Court in *CCE vs. Hari Chand Shri Gopal & Ors.* (supra) is not relevant to the case on hand, since the said decision related to the claim of exemption and not to the claim of deduction. In any event, the condition under s. 80-IB does not call for cumulative satisfaction of all the conditions, in the sense, "housing project" as referable to residential projects alone.

20. As regards the objection of the Revenue that the purchaser had converted the residential units as a commercial area, learned senior counsel appearing for the assessee submitted that what was sold was only residential unit and what the purchaser did after the purchase is not the concern of the assessee or the statute. Post-project completion factors are totally alien to the consideration of the assessee's claim for deduction, since the assessee has no control over the manner in which and the usage to which the purchaser puts his residential units purchased.

21. Learned senior counsel further pointed out to the amendment brought forth under Finance (No. 2) Act, 2004 w.e.f. 1st April, 2005 inserting cl. (d) as well as insertion of cls. (e) and (f) under the Finance (No. 2) Act, 2009, w.e.f. 1st April, 2010 to s. 80-IB(10) of the Act and submitted that read in the context of sub-cl. (c) of s. 80-IB(10) of the Act, restrictions as regards allotment to an individual in a family under cls. (e) and (f) and in the context of sub-cl. (d) as the built-up commercial area, it was clear that the expression "housing project" has to have a wide interpretation and understanding and that sub-cls. under s. 80-IB(10) do not contemplate a reading that the deduction would be available if only all the units are residential alone.

22. Heard learned senior counsel appearing for the assessee as well as learned standing counsel appearing for the Revenue and perused the materials available

on record.

23. There is no dispute on the facts. Hence, it is not necessary to once again repeat the same. The question being a legal one, we need to see what s. 80-IB(10) states. The section, as it stood prior to the amendment under Finance (No. 2) Act, 2004, w.e.f. 1st April, 2005 and after the amendment under Finance (No. 2) Act, 2004, are as follows:

24. Sec. 80-IB(10) of the Act during the asst. yr. 2004-05:

80-IB. Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.--.....

(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.

25. See. 80-IB(10) of the Act after the amendment under Finance (No. 2). 2005 w.e.f. 1st April. 2005, reads as under:

80-IB(10): The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2007, 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. 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, within four 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 cl. (a) or cl. (b) shall apply to a housing project carried out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf;

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the city of Delhi or Mumbai or within twenty five kilometers from the municipal limits of these cities and one thousand and five hundred square feet at any other place; and

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet, whichever is less.

26. The amendment to s. 80-IB(10) on cl. (d) and under Finance (No. 2) Act, 2010 w.e.f. 1st April, 2010, is as follows:

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed three per cent of the aggregate built-up area of the housing project or five thousand square feet, whichever is higher.

27. As already pointed out in the preceding paras, the only other provision which deals with deduction on housing project is, s. 80HHBA of the Act. This section deals with deduction in respect of projects executed on the basis of global tender and aided by World Bank. Explanation to said section defines "housing project", which reads as follows:

80HHBA. Deduction in respect of profits and gains from housing projects in certain cases.--(1).....

Explanation.--For the purposes of this section,--

(a) "housing project" means a project for--

(i) the construction of any building, road, bridge or other structure in any part of India.

(ii) the execution of such other work (of whatever nature) as may be prescribed.

28. Sec. 80-IA deals with deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc. It defines "infrastructure facility" in Explanation to sub-s. (4), as follows:

(4) This section applies to--.....

Explanation.--For the purposes of this clause, "infrastructure facility" means--

- (a) a road including toll road, a bridge or a rail system;
- (b) a highway project including housing or other activities being an integral part of the highway project;
- (c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;
- (d) a port, airport, inland waterway, inland port or navigational channel in the sea.

29. As is evident from the reading of the Explanation in s. 80HHBA. the expression "housing project" is defined in a wide term to mean construction of any building, road, bridge or other structure in any part of India. Admittedly, road, bridge or other structure are taken in as infrastructure facility under s. 80-IA. There is no definition of "housing project" under s. 80-IB(10) of the Act. This, however, does not pose any difficulty. For reading s. 80HHBA and s. 80-IA, it is clear that s. 80-IB is concerned about housing project, namely, construction of any building other than what is contemplated as an infrastructure facility under s. 80-IA. Thus when under the very same chapter dealing with deduction, the expression "housing project" has already been defined in a related provision, we do not find, the absence of the same under s. 80-IB should pose a problem in understanding the meaning of the said expression. In the absence of definition of the expression "housing project" anywhere else in the Act and the said expression being defined in a related deduction provision under the same Chapter VIA, we feel, it would be more appropriate to go by the definition of the expression "housing project", as available under s. 80HHBA for the purpose of understanding the said expression of "housing project" under s. 80-IB of the Act.

30. As seen already, "housing project" defined under s. 80HHBA refers not only building, but also road, bridge or other structure in any part of India. Going by the deduction contemplated under s. 80-IB of the Act. deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings and s. 80-IA of the Act specifically deals with deductions on an enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructural facility as defined in the Explanation, we hold that the housing project contemplated under s. 80-IB(10) refers construction of "any building" and widest possible meaning has to be given to the word "building" and cannot be restricted to and as referable to a housing project covering residential units only. As rightly pointed out by learned senior counsel appearing for the assessee

placing reliance on the decision in *Tata Engg. & Locomotive Co. Ltd. vs. Gram Panchayat* (supra), the word "house" includes building which is used for business. We hold that the benefit of deduction under s. 80-IB(10) of the Act, with reference to housing project has to go in tune with the Explanation given in 80HHBA and building, as understood by the apex Court in the decision in *Tata Engg. & Locomotive Co. Ltd. vs. Gram Panchayat* (supra).

31. It is no doubt true that the said decision is related to the provisions of the Village Panchayats Act. 1937; yet, the observation therein are apposite to the understanding of the term "building". The apex Court pointed out that under Village Panchayats Act. 1937, the term "house" would include a factory, building for levy of tax on houses and lands. Holding that "house" in its ordinary sense would include any building irrespective of the user, the apex Court held, "the word "house" extends to a building which is used for business and should not be restricted to a mere dwelling house". It pointed out that it is not limited to a structure designed for human habitation and may mean a building or shed intended or used as a habitation or shelter for animals of any kind, a building in the ordinary sense or any building, edifice, or structure enclosed with walls and covered, regardless of the fact of human habitation. Under particular circumstances, the term has been held equivalent to and interchangeable or synonymous with "building". "dwelling", and "dwelling house" and sometime "premises".

32. Thus, given the fact that the one and only definition we have on the "housing project" is under s. 80HHBA and it refers to the project of construction of a building apart from other things, we hold that the expression "housing project" as defined therein referring to "any building", should be taken as referable to a structure that is built irrespective of its usage as for residential/commercial usage for the purpose of understanding the scope of s. 80-IB(10) of the Act. Thus, as rightly pointed out by learned senior counsel appearing for the assessee, irrespective of the purpose for which the housing project has been developed and constructed, so long as the conditions stipulated under s. 80-IB(10) of the Act are satisfied, the assessee would be entitled to the benefit of deduction under the said provision.

33. It is also a matter of relevance that the Development Control Rules also draw division of the zones as residential zones, commercial zones and mixed zones. Even here, residential zone is not a watertight compartment to have houses alone, given the need for providing for other infrastructural facilities, the zonal classification takes note for the space for commercial establishment in prime housing zone also.

34. As far as the assessee's case is concerned, the Revenue does not deny the fact that the assessee had complied with cls. (a) and (b) and that it had commenced the development of construction of the project on 1st Oct., 1998 and that the area of the land satisfies the minimum required area of one acre. The one and only dispute herein is as to the built-up area, as regards the residential

unit, later on converted as commercial unit.

35. It may be seen that the built-up area of 8.33 per cent, as relatable to commercial area, has nothing to do with the dispute raised, since the assessee has not made any claim for deduction on this. However, as a matter of principle, considering the understanding that we place on the expression "housing project", in a given case, we do not find such occupation of commercial area in a housing project would negate the claim of the assessee for 100 per cent deduction of the profits and gains from the business of undertaking, development and construction of housing project subject to the assessee complying with the other conditions under cls. (a), (b) and (c) of s. 80-IB(10) of the Act.

36. Leaving that aspect aside, on a reading of the three clauses, it is clear that in a given case, when the housing project, a 100 per cent residential unit, satisfies other cls. (a) and (b) and the built-up area as given under cl. (c) of s. 80-IB(10) of the Act, there could be no difficulty for the Revenue to grant the deduction. The question becomes a little complicated when 100 per cent residential housing project has built-up area of mixed nature. While few of the units may satisfy the criteria of the built-up area of less than 1500 sq. ft., there may be units which have built-up area crossing the limit as specified in cl. (c) of s. 80-IB(10) of the Act. In such an event, on a reading of the provision, we hold that the assessee would not be entitled to have the benefit of 100 per cent absolute deduction under s. 80-IB(10) of the Act in respect of the entire project, but would be entitled to pro rata deduction on the units satisfying the condition under cl. (c). Given the object of the provisions under s. 80-IB(10) of the Act, when the deduction to be granted is on the profits and gains of undertaking developing and constructing approved housing projects, in the absence of restrictive covenant under subs. (10) of s. 80-IB, we do not find any justifiable ground to hold that on the mere fact of some of the units having the built-up area exceeding the condition specified under cl. (c), the claim for deduction would stand rejected on the entire project. As pointed out in the decision of the Bombay High Court in *The Commissioner of Income Tax-II Vs. Brahma Associates*, with zones classification permitting commercial establishment in residential flats too, once the local authorities approved the project with or without the commercial use as permitted under the rules, the project approved is eligible for deduction under s. 80-IB(10). The fact that the housing project has residential flats and commercial user, by itself, cannot, in any way, stand in the way of granting deduction. The restriction under s. 80-IB(10)(c) cannot be construed as a negative condition to deny the benefit to an assessee, when the approved project has residential units of more than 1500 sq. ft. The idea of prescribing such restriction is to encourage construction of affordable houses to common man and the restriction is not by way of negative condition to reject a claim where the housing projects have units with the built-up area exceeding the prescribed limit as well as within the limits. So too, in a case where the project contains commercial as well as residential area.

37. As far as the law as it stood during the relevant assessment year or even thereafter upto 2004-05 is concerned, the section contains no condition that the housing project has to be out and out a residential one or is there a ceiling referable to commercial usage. For the first time in 2005, cl. (d) was inserted under Finance (No. 2) Act of 2004, which restricted the built-up area of the shops and other commercial establishments included in the housing project as not to exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet, whichever is less.

38. Thus, going by s. 80-IB(10) of the Act, as it stood during the assessment year, four things are clear, namely expression "housing project" cannot receive a restricted meaning, as had been propounded by the Revenue. The meaning of the expression "housing project", as given under s. 80HHBA of the Act, hence, would govern the case herein. Hence. the housing project would include commercial buildings also. Secondly. there is no restriction that the built-up area for the housing project cannot have any commercial units. Thirdly, the provision of law as it stood prior to the amendment in 2005 contained no such ceiling as to the extent of the built-up area of the shops and commercial units included in the housing project. Finally, this is made clear by the insertion of the cl. (d) under the Finance Act in s. 80-IB(10) of the Act, which, for the first time spoke about the restriction on the commercial area in the housing project. Hence, the amendment makes clear that the law as it stood till 2005 did not contemplate any restrictions as to the extent that the commercial establishment should occupy in housing project. The only condition that the provision contemplated in cl. (c) to s. 80-IB(10), as it stood during the relevant assessment, was that if there be a housing unit in a housing project, the said unit shall not have a built-up area beyond what is contemplated under cl. (c) of s. 80-IB(10) of the Act. which means, in a given project, even if the total built-up area occupied by the commercial establishment is 100 per cent or 90 per cent or more, but less than 100 per cent and the residential unit occupied a minor area only, the assessee would nevertheless be entitled to the relief of 100 per cent deduction under the said provision. The only condition is that where there is residential unit, in the case of cities like Delhi and Mumbai or places within twenty five kilometers from the municipal limits of these cities, the residential unit shall be of an extent of one thousand square feet or one thousand and five hundred square feet at any other place, as the case may be.

39. Thus, in the face of the clear provisions and going by the strict construction, one cannot read any limitation into the expression "housing project" to mean the residential project alone and that if and when the projects have mixed built-up area of commercial and residential, the question of disallowance will arise only if and when the residential flats are beyond the limit as provided under sub-cl. (c) of s. 80-IB(10) of the Act and not otherwise. Even herein, the disallowance could be only proportionate to the extent of units in violation of the area prescribed under cl. (c). In a pure commercial housing project, the question of applicability of sub-cl. (c) does not arise at all.

40. It is seen from the order of the Tribunal that the assessee made an alternative submission that to the extent of compliance of the built-up area under residential unit, pro rata relief be given to the assessee. As far as this relief is concerned, in similar circumstances, in the decision in H.P. Tourism Development Corporation Vs. Union of India (UOI) and Others, the Himachal Pradesh High Court considered the possibility of granting the proportionate relief on pro rata basis to the extent of compliance of the provisions. It is no doubt true that the section does not provide any such working. Yet, this being a deduction provision and there being no such indication that the conditions have to be cumulatively satisfied in the context of the meaning of a "housing project" to include residential-cum-commercial complex, we feel, in fairness to the claim of the assessee, the proportionate relief has to be read into the provisions, so that deduction provisions are sustained.

41. In this connection, learned senior counsel appearing for the assessee referred to the decision of the Bombay High Court in CIT vs. Brahma Associates (supra) as well as The Commissioner of Income Tax 25, C/11, Room No. 209, 2nd Floor, Pratyaksha Kar Bhavan, Bandra Kurla Complex, Bandra (East), Mumbai - 400051 Vs. M/s. Vandana Properties, 602B, Prem Nagar, Off. SV P Road, Borivali (West), Mumbai - 400092,

42. The issue raised in the decision of the Bombay High Court is almost identical to the case on hand. The assessment year under consideration before the Bombay High Court was 2003-04. A reading of the decision of the Bombay High Court in CIT vs. Brahma Associates (supra) shows that the assessee therein had a housing project called ""Brahma Estates" at Pune. This consisted of 15 residential buildings and 2 commercial buildings. Thus the extent of commercial area was 20.83 per cent of the total built-up area. On the claim for deduction on the profits derived from the sale of residential units in the project, the AO rejected the claim on the ground that the project approved by the local authority was as residential plus commercial and hence not being a housing project, covered under s. 80-IB(10), the assessee was not entitled to the deduction. The appeal by the assessee was dismissed by the CIT(A) and hence, the assessee went on further appeal to the Tribunal. The Special Bench of the Tribunal allowed deduction under s. 80-IB(10) in respect of 15 residential buildings on the ground that the profits from the exclusively residential buildings could be determined on stand alone basis. On the question as to whether the assessee would be entitled to the deduction under s. 80-IB(10) of the Act upto 1st April 2005. the Bombay High Court pointed out in para 22, which reads as under:

It is not in dispute that where a project is approved as a housing project without or with commercial user to the extent permitted under the Rules/Regulations, then, deduction under s. 80-IB(10) would be allowable. In other words, if a project could be approved as a housing project having residential units with permissible commercial user, then it is not open to the IT authorities to contend that the expression "housing project" in s. 80-IB(10) is applicable to projects

having only residential units.

43. The Bombay High Court held that by the date on which the legislature introduced 100 per cent deduction under the IT Act, it was known that the local authorities could approve a housing project, without or with the commercial user to the extent permitted under the Development Control Rules.

44. When the project fulfils the criteria for being approved as a housing project, then, deductions cannot be denied under s. 80-IB(10) of the Act, merely because the project is approved as residential plus commercial. The Bombay High Court held that if the conditions specified under s. 80-IB are satisfied, then deduction is allowable on the entire project and there is no question of allowing deduction to a part of the project alone. Since the project was approved in accordance with Development Control Rules, the assessee would be entitled to 100 per cent deduction on the entire project approved by the local authority. However, pointing out to the stand of the assessee that it had not filed any appeal as against the order of the Tribunal granting the relief to the 15 residential units alone on stand alone basis, the Bombay High Court held that the assessee was entitled to deduction on the properties, as had been granted by the Tribunal, solely on the ground that the assessee had not challenged the decision of the Tribunal. The restriction under s. 80-IB(10) regarding the size of the residential unit would in no way curtail the powers of the local authority to approve a project with commercial user to the extent permitted under the DC Rules/Regulations.

45. Referring to s. 80-IB(10)(d) of the Act. the Bombay High Court held:

The expression "included" in cl. (d) makes it amply clear that commercial user is an integral part of a housing project. Thus, by inserting cl. (d) to s. 80-IB(10) the legislature has made it clear that though the housing projects approved by the local authorities with commercial user to the extent permissible under the DC Rules/Regulations were entitled to s. 80-IB(10) deduction, w.e.f. 1st April, 2005 such deduction would be subject to the restriction set out in cl. (d) of s. 80-IB(10). Therefore, the argument of the Revenue that w.e.f. 1st April. 2005 the legislature for the first time allowed s. 80-IB(10) deduction to housing projects having commercial user cannot be accepted.

46. Going by the background of the expression "housing project" and various clauses contained in s. 80-IB of the Act, read in the context of subsequent insertion of cl. (d). inserted prospectively under the Finance Act 2005. we have no hesitation in accepting the case of the assessee that "housing project" has to be understood as a building project and need not be restricted to residential project alone, meaning thereby, user of the unit is not of relevance in the matter of grant of relief. The project may be either out and out residential project or commercial project or mix up of both for. a housing project, purely of commercial nature, approved by the local authority, is also a housing project, entitled to 100 per cent deduction. So too. in projects containing residential units alone, where there is a partial compliance, proportionate to the compliance, the assessee

would be entitled to have the deduction. In the case of mixed projects, the assessee's claim has to be allowed in full, if all the residential units satisfied cl. (c), otherwise, to the extent of compliance, the relief has to be worked out. A housing project of commercial premises is entitled to 100 per cent deduction, there being no necessity of looking at cl. (c) for compliance. Thus, the assessee would be entitled to the benefit of deduction on satisfaction of cls. (a), (b) and (c) of s. 80-IB(10) of the Act and that the requirement as regards cl. (c) would arise, wherein, in a given building, where there is a residential unit, the same has to satisfy the maximum built-up area specified under sub-cl. (c) of s. 80-IB(10) of the Act. Even though the provisions under sub-cls. (d), (e) and (f) of s. 80-IB(10) of the Act are prospective in nature, yet, for the purpose of understanding the scope of deduction under the provisions of the Act, we do not have any hesitation in drawing assistance from these provisions to decide on the scope of s. 80-IB of the Act, as it stood at the material point of time.

47. In the course of the argument, learned senior counsel appearing for the assessee referred to the decision in *The State of Tamil Nadu Vs. Tvl.Essar Shipping Limited No. 7, Chennai House Esplanade Chennai 600108* , only to submit that even though the assessee had not filed any appeal as against the order of the Tribunal on the proportionate relief granted, yet, this Court may consider the grant of full relief, if it fits within the reasoning of the provisions contemplated 100 per cent relief on the housing project.

48. We do not think that the assessee would be well placed by placing reliance on the decision reported in *State of Tamil Nadu vs. Essar Shipping Ltd. (supra)*, since the question involved therein related to chargeability of the provision. Even though in the decided case, the assessee had not filed any appeal against the decision of the Tribunal by reason of the relief granted by the Tribunal on different aspect, yet, when the liability of the assessee therein rested on the applicability of the charging provisions, in the appeal filed by the Revenue, the assessee raised grounds as by way of cross objection as to the very liability under the Act. This Court considered the entirety of the issue to grant the relief to the assessee.

49. The situation herein is a totally different one. The question is one of deduction and not of chargeability under the provisions of the Act. In the circumstances, we reject the assessee's case in this regard.

50. As regards the reliance placed by the Revenue on the strict construction of the provision, as rightly pointed out by learned senior counsel for the assessee, there is no dispute on the fact that the section requires strict compliance of understanding. The section as it stood during the material time, does not allow a different interpretation from what had been stated to view the expression of "housing project". In the circumstances, we do not find the decision referred to would be of any assistance to the Revenue in the matter of understanding the width of the expression, thereby, restricting the scope of "housing project". In the circumstances, we reject the Revenue's appeal and confirm the order of the

Tribunal. The above Tax Case (Appeals) are dismissed. No costs.