

आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में।  
**IN THE INCOME TAX APPELLATE TRIBUNAL " C " BENCH, MUMBAI**

श्री अमित शुक्ला, न्यायिक सदस्य एवं श्री राजेश कुमार, लेखा सदस्य के समक्ष।  
**BEFORE SHRI AMIT SHUKLA, JM AND SHRI RAJESH KUMAR, AM**

आयकर अपील सं./I.T.A. No.3631/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2009-10)

M/s Peshwa Construction, 595, Narendra Villa, Dr.Ambedkar road, Matunga (CR), Mumbai-400019	<b>बनाम/</b> Vs.	Commissioner of Income Tax,15, R.No.124, 1 <sup>st</sup> floor,Matru Mandir, Tardeo Road, Mumbai-400007
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)
<b>स्थायी लेखा सं./ PAN : AAIFP6690H</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/Assessee by :	Shri Vipul Joshi
प्रत्यर्थी की ओर से/ Revenue by :	Shri Deepkant Prasad

सुनवाई की तारीख / **Date of Hearing** : **17.10.2016**  
घोषणा की तारीख / **Date of Pronouncement** : **15.12.2016**

**आदेश / O R D E R**

**PER RAJESH KUMAR, AM :**

This is an appeal filed by the assessee challenging the order of Commissioner of Income Tax-15, dated 21.3.2014 passed under section 263 of the Income Tax Act, 1961 (hereinafter called the Act) in violation of principle of natural justice.

2. Brief facts of the case are that the assessee filed its return of income on 31.07.2009 declaring a total income at NIL by claiming deduction under section 80IB(10) of the Act of Rs.4,12,68,224/- which was

processed under section 143(1) of the Act. Thereafter, the case was selected for scrutiny and the statutory notices under section 143(2) and 142(1) of the Income Tax Act, 1961 were issued and served upon the assessee. The assessee firm is engaged in the business of property development. The project "Hillscape" located at survey No.62/2 and 62/4, Khandhwa Khurd, Behind Sheetal Petrol Pump, Pune, was completed during the year having three wings comprising 4 flats per on floor per wing totaling to 84 flats with area of the plot 1.25 acres. The project was approved on 20.4.2001 and the area of per flat was less than 1000 sq.ft. The commencement certificate was issued by the competent authority on 5.7.2006 and the project was completed on 31.3.2008. The assessment under section 143(3) was completed on 27.12.2011 assessing the total income of the assessee at Rs.15 lakhs by restricting the deduction u/s 80IB(10) of the Act of Rs.3,97,68,224/- as against the actual claim of Rs.4,12,68,224/-. Thereafter the assessment as completed by the AO was set aside by the Commissioner with a direction to pass assessment order afresh after examining the documents and conducting inquiry by exercising the revisionary jurisdiction u/s 263 of the Act vide order dated 21.3.2014 after issuing show cause notice dated 8.1.2013. The various reasons cited in the show cause notice are as under:

1....

2. I have called for and examined the assessment records of the assessee. The order sheet with only 3 entries on one page has also been looked into. The assessee has claimed the deduction u/s 80IB(10) is as under :

3. One of the requirements of Sec 80IB(10) is as under :

(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, within four years from the end of the financial year in which the housing project is approved by the local authority;

Furthermore, explanation (ii) to section 80IB (a) is as under :

(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;”

4. As Sec 80IB(10) is a provision for deduction/exemption, it has to be construed strictly. It is the duty of the assessee to make a claim for exemption and place relevant materials before the AO in support thereof and to prove that his case falls within the exemption (87 ITR 556) (Cal).

5. It is seen that in this case, the local authority has issued a commencement certificate for the project in Pune at Neco "Hillscape" survey No.62/2 and 62/4, Kondhwa Khurd, Behind Sheetal Petrol Pump, Mumbai-400048 on 24.12.2000 and 5.7.2006. Thus it is case

*covered by explanation (ii) of the section 80IB quoted above. This aspect has not been examined at all by the AO during the assessment proceedings for this AY and needless to say that legal implication is against the assessee's case. It may also be mentioned here that not only this aspect remained to be examined by AO. It was not even disclosed by the assessee during the assessment proceedings for earlier assessment years. Thus, the assessee had not disclosed a material fact required for claim of exemption u/s 80IB(10) of the IT Act, 1961 for AYs 7.8. and 08-09. The failure of the AO to examine a crucial requirement makes the assessment order erroneous in so far as it is prejudicial to revenue as the claim of deduction u/s 80IB (10) amounting to Rs.3,97,68,224/- has been erroneously allowed.*

*6. In the instant case it is further seen that the completion certificate for the project has also not been issued by the local authority. Only a certificate by way of "BHOGVATA PATRA" Dated 31.3.2008 has been issued by stating that only 72 flats are complete and ready to use for residence. It may be pointed out here that as per the building plan available on record, total number of 84 flats constitute the project and thus the project was not completed as on 31.3.2008. Thus, the assessee failed to fulfill the condition of eligibility laid down u/s 80IB(1)(i) of the Act as well. This also makes the assessment order erroneous and as such no enquiry whatsoever has been conducted even on this issue.*

*7. It is further seen that the assessee did not furnish form no. 10CCB in the prescribed proforma, duly certified and signed by the CA. This is one of the basic conditions for claiming deduction u/s 80IB (10). In fact, the only document in this regard available in the assessment record is an unsigned photocopy of a letter issued by the CA.*

*7.1 It is further to be pointed out that in the text of his report in form 10CCB at Col.26, the auditor has mentioned NIL with regard to details of deduction admissible under chapter VIA. Thus, the AO has failed to even examine the audit report annexed with the return of income.*

*8. As discussed above, it is abundantly clear that the assessment order passed by the AO for the AY-09-10 is erroneous in so far as that the order is passed mechanically without any examination of the important requirements for allowability to deduction under*

*section 80IB(10) and the claim of the assessee has been accepted substantially. Thus, after calling for and examining the record of assessment proceedings of the assessee, I consider that the assessment order passed by the ITO ward 15(1)( 4), Mumbai is erroneous in so far as it is prejudicial to the interest of revenue in the assessment year 2009-10. You are hereby given an opportunity of being heard to state as to why order u/s 263 (1) may not be passed in the circumstances of the case. You may, therefore, appear either through authorized representative or otherwise at my office on 15.1.2013 at 3.00 pm and state your case”*

*Sd/-  
( PRADEEP SHARMA)  
Commissioner of Income tax-15,  
Murnbai.*

3. In reply to the above notice, the assessee submitted that the plan was approved by the Pune Municipal Corporation on 29.11.2001 for a construction of three buildings with ground floor plus four floors has granted to M/s Badshah Enterprises for 50 flats. However, due to some reasons, the project was abandoned by the said firm and the assessee-firm after coming into being re-submitted fresh plan on 15.4.2006 that 50 flats comprising of three buildings and commencement certificate was given to the assessee by Pune Municipal Corporation on 5.7.2006. Thereafter the assessee further revised the plan to construct 84 flats, 42 car parking which was approved vide letter No.DPO/SEC 6/0231/07/203 which was also filed before the Commissioner of Income Tax. After completion of construction of all 84 flats, the assessee obtained all NOC's from various government authorities and filed all these documents

including indemnity bond on 17.3.2008 before the municipal corporation for issue of completion certificate. Thereafter, Pune Municipal Corporation issued "BHOGVATA PATRA" on 31.3.2008 vide No. BCO/14/1/230. However, "BHOGVATA PATRA" was issued only in respect of 72 flats i.e. ground plus 6 floors. In other words, this was a part completion certificate issued by the Pune Municipal Corporation for the reason that road on the project land was not yet widened by the Pune Municipal Corporation. On the basis of this completion certificate, the Commissioner observed that the AO had not examine the issue of completion of the project and thus, came to the conclusion that failure of the AO to conduct inquiries goes to the root of eligibility condition for deduction u/s 80IB(10) of the Act.

4. The Commissioner noted that final completion certificate from Pune Municipal Corporation has not been issued so far to the assessee which was admitted by the Id.AR of the assessee because of the reason that the road proposed on the project land was not widened as Pune Municipal Corporation had not taken the possession of the land for the said purpose. The assessee submitted before the Commissioner that flats at 7th floor were occupied by the residents since 2008. The Id. AR argued that since the delay in issuing the of final completion certificate qua 7<sup>th</sup> floor by Pune Municipal Corporation was attributed to the reasons not in the control of the assessee as the Municipal Corporation did not undertake the road widening. The Commissioner further noted that the assessee himself

admitted vide submission dated 30.1.2011 that the completion certificate was not issued for the project and only "BHOGVATA PATRA" was issued by Pune Municipal Corporation on 31.3.2008 only for 72 flats. According to the CIT, the AO had simply noted that certain details were filed including the copies of commencement certificate, completion certificate and sale agreement but there was no proof either in the order sheet or in the assessment record that the AO had examined all these documents. As per CIT there was non-application of mind on the part of the assessing officer. Thereafter, the Id.CIT after relying on various decisions as recorded in para 12 to 27 of the appeal order came to the conclusion that the order passed by the AO was erroneous and prejudicial to the interest of the revenue and therefore the same was required to be set aside and accordingly set aside with a direction to pass fresh assessment order.

5. The Id.AR vehemently submitted before us that the assessee had rightly claimed deduction u/s 80IB of the Act qua the profit earned by the assessee from housing project as the assessee had fulfilled all the conditions as envisaged u/s 80IB(10) of the Act. The Id.AR submitted that the assessee moved a revised plan for 84 flats in three buildings with seven floors which was approved by the Pune Municipal Corporation and completion was granted vide letter No.DPO/SEC 6/0231/07/203 dated 31.3.2008. However, the Pune Municipal Corporation granted completion partially thereby withholding the completion certification ("*BHOGVATA*

*PATRA*") in respect of 12 flats on the 7<sup>th</sup> floor for the reasons that the proposed road widening on the project land which was yet to be done by Pune Municipal Corporation. The Id. AR submitted that the delay for issuing completion certificate was purely attributable to the above said reasons which was not issued till the date of exercising revisionary powers and also till the date of passing the order under section 263 of the Act. It was submitted that the delay was on the part of the Pune Municipal Corporation in taking possession of the land of the assessee for development and widening of the road. The Id. AR further submitted that in order to claim deduction as per the provisions of section 80IB(10) the issue of completion certificate was not necessary but even if the assessee had completed the construction and applied for the completion certificate before 31.3.2008 after obtaining necessary approval from the department concerned it would be suffice. The Id. AR drew our attention to various "No Objection Certificates" which were placed at pages 46 to 67 of the paper book qua 84 flats. The Id. AR vehemently submitted that revisionary powers were exercised by the Commissioner without appreciating the facts on records in correct perspective. It was argued by the Id.AR that the points on which the Id. Commissioners exercised the revisionary jurisdiction u/s 263 were wrong as the AO during the course of assessment proceedings had examined the issue of allowability of deduction u/s 80IB(10) of the Act comprehensively and thereafter framed



the assessment allowing deduction u/s 80IB(10) of the Act . The Id. AR also pointed out that similar deduction was allowed for the assessment year 2007-08 which was initial year of claim of deduction u/s 80IB(10) of the Act by drawing our attention to assessment order placed at pages 98 to 100 of the paper book but the said assessment was also reopened u/s 147 r.w.s148 of the Act which was pending. It was also argued before us that the Commissioner failed to understand the meaning of "BHOGVATA PATRA", a MARATHI term in Mumbai used for completion certificate and thus wrongly observed that the completion certificate was not issued by local authority only "BHOGVATA PATRA" dated 31.3.2008 was issued.

The CIT wrongly observed that only 72 flats was ready for occupation out of 84 flats and therefore the project was not completed on 31.3.2008 whereas as a matter of fact the assessee applied for completion certificate for the entire project after obtaining necessary NOC's from the concerned department placed at pages 46 to 67 of the paper book which corroborated the averments of the assessee that the construction was completed before 31.3.2008. The observations of the Commissioner that the assessment order was erroneous and prejudicial to the interest of the revenue on the ground that the claim of deduction u/s 80IB(10) amounting to Rs. Rs.3,97,68,224/- was wrongly allowed to the assessee was altogether misconceived and based upon incorrect appreciation of facts on records.

6. In para 7 of the notice , the Commissioner observed that assessee did not furnish form no. 10CCB in the prescribed proforma, duly certified and signed by the CA which was one of the basic conditions for claiming deduction u/s 80IB(10). The commissioner of income tax had also observed and noted that column No.26 in form 10CCB was mentioned as NIL with regard to details of deduction admissible under chapter VIA. The Id counsel for the assessee submitted that the column was marked as NIL because it was meant for deduction u/s 80IB(a)(4)(2) of the Act whereas the claim of the assessee was duly mentioned in column 27 which reflected the amount of deduction claimed u/s 80IB(10). The Id. Counsel finally submitted that the Assessment Order was framed in accordance with Act after duly examining the issue of allowability of deduction u/s 80IB(10) and thus the invocation of revisionary jurisdiction by the Commissioner u/s 263 of the Act was totally wrong and contrary to the provisions of Income Tax Act and so was the order of the Commissioner setting aside the Assessment Order and directing the AO to make fresh assessment. In defence, the Id. AR relied on the following decisions:

- A) CIT V/s Hindustan Samuh Awas Ltd (2015) 377 ITR 150 (Bom);
- B) CIT V/s Tarnetar Corporation (2014) 362 ITR 174 (Guj);
- C) ITO V/s Saket Corporation (2015) 62 taxmann.com 38 (Guj)
- D) Siddhivinayak Kohinoor Venture V/s ACIT (2015) 67 SOT 284 (Pune-Trib) URO

7. On the other hand, the Id. DR strongly opposed the arguments of the Id.AR and submitted that the assessment was rightly set aside by the Commissioner by exercising the revisionary jurisdiction u/s 263 of the Act as the order of the assessing officer passed under section 143(3) was erroneous and prejudicial to the interest of the revenue in view of the fact that the claim of the assessee u/s 80IB(10) was not examined by the AO and deduction was wrongly allowed. The Id. DR argued that the assessee has been granted "BHOGVATA PATRA" ON 31.3.2008 only in respect of 72 flats whereas the project was sanctioned for 84 flats and till the date of the passing order u/s 263 by the Commissioner even no completion certificate was issued for remaining flats which proved that the project was not completed on 31.3.2008 and the AO had failed to make any inquiry during the assessment proceedings and did not examine all aspects of the matter. The Id. DR prayed that the order of the Commissioner passed under section 263 deserves to be upheld.

8. We have carefully considered the rival contentions and perused the relevant material placed before us including the orders of authorities below and case laws relied upon by both the parties. We find that the assessee had constructed a housing project of 84 flats comprising in three buildings having ground Plus 7 floors. The commencement certificate was issued by Pune Municipal Corporation for 84 flats and construction was undertaken and completed accordingly. After completion of construction,

the assessee obtained various "No Objection Certificates" from various departments like Fire Department dated 21.1.2008, Water supply department dated 31.1.2008, authority for tree growth dated 12.3.2008, Accompanied letter dated 13.3.2008, Health care dated 24.3.2008, Letter for lift permission dated 26.3.2006 and final certificate from Fire Department dated 29.3.2008. All these NOC's were obtained prior to 31.3.2008 and submitted to Pune Municipal Corporation for issuing final completion certificate qua 84 flats. Thereafter Pune Municipal Corporation issued "Bhogvatapatra" dated 31.3.2008 which was a completion certificate in respect of 72 flats only up to 6<sup>th</sup> floors. According to the CIT only part completion of the project was granted thereby withholding the completion qua 12 flats on the 7<sup>th</sup> floor of all the three buildings on the ground that road widening on the side of the project was yet to take place which was to be done by the Municipality. We find merit in the submissions of the Id.AR that the delay in issue of completion certificate qua development of flats was on the part of the Pune Municipal Corporation who failed to take possession of the land for widening the road and consequently withheld the NOC for 12 flats on the 7<sup>th</sup> floor. A perusal of the show cause notice issued under section 263 of the Act reveals various reasons and grounds on the basis of which the Commissioner exercised jurisdiction u/s 263 for setting aside the order of Assessment passed by the AO. According to the Commissioner the

assessee had not placed/furnished the necessary material for verification before the AO qua the claim deduction u/s 80IB(10) for assessment year 2007-08 and 2008-09 and the AO accordingly failed to examine the crucial preconditions for allowance of deduction u/s 80IB(10) of the Act resulting into assessment order being erroneous and prejudicial to the interest of revenue as the claim u/s 80IB(10) of the Act amounting to Rs.3,97,68,224/- was wrongly allowed without examining the necessary documents and satisfying the various preconditions. The CIT also noted that the Pune Municipal Corporation issued "BHOGVATAPATRA" only in respect of 72 flats whereas the project was envisaged for 84 flats and therefore assessee failed to fulfill the necessary conditions for claiming deduction u/s 80IB(10) of the Act and resultant assessment order passed by the AO was erroneous and prejudicial to the interest of revenue as no inquiry was conducted by the AO. Another reason given by the Commissioner for directing the AO to reframe the assessment was that the assessee did not furnish form 10CCB duly certified and signed by the Chartered Accountant which was the basic conditions u/s 80IB (10) of the Act thereby contradicting his own findings stated in para 7.1 of the show cause notice that in the audit report in form No. 10CCB at Col.26, the auditor had mentioned NIL as regard the details of deduction admissible under chapter VIA. According to the Commissioner the AO had even failed to examine the audit report annexed with the return of income. We find

that the findings as recorded by the Commissioner were contradictory and conflicting and there was no application of mind to the facts on records and he proceeded to set aside the assessment for the reasons which were conflicting and based upon wrong appreciation of facts on record. On one hand the commissioner has observed that audit report in Form 10CCB was not filed whereas contradicting his own observation he further noted that AO failed to examine the audit report filed along with the return of income. According to the AR of the assessee the column no.26 of the audit report of form No.10CCB the column was marked as NIL as the assessee had not claimed any deduction u/s 80IB(3,4,5 and 7) whereas column No.29 and 30 were duly filled in and Rs.4,12,60,224/- was mentioned as claim of deduction u/s 80IB(10) of the Act which appears to be correct. We also find that there was a certificate appended by the Auditor at the end of the said form in respect of the claim under section 80IB(10) of the Act . In view of the facts and circumstances, hereinabove, we are of the considered view that the assessment framed by the AO was correct and was wrongly set aside by the Commissioner by exercising revisionary jurisdiction/powers u/s 263 of the Act. Besides the case of the assessee is also supported and squarely covered by the decision in the case of Hindustan Samuh Awas Ltd(supra) in which the Hon'ble Bombay High Court has held that even if the project is part completed and was granted completion certificate for the work

completed, the assessee is entitled for claiming benefit u/s 80IB(10) of the Act. The relevant portion of the judgment of the Jurisdictional High Court in the case of Hindustan Samuh Awas Ltd (supra) is reproduced below:

**"10.** We have no difficulty to accept this contention. We also hold that the explanation is quite clear and does not introduce any uncertainty. In other words, date of completion of a project has to be the date of issuance of Completion Certificate by the Municipal authority.

**11.** The question we raise here is whether the explanation introduced an element of harshness to such an extent that it rendered the main provision nugatory? In our view, the explanation is introduced recently to put an end to a controversy, which might arise before the Assessing Officer about the date of completion. The intention of the legislature in providing explanation to fix the date of completion of a project is quite helpful when this provision is utilized in practice. In our view the explanation has introduced an unnecessarily strictness in the provision which is in the nature of exemption and not in the nature of charging. Sub-section (10) mentions that a housing project should be complete before 31.03.2008 so as to get the exemption. Completion of housing project is a physical act. It can be demonstrated on the spot and also through a certificate issued by an architect who is appointed for supervising the construction work. He is a professional who would declare that the project is complete. Unfortunately, Sub-section (10) and the explanation do not give any importance to the issuance of such Completion Certificate by the concerned architect. It gives importance only to the certificate of Municipal authority. It is common knowledge that an application for Completion Certificate submitted to the Municipal Authorities is accompanied by a Completion Certificate issued by the concerned architect. No doubt, the Municipal authorities then cause inspection of the site and verify the claim. Thereafter, they issue Completion Certificate. But, if a project is really complete before 31.03.2008 and an application is moved quite in time, for seeking Completion Certificate from the Municipal authorities, and if they do not take steps urgently and delay the issuance of Completion Certificate from their side, can it be said that such certificate would alone decide the date of completion of the project? The answer is in negative.

**12.** *In the facts of this case, admittedly, the Architect of the project had given a certificate prior to 31.03.2008. The respondent submitted application to the Municipal authority along with such certificate well in time on 25.03.2008. It seems that the Municipal authorities directed the respondent to deposit certain amount for issuance of Completion Certificate on 27.03.2008 and the amount was accordingly deposited on 31.03.2008. Thereafter, the certificate was issued in October, 2008. This delay cannot be attributed to the respondent assessee.*

**13.** *In view of this, we are inclined to hold that the project, for which exemption is sought, was completed prior to 31.03.2008 and therefore, we are inclined to record our answer in affirmative to the substantial question of law referred to above. Both the appeals are accordingly dismissed."*

In the case of the assessee also the construction of flats was completed before 31.3.2008 and the assessee applied for issue of completion certificate after obtaining necessary NOCs from various Govt authorities and therefore the case of the assessee is squarely covered by the ratio laid down in the above decision. Accordingly we are inclined set aside the order of CIT and uphold the assessment framed by the AO.

9. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 15th DEC, 2016

आदेश की घोषणा खुले न्यायालय में दिनांक: 15th DEC, 2016 को की गई ।

SD

**(AMIT SHUKLA)**

न्यायिक सदस्य / JUDICIAL MEMBER

sd

**( RAJESH KUMAR )**

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 15/12/2016

व.नि.स./ SRL , Sr. PS



**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

True copy

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**