IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 5614/Del/2012
AY: 2009-10

ITA No. 1950/Del/2012
AY: 2008-09

ACIT,	**vs**	**Shipra Estate Ltd. & Jai Krishan Estate**
Circle 36(1),		**Developers Pvt. Ltd., D-32,**
New Delhi.		**Main Vikas Marg, New Delhi.**
		(PAN: ABGFS9748C)

ITA No. 5849/Del/2012
AY: 2009-10

Shipra Estate Ltd. & Jai Krishan Estate	**vs**	**ACIT, Circle 36(1),**
Pvt. Ltd.,		**New Delhi.**

C.O. No. 20/Del/2015
(In ITA No. 1950/Del/2012)
AY: 2008-09

Shipra Estate Ltd. & Jai Krishan Estate	**vs**	**ACIT, Circle 58(1)**
Pvt. Ltd.,		**New Delhi.**

(Appellant)	**(Respondent)**

Department by: Shri Pankaj Vidharthi, CIT DR
Assessee by: Shri Ajay Wadhwa, Adv.

Date of hearing: 02.03.2016
Date of pronouncement: 30.05.2016

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA 1950/12 has been preferred by the Department against the order dated 20.01.2012 passed by the ld. CIT(Appeals)-XXVII, New

Delhi for A.Y. 2008-09. CO 20/2015 has been preferred by the assessee against the Departmental Appeal. ITA 5614/12 has been preferred by the Department against the order dated 27.08.2012 passed by the ld. CIT(Appeals)-XXVII, New Delhi for AY 2009-10. ITA 5849/12 is the cross appeal by the assessee for AY 2009-10. As the three appeals and the CO were heard together, they are being disposed of by this common order.

ITA 1950/2012 & CO 20/2015

2. Return declaring an income of Rs. 11,00,06,440/- was filed on 29.09.2008. In the assessment order passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act'), the AO determined the income of the assessee at Rs. 36,88,00,000/- after making an addition of Rs. 25,91,00,000/- by rejecting the project completion method of accounting followed by the assessee. The assessee is a partnership firm having two partners namely M/s Shipra Estate Ltd. (50% share) and M/s Jai Kishan Estate Developers (P) Ltd. (50% share). The assessee firm entered into joint venture with Ghaziabad Development Authority (GDA) for the construction and development of housing projects on two plots of land bearing plot no. 14 and plot no. 15 situated in Indirapuram at Ghaziabad. The firm had commenced development of 'Vista' project in the year 2005 and 'Shristi' project in

the year 2007 on the two plots respectively as mentioned above. During the year, the assessee had carried on the work on both the projects. The method of accounting being followed by the assessee was Project Completion Method and the revenue was recognized at the time of registration of the residential unit in the name of the customer. Till the completion of the project, amounts received from the customers against the booking of the flats were shown as advances and were reflected as liabilities in the Balance Sheet. The expenses incurred were shown under work-in-progress. The AO noticed that as on 31.03.2008, the assessee had received a total amount of Rs. 228.25 crores from the customers in respect of the Vista project. The total estimated cost of the project was Rs. 209.81 crores. As per the allotment letters, the total sales price of the Vista flats was calculated by the AO at Rs. 250.24 crores. The assessee had already received an amount of Rs. 228.25 crores (91.21% of the total sale price of the flats). The AO opined that receipt of 91.21% showed that the flats were in advanced stage of completion and that the Vista project had been substantially completed. It was the AO's observation that the income had not only accrued but had in effect been received by the assessee. The AO further opined that the method of accounting being followed by the assessee was so arranged with a

view to distort the profits. The AO also observed that in a letter to the bank, the assessee had stated the completion date of Vista Project as 2007 itself. Thus, based on all these observations, the AO rejected the method of accounting i.e. Project Completion Method followed by the assessee.

3. On appeal, the ld. First Appellate Authority allowed the assessee's appeal by holding that Project Completion Method was a recognized method of accounting prescribed by the Institute of Chartered Accountants of India (ICAI) and had been regularly followed by the assessee. The ld. CIT (A) observed that since the assessee was a real estate developer and not a construction contractor, Project Completion Method was the right method for determining the profits of the assessee. The addition of Rs. 25,91,00,000/- made by the AO was deleted.

4. Now the Department is in appeal before us and has challenged this deletion. In the CO, the assessee has challenged the rejection of assessee's claim for allowance of deduction u/s 80IB (10) of the Act by the ld. CIT (A).

5. The ld. DR submitted that the AO had rejected the method of accounting after a very thoughtful deliberation. He submitted that careful consideration of the accounts of the assessee show

that the assessee has followed neither the cash system nor the accrual system of accounting and that the profits that have been offered for taxation is a distorted figure for avoiding the assessee's tax liability. It is seen that the assessee has received Rs.373.17 crores as advances from its customers. It is worth emphasizing that income has not only accrued but has also been received by the assessee .There is nothing to show that there is any uncertainty with regards to the ultimate receipts of the revenues since these payments have already been received by the assessee. A careful perusal of the chart of advances received from the customers shows that in most of the cases in which allotment has been made the payments have already been received. It is seen that in the Vista project the total Sales price of all the flats, as per the allotment letters issued to customers is Rs 250.24 crores. As against this Rs 228.25 crores have already been received as on 31.03.2008. Thus it is seen that 91.21% of the selling price has already been received by the assessee. It was also submitted that barring a few cases, 100% payments have been received for each flat. These facts go on to show that the Vista project has been substantially completed. It would be appreciated that as per the conditions laid down in the allotment

letter the consideration from the customers is to be received in instalments. The customers are required to pay certain amount at the time of application and the balance in seven equal instalments at the interval of 3 months. As is the normal practice in the case of real estate builders, instalments are linked to stages of construction and completion of the flats. More than 91% of the total sales consideration could not have been received unless all the flats were in an advanced stage of completion. Moreover the assessee had submitted to the bank a letter for sanction of finance where it had estimated that the Vista Project would be completed in 2007 itself. The Ld DR drew our attention to the Balance Sheet and submitted that that the assessee has shown huge amounts as work-in-progress. The consolidated estimated cost of Vista plus Srishti was Rs 536.08 crores. The inventory shown in the balance sheet together with the expenses that have been shown in the Profit & Loss a/c work out to more than Rs 220 crores, which is a substantial proportion of the estimated cost. It must be kept in mind that this is the consolidated cost of both the projects and the Proportion of cost incurred with respect to Vista is much higher. Thus it emerges that a very high proportion of estimated cost of Vista has already

been incurred by the assessee. Therefore even from the cost incurred point of view there is no doubt that a major portion of the project has been completed.

6. The Ld. DR submitted that in light of the observations of the AO, the correct method of accounting is Percentage Completion Method and, therefore, impugned order should be set aside.

7. The ld. AR submitted that the assessee is a Real Estate Developer and not a contractor or an investor. It was submitted that real estate development, or property development, is a multifaceted business process, encompassing activities that range from the renovation and re-lease of existing buildings to the purchase of raw land and the sale of developed land or parcels to others. Real estate developers are the people and companies who coordinate all of these activities, converting ideas from paper to real property. Real estate development is different from construction, although many developers also manage the construction process. The Ld. AR submitted that Developers buy land, finance real estate deals, build or have builders build projects, create, imagine, control and orchestrate the process of development from the beginning to end. Developers usually take the greatest risk in the creation or renovation of real estate—and receive the greatest rewards. Typically, developers purchase a tract of land,

determine the marketing of the property, develop the building program and design, obtain the necessary public approval and financing, build the structures, and rent out, manage, and ultimately sell it. Sometimes property developers will only undertake part of the process. For example, some developers source a property; get the plans and permits approved before on selling the property with the plans and permits to a builder at a premium price. Alternatively, a developer that is also a builder may purchase a property with the plans and permits in place so that they do not have the risk of failing to obtain planning approval and can start construction on the development immediately. Developers work with many different counterparts along each step of this process, including architects, city planners, engineers, surveyors, inspectors, contractors, leasing agents and more. The Ld. AR submitted that the modus operandi of the assessee was as under:

(i) Joint Venture with Ghaziabad Development Authority (GDA). GDA contributes land and continues to be its owner.

(ii) Assessee undertakes approval, construction, development, completion, marketing and sale of project.

(iii) Assessee appoints contractor for construction purposes.

(iv) The assessee as per the terms and conditions of Flat Buyer's agreement recognizes the transaction only when the flat is delivered to the customer and is registered in the customer's name by Ghaziabad Development Authority.

(v) Till the flat is registered, the buyer cannot sell the same and exit.

(vi) The assessee accounts for income / sale only when it registers the flats in the name of the customers and till then the amount received is treated as advance and shown as a liability in the Balance Sheet and the expenditure incurred is treated as work in progress.

8. The Ld. AR further submitted that the ICAI has clarified that Revised Accounting Standard 7 – 'Construction Contract' is applicable to only contractors and not to builders and real estate developers. AS-9 Revenue Recognition is applicable to Real Estate Developers. AS 9 recognizes both proportionate completion method and the completed service contract method for revenue recognition. A real estate developer can choose the project completion method for revenue recognition. He pointed

out that there is no dispute on the correctness and accuracy of the accounts maintained by the assessee and that the aforesaid method has been consistently applied and followed by the assessee. The ld. Assessing Officer has changed the method for the first time in Assessment Year 2008-09. He submitted that any change in the method will result in the income from Assessment Year 2006-07 to Assessment Year 2012-13 to be recomputed which would be contrary to the judgment of the Hon'ble Supreme Court in the case of Excel Industries Ltd. 358 ITR 295 wherein it has been held that an exercise which only results in change in income in various years but is overall tax neutral need not be pursued. Here also, the method suggested by the Assessing Officer will only result into profit for each year being different but the overall profitability will be the same. He relied on the judgment of the Hon'ble Supreme Court in M/s Bilahari Investment (2008) 299 ITR 1 for the preposition that every assessee is entitled to arrange its affairs and follow the method of accounting, which the Department has earlier accepted. It is only in those cases where the Department records a finding that the method adopted by the assessee results in distortion of profits, the Department can insist on substitution of

the existing method.

9. On the ground raised in the CO by the assessee on the issue of deduction u/s 80-IB (10) of the Act, the ld. AR submitted that this ground was taken before the ld. CIT (A) as Ground no. 4. However, the ld. CIT(A) rejected the ground in para 22 of the impugned order by observing that since the method of accounting being regularly followed by the assessee has been accepted, this ground is rejected as having become *in fructuous*. It was submitted that this ground was not an alternate ground but on additional claim to which the assessee was entitled.

10. We have heard the rival submissions and perused the material on record. The following facts remain uncontroverted:

11. During the year under consideration, the assessee was developing two Projects namely Vista and Sristhi in joint venture with Ghaziabad Development Authority. The Vista project was started in the year 2005 and had made considerable progress by the end the Financial Year. The assessee was following Project Completion Method of accounting and the revenue was recognized at the time of registration of the residential unit in the name of the customer. Till the time of registration of the residential units the amounts received

from the customers were being treated as advances and were reflected in the Balance Sheet as Liabilities. The cost associated with the development and construction of the residential units was being shown under the head 'work-in-progress'. Registration in the name of the customers was done by the Ghaziabad Development Authority who continued to be owner of the Project and the assessee was granted only development rights. The primary reason why the A.O. rejected the Project Completion Method and has applied the Percentage Completion Method is that the assessee had received substantial portion of the total sale consideration of the residential units in the Vita Project i.e. 91.21%. This amount was being shown by in the balance sheet under the head liabilities and was not reflected in the Profit & Loss account. The fact that 91% of the total sale price had been received led to the inference that the Vista Project was substantially complete as on 31.3.2008. AO, therefore, treated the advances of Rs.228.25 Crores as sale consideration in respect of the various residential units in Vista Project. The A.O. then worked out the proportionate cost of development and construction of the Project by multiplying the total cost of the Project with 91.21%. The difference of the two was treated as profits of the assessee.

12. In this regard it is seen that Project Completion Method followed by the assessee is a recognized method of accounting prescribed by the Institute of Chartered Accountant of India. Before its revision in 2002, AS-7 was applicable in the case of both the Construction Contractors and Real Estates Builders and Developers. AS-7 prescribed both the Percentage Completion Method and the Project Completion Method and it was the choice of the assessee to follow either one of the methods. The ICAI has clarified that the revised AS-7 is applicable only in the case of Construction Contractors and in the case of Real Estates Builders and Developers AS-9 is applicable which prescribes Project Completion Method of accounting. It is established legal position that an assessee can follow any recognised method of accounting and the condition is that the same method has to be followed consistently. In case of a building project, the Institute of Chartered Accountants of India which is an authority on prescribing accounting standards had prescribed accounting standard AS-7 in 1983 for accounting of income in respect of real estate projects and in terms of AS-7 which was applicable to both contractor and real estate developer, a person is free to follow either of project

completion method or percentage completion method depending upon the nature of project. The assessee, in this case, has followed project completion method which is one of the prescribed methods by the Institute of Chartered Accountants of India. Even in terms of the revised accounting standard which was applicable for most part of the work done by the assessee the income had been correctly declared as per project completion method in the year of completion. The assessee has followed project completion method which was one of the prescribed methods and the same method has been accepted by the department in the earlier years. Department, therefore, cannot reject the method and apply percentage completion method in a subsequent year.

13. In view of discussion of the facts of the case and the legal position as above it is held that the Project Completion Method followed by the appellant is a recognized method of accounting prescribed by the ICAI which has been regularly followed by the assessee. The assessee being a real estate developer and not a construction contractor, Project Completion Method is the right method for determining the profits. The Project Completion Method being followed should not have been disturbed by the

Assessing Officer as it was being regularly followed by the assessee in earlier years also and there is no cogent reason to change the method. We, accordingly, uphold the findings of the Ld. CIT(A) on this issue.

14. Hence, ground no. 1 of Department's appeal is rejected. Accordingly, the appeal of the Department is rejected.

15. As far as the CO of the assessee is concerned, we are in agreement with the submission of the ld. AR that the assessee's claim u/s 80-IB (10) of the Act was not an alternate claim to the assessee's method of accounting having been rejected. It was an additional claim which somehow has been misconstrued by the ld. CIT (A) and we deem it fit to restore this limited issue of claim u/s 80-IB (10) of the Act to the file of the ld. CIT (A) to examine it afresh in light of the existing legal requirements and fulfillment thereof by the assessee after providing due opportunity to the assessee for presenting its case.

16. In the result, the CO of the assessee is allowed for statistical purposes.

ITA 5614/2012 & ITA 5849/2012

17. Return showing income of Rs. 24,14,37,960/- was filed on 25.03.2010. In the assessment order passed u/s 143(3) of the Act, the income was determined at Rs. 60,91,00,000/- after making an addition of Rs. 36.77 crores. Out of this addition, disallowance u/s

80IB(10) was to the extent of Rs. 29.68 crores and the balance amount of Rs. 7.09 crores was added on account of application of Percentage of Completion Method by the AO in place of Project Completion Method followed by the assessee. As in the preceding assessment year, the assessee was engaged in the business of Real Estate Development and the assessee firm had entered into a Joint Venture with Ghaziabad Development Authority (GDA) for development of housing projects on two parcels of land bearing Plot No. 14 and 15 situated in Indirapuram at Ghaziabad and had entered into a Memorandum of Understanding (MOU) with GDA on 08.01.2001. As per the MOU, GDA was to continue to be owner of the property and the assessee firm, after undertaking the construction, development and completion of the projects was to market the same. The conveyance deed with the buyers of the flats was to be executed by the GDA. During the year under consideration, the assessee had shown sales of Rs. 154.94 crores in respect of flats sold in the 'Vista' Project and the profit was shown at 53.82 crores. The assessee had been regularly following the Project Completion Method and the accrual system of accounting. The revenue was recognized by the assessee at the time of registration of the property by GDA in the buyer's name. Till the time of registration of the residential units, the

amounts received from the customers were being treated as advances and were reflected in the Balance Sheet as liabilities. The cost associated with the development and construction of the residential units was being shown as work-in-progress. The AO, proceeding on the same reasoning as in the preceding AY i.e. AY 2008-09, was of the opinion that the assessee should have followed the percentage of Completion Method for showing its correct taxable profits during the year under consideration. As per the AO, the estimated Sale Value of the Vista Project was Rs. 351.58 crores against which the assessee had already received an amount of Rs. 295.43 crores which was about 84% of the total estimated sales. Therefore, as per the AO, the income had not only accrued but had also been received by the assessee. Thereafter, the AO proceeded to apply Percentage of Completion Method and made on addition of Rs. 36.77 crores on this count. The ld. CIT (A) deleted this addition is entirety following his earlier year's order in AY 2008-09.

18. Apart from this, out of the profits of Rs. 53.82 crores shown by the assessee on sales finalized during the year under consideration, an amount of Rs. 29.68 crores was claimed as deduction u/s 80IB(10) of the Act in respect of the 'Vista' Project. The Vista Project was divided into five sub projects as under:

i. Vista A&B Blocks having 2 Towers and 320 flats.

ii. Vista D&E Blocks having 2 Towers and 320 flats.

iii. Vista B1, B2 & B3 Blocks having 3 Towers and 120 flats also called C Block.

iv. Vista B4, B5, B6 & B7 Blocks having 4 Towers and 144 flats also called F Block.

v. Vista Commercial Block having 80 shops.

19. The assessee had claimed deduction u/s 80IB (10) in respect of two bed room flats in Block A,B, D and E in respect of 346 flats sold during the year (out of 640 total flats sold). The project was approved on 02.06.2005 and the completion certificate was dated 14.01.2010. The total plot area of the project was 5.33 hectares or 13 acres approximately. The AO disallowed deduction u/s 80IB(10) on the ground that the area of the residential units on which the deduction was claimed was more than 1000 sq. fee each as the area mentioned in the sale deed was 99.96 sq. mts. Or 1067.74 sq. feet and hence the conditions of section 80IB (10) (c) were not fulfilled. The other objection of the AO to the claim was that the shop and commercial establishment included in the Vista Housing Project exceeded the limit prescribed in clause (d) of section 80IB(10) i.e. 5% of the aggregate built up area of the housing project or 2000 sq. feet

whichever is less. As per the AO, the total built up area of the commercial establishment was 4896.2 sq. mts. or 52702 sq. feet. The third point of the AO's objection was that the Audit Report in Form 10CCB as per Rule 18BBB of the Income Tax Rules, 1962 had not been filed separately by the assessee in respect of Vista A&B and Vista D&E and also that the Profit/Loss Accounts and Balance Sheets of these two Towers had not been audited separately and hence it was difficult to rely on the claim of deduction u/s 80IB. The entire claim of deductions amounting to Rs. 29.68 crores was denied by the AO.

20. Subsequent to the disallowance of deduction, the AO referred the matter of determining the area of each flat to the DVO. The DVO submitted his report specifying the area of the flats as under:

S. No.	Floor	Type of Flat	No. of Flats in A,B,C & D Blocks	Built up Area of Flat i/c Walls & covered Balcony (in sq.ft.)	Area of Balcony (open to Sky) in sq. ft.)	Total area (in Sq. Ft.)
1.	1st	Comer	16	1029.28	231.28	1260.56
2.	1st	Middle (Porch Side)	16	988.79	118.05	1106.84
3.	1st	Middle	32	988.79	255.96	1244.75
4.	2nd to 10th	Comer	144	1029.28	Nil	1029.28
5.	2nd to 10th	Middle	432	988.79	Nil	988.79

20.1 Thus, the DVO held that only 432 flats i.e. the middle flats on 2nd & 10th floor of Blocks A,B,D&E were having built up area of less

than 1000 sq. feet and hence qualifying for deduction u/s 80IB(10) of the Act. The remaining flats were held to have built up area of more 1000 sq. feet and not eligible for deduction.

21. Aggrieved, the assessee filed an appeal before the First Appellate Authority and objected to certain observations of the DVO with regard to the working of the built up area of the various flats. It was submitted that with respect to 16 porch size Middle Flats and 32 Middle Flats on 1st Floor, the DVO had included the area of a balcony which was open to the sky in the built-up area which should not have been included in calculation of the built up area in terms of definition of the built up area provided in the Act. The assessee's plea before the ld. CIT (A) was that this inclusion had resulted in the built up area of these flats crossing 1000 sq. feet. The assessee also objected to the working of the DVO in respect of the built up area of 144 corner flats on floor nos. 2 and 10 on all the four blocks. The assessee also submitted before the ld. CIT(A) that admittedly as some of the flats in respect of which deduction u/s 80IB(10) had been claimed had built up area exceeding 1000 sq. feet the deduction should be allowed in respect of flats having built up area of less than 1000 sq. feet on a proportionate basis.

22. As far as the issue of the area of shops/commercial establishment was concerned, the assessee submitted before the First Appellate Authority that commercial establishment was a separate sub-project within the overall Vista Project. Although the AO had treated it as an integral part of the Vista Project, Vista Project had five separate and independent sub-projects viz. Vista A&B, Vista D&E and Vista C. Vista D comprised of only residential units in form of separate towers and commercial establishment was having separate entry and exit which had also been independently certified specifically by the DVO in his report. It was the assessee's submissions before the ld. CIT(A) that the commercial establishment was not included in the housing project and, therefore, clause (d) of section 80IB(10) was not violated. It was further emphasized that no profits from the sale of commercial space was claimed as deduction u/s 80IB and only the profits resulting from the sale of residential units was claimed as deduction. It was also submitted before the ld. CIT(A) that if the AO's view of the commercial establishment being included in the Vista Housing Project were to be held as correct, then the profits from the sale of commercial space would become an allowable deduction u/s 80IB(10) in AY 2010-11 as the provisions of the Act had been amended w.e.f. 1.4.2010 according to which a project approved after

1.4.2005 could be completed in five years from the end of the Financial Year in which the approval was obtained (Assessee's Project approved on 2.6.2005 and completed by 31.3.2011). The assessee also relied on the decision of ITAT, Delhi in its own case in ITA Nos. 2613, 2614, 2739 & 2741 in which it was held that when the total shopping area was below 5% of the total area and the project was approved and in conformity with GDA approval, then deduction u/s 80IB had to be allowed for the whole project. Regarding the AO's observation on the Audit Report, the assessee submitted before the ld. CIT (A) that separate books of account had been maintained for each of the sub-projects but the auditors had provided their opinion on the consolidated accounts. Since the Report in Form 10CCB confirmed to the guidelines issued by the ICAI, the same should not have been ignored.

23. The ld. CIT (A) after considering the assessee's submissions decided the issues as under:

i. The assessee's contention that deduction u/s 80IB (10) in respect of flats having built-up area of less than 1000 sq. feet should be allowed on a proportionate basis was accepted. 232 flats were held eligible for deduction out of 346 flats sold as per the DVO's report and the extent of allowable deduction was

worked out at 19.28 crores. The issue was restored to the file of AO for verifying the calculation and allowing the claim in respect of 232 flats.

ii. The assessee's contention that the flats having balcony open to sky and included in the built up area of the flats by the DVO should also qualify for deduction was however rejected.

iii. The assessee's contention that the Vista Project comprised of five separate sub-projects with the shopping area having its own separate entry and exit was also accepted and it was held that the built up area of the shopping commercial establishment is to be taken into account only when such commercial establishment is included in the housing project in terms of section 80IB (10(d).

iv. The ld. CIT(A) also accepted assessee's contention that no defects were pointed out by the AO with respect to the accounts and, therefore, the deduction u/s 80IB(10) could not be disallowed on the ground that the auditors had given their opinion on the consolidated accounts of the assessee.

24. Now both the assessee, as well as the Department, is in appeal before us.

25. ITA No. 5614 has been filed by the Department and the grounds of appeal are as under:

"On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in deleting the addition of Rs 7.09 crores made by made by the A.O, under percentage completion method, when the assessed has already received 84% of the selling price of the flat and shown as advance from the customer

2 "On the facts and in the circumstances of the case, the Ld, CIT(A) has erred in allowing deduction u/s 80IB (10) amounting to Rs.10.40 crores on proportionate basis as against Rs.29 68 crores claimed by the assessee when the assesses did not fulfill all the conditions specified in the said section'

3 *"On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in not considering the fact that No separate approval was taken from Ghaziabad Development authority (GDA in short) for the project named Vista (Blocks A & B; D&E) on which deduction u/s 80 IB (10) claimed and the map approved by GDA was for the entire project named Vista at Plot No. 14, Indirapuram, Ghaziabad (UP)."*

4 *"On the facts and in the circumstances of the case, the Ld CIT (A) order deserves to be cancelled and the assessment order needs to be confirmed."*

26. ITA 5849 is the assessee's appeal and the grounds of appeal are as under:

1. *That the project of the appellant company fulfills all the requirements of section 80IB (10) of the Act and as such, appellant company is entitled to the benefit of exemption under section 80IB (10) of the Act as claimed. The assessing officer went wrong on facts and in law in disallowing the claim of deduction of Rs. 29.68 crore under section 80IB (10) of the Act and consequently the Commissioner of Income Tax,*

(Appeal)-XXVII, New Delhi in principle allowed the deduction under section 80IB (10) of the Act but erred on facts and in law to restrict the deduction to Rs. 19.28 crores calculated for 232 flat out of the total deduction of Rs. 29.68 crores claimed on 346 flats. The observation made and bases adopted are unjustified and bad in law. The deduction under section 80IB (10) to have been allowed at Rs. 29.68 crore as claimed. The order passed by the Hon'ble CIT (Appeal), may kindly be modified accordingly.

That the DVO on reference from the AO submitted report to the AO wherein the area of 114 flat has been held to be more than 1000 sq.ft by including the area of the balcony which is open to sky. The CIT(Appeal)-XXVII, New Delhi thus erred on facts and in law in adopting the report of the DVO and restricting the deduction under section 80IB(10) of the Act and in doing so he ignored the facts and circumstances of the case and thus the deduction restricted is illegal and unjustified and bad in law.

27. On ground no. 1 of the Department's appeal, the ld. AR submitted that the ground is the same as in earlier year i.e. AY 2008-09 which has already been argued before us. We concur with the submissions of the ld. AR and in view of our findings in ITA 1950/Del/2012 on this issue; we dismiss ground no. 1 of the Department's appeal.

28. Ground Nos. 2 & 3 of the Department's appeal and ground nos. 1 & 2 of the assessee's appeal are being taken up together as they all relate to the claim of deduction u/s 80IB(10) of the Act. As per the Department, the claim u/s 80IB(10) was not allowable as no separate approval for the four projects viz. Vista A, B, D & E was

taken and only a consolidated approval for the entire Vista Project was taken from the GDA containing seven projects (Vista A to F and one Commercial). It was the observation of the AO that the whole Vista Project on plot no. 14 was approved by the GDA as one project. The ld. DR submitted that as the housing project and the commercial project were approved on the same map, the commercial project would have to be included in the housing project. The ld. AR submitted that projects A&B and D&E were two housing projects where the flats were less than 1000 sq. ft. each. Each of these two housing projects did not have any commercial establishment and comprised of only residential units. It was submitted that separate books of account, profit/loss account were prepared for the commercial project as well as for each of the residential projects. It was the plea of the ld. AR that commercial project has been treated as a separate independent activity on which no deduction u/s 80IB (10) was ever claimed by the assessee. The ld. AR also referred to the Report of the DVO, wherein the DVO himself has admitted that the entrances and exits of the Vista Shopping Complex and Vista Residential Project were separate and not interconnected. It was submitted that the entire project comprised of six residential projects and one commercial project and no deduction had ever been claimed in respect of projects C, F and the

Commercial Project and, therefore, there was no valid reason for denial of deduction for Projects A & B and D & E which contained each unit measuring less than 1000 sq. ft. The ld. AR reiterated that the commercial project was completely different, separate and distinct from each of the six residential projects and that there was no commercial office space or area in any of the housing projects in A & B and D & E.

29. As far as the issues of exclusion of projections that were open to sky and that of incorrect measurements by the DVO were concerned, the ld. AR submitted a chart depicting the built-up area of the various flats as per the DVO report. The same is being reproduced herein under for a ready reference:

S.No.	Floor	Type of flat	No. of flats in A.B.D.E projects	Built up area of flat i/c walls & covered balcony (in sq. ft.)	Area of Balcony (Open to Sky) (in sq.ft.)	Total area (in sq. ft.)	Remarks
1.	1st	Corner	16	1029.28	231.28	1260.56	Details as per Annexure 'A'
2	1st	Middle(Porch side)	16	988.79	118.05	1106.84	Details as per Annexure 'B'

3.	1st	Middle	32	988.79	255.96	1244.75	Details as per Annexure 'C'
4.	2nd to 10th	Corner	144	1029.28	Nil	1029.28	Details as per Annexure 'D'
5.	2nd to 10th.	Middle	432	988.79	Nil	988.79	Details as per Annexure 'E'

30. The ld. AR submitted that as per the DVO, only 432 flats out of the total 640 flats in projects A, B, D & E qualified for deduction u/s 80IB (10) as having built-up area of less than 1000 sq. ft. each and the ld. CIT (A) relying on the DVO report allowed the claim of Rs. 19.28 crores out of the total claim of 29.68 crores made by the assessee u/s 80IB (10) of the Act. However, deduction with respect to 208 flats at S.Nos. 1 to 4 in the chart above was not allowed as the flats at S.No. 2 & 3 above, although had a built up area of less than 1000 sq. ft. as per the DVO, but the area exceeded 1000 sq. ft. when the area open to the sky was added. The ld. AR submitted that a balcony structure which has an equivalent structure on the top is to be included in the built-up area but the structure which is open to the sky does not qualify as built up area. He relied on a series of

judgments of the Tribunal and Hon'ble High Courts in support of his contention.

31. The Ld. AR further submitted that the flats and S.No. 1 and 4 in the chart depicted incorrect measurements by the DVO. The Ld. AR submitted that the deduction was denied by the Ld. CIT (A) on the basis of measurements made by the DVO. It was submitted that the area in respect of these 160 flats was in fact only 988.79 sq ft each but the DVO had calculated the same at 1029.28 sq ft which was grossly incorrect. The Ld. AR submitted that the definition of the built-up area included inner measurements of the residential unit at the floor level including the projections and balconies as increased by the thickness of the wall but does not include the common areas shared with other residential units. The Ld. AR submitted that in the construction industry, the outer walls are 9 inches walls whereas the internal walls are 4.50 inches. The area of the walls and the common walls has been arbitrarily applied by the DVO thus increasing the area by approximately 35 sq ft each. It was also submitted that the Ld. CIT (A) did not give sufficient opportunity to the assessee to rebut the findings of the DVO. In light of these anomalies, it was submitted, the full claim of deduction is to be allowed to the assessee.

32. The Ld. DR relied on the DVO's report and the impugned order and submitted that no interference was called for at this stage and that the deduction claim was prima facie incorrect in view of the detailed findings of the Assessing Officer and that even the relief allowed by the Ld. CIT(A) deserves to be reversed.

33. We have heard the rival submissions and carefully perused the relevant material placed on record. As far as ground no. 2 of the Department's appeal is concerned, it is seen that the issue of pro rata deduction is covered in favour of the assessee by the following cases:-

i) ITO vs Air Developers (2009) 122 ITD 125 (Nagpur)

ii) SJR Builders vs ACIT 3 ITR (Trib) 569 (Bangalore)

iii) Sreevatsa Real Estate (P) Ltd. 9 ITR (Trib) 808 (Chennai)

In ITO vs Air Developers (supra), the Nagpur Bench held that:-

> *"In view of the decision of the Kolkata Bench of the Tribunal in the case of (Bengal Ambuja Housing Development Ltd. v. Dy. CIT [IT Appeal No. 1595 (Kol.) of 2005, dated 24-3-2006], which was squarely applicable to the instant case, it was to be held that if the assessee had developed a housing project wherein the majority of the residential units had a built-up area of less than 1500 sq. ft., i.e., the limit prescribed by section SO-IB(IO) and only a few residential units were exceeding the built-up area of 1500 sq. ft., there would*

> *be no justification to disallow the entire deduction under section 80-lB(10). It would be fair and reasonable to allow the deduction on a proportionate basis, i.e., on the profit derived from the construction of the residential unit which had a built-up area of less than 1500 sq. ft., i.e., the limit prescribed under section 80-IB(IO). In view of the above, the Assessing Officer was to be directed that if it was found that the built-up area of some of the residential units was exceeding 1500 sq.ft., he would allow the proportionate deduction under section 80- IB(10). Accordingly, the appeal of the revenue was to be dismissed and cross-objection of the assessee was deemed to be partly allowed. [Para 6.7]"*

Similarly, in SJR Builders (supra), the Bangalore Bench of the ITAT held that:-

> *"However, in the light of the decision of the Special Bench in the case of Brahma Associates v. Joint CIT [2009] 315 ITR (AT) 268 (Pune), merely because some flats are larger than 1500 sq.ft, the assessee will not lose the benefit in its entirety. Only with reference to the fats which have than the prescribed area, the assessee will lose the benefit."*

The Chennai Bench of the ITAT, in the case of Sreevatsa Real Estates (P) Ltd. (supra), held that :-

> *"The assessee was a company engaged in property development and claimed deduction under section 80-IB(10). The Assessing Officer denied the claim citing various reasons, one of them being - Project was not exclusively for units with built-up area less than 1500 sq. ft. Commissioner (Appeals) confirmed the order of the Assessing Officer. In second appeal, ITAT Chennai held -*
>
> *Further as regards revenue's contention that since some of the housing units exceeded 1500 sq. feet., no claim under section 80-111(10) could be allowed, it was to be held that the assessee was eligible for*

> *claiming deduction under section 80-IB(10),* pro rata *for the housing units having area of less than 1500 sq. ft. for both the year. [Para 15]"*

Keeping in view the Report of the DVO as well as the ratio of judgments as discussed above, we concur with the finding of the Ld. CIT(A) that the assessee was eligible to get proportionate deduction u/s 80IB(10) of the Act in respect of flats sold during the year on fulfilling the prescribed conditions. Hence ground no. 2 of the Department's appeal is dismissed and the findings of the Ld. CIT (A) are upheld.

34. As far as the issue of requirement of a separate approval for each housing project is concerned (corresponding to ground no 3 of the Department's appeal), we are of the considered opinion that section 80IB (10) prescribes approval of a housing project. A Housing Project may comprise of both eligible as well as ineligible units. The deduction will be available and limited to the claim on eligible units irrespective of the fact that the entire project comprising of eligible and ineligible units has been approved by the authority by way of a single approval/composite approval. Section 80IB(10) refers to the approval of a housing project but does not prescribe a pre-condition that the deduction will be available in respect of only that unit or part of the project which

has been separately approved by the local authority. Hence, it is our considered view that a separate approval for each eligible unit or project is not the intention of the Act. The Hon'ble Madras High Court in the case of Viswas Promoters (P) Ltd. vs ACIT 255 CTR 149 has held that the mere fact that one of the blocks have units exceeding built-up area of 1500 sq ft per se, would not result in nullifying the claim of the assessee for the entire project. Consequently, it was held, that assessee was entitled to the benefit of deduction u/s 80IB (10(c) of the Act in respect of each of the blocks. The Pune Bench of the ITAT has held in the case of Siddhivinayak Kohinoor Venture vs ACIT (2014) 159 TTJ 390 that construction of even one building with several residential projects of the prescribed size would constitute a housing project for the purpose of section 80IB(10) of the Act. The Pune Bench further held that each block in a particular project has to be taken as an independent building and hence is to be considered a housing project for the purpose of claiming deduction u/s 80IB(10). Para 32 of the order is relevant in the present appeal also and is being reproduced herein under for a ready reference:-

"32. The argument of the Revenue, based on the statement of Chief Engineer, PCMC, in our view, does not

help the case of the Revenue as the following discussion would show. The case set up by the Revenue is that two projects have been sanctioned by a common approval and thus the PCMC has viewed the two projects as a single composite project. It is contended by the Revenue that the expression 'housing project', though not defined in s. 80-113(10) of the Act, should be taken to be the project per se, as approved by a 'local authority' for the purposes of s. 80-IB(10) of the Act. No doubt, for a 'housing project' to be eligible for deduction under s. 80-IB (10) of the Act, it is required to be approved by a 'local authority', so however, the phraseology of s. 80-IB (10) of the Act does not reflect a legislative intent that the project should be 'as approved' by a 'local authority'. The requirement of s. 80-IB (10) of the Act to the effect that project should be approved by a 'local authority' is fulfilled no sooner when the 'housing project' considered by an assessee is approved by a 'local authority'. Moreover, the expression 'housing project' is not defined in the Development Control Rules for PCMC i.e. the 'local authority' in the case before us and thus, the said enactment cannot be resorted to for the purpose of understanding the meaning of expression 'housing project' contained in s. 80-IB(10) of the Act. Therefore, so long as the claim of deduction is in relation to a 'housing project', which has been approved by the 'local authority', it would satisfy the requirement of s. 80-IB(10) of the Act. Pertinently, if the proposition of the Revenue is to be upheld, the same would be quite contrary to the manner in which the expression 'housing project' contained in s. 80-IB (10) of the Act has been understood bu the Hon'ble Bombau High Court in the case of Vandana Properties (supra) and also bu the Hon'ble Madras Hiah Court in Viswas Promoters (P.) Ltd. (supra) and Arun Excello Foundations (P.) Ltd. (supra). It may also be pertinent to observe that the Hon'ble Bombay High Court in Vandana Properties (supra) not only noted that the expression 'housing project' is not defined under s. 80-IB(10) of the Act but also noted that the same was not defined even under the relevant local regulations before it, viz. the Mumbai Municipal Corporation Act, 1988 and the Development Control Regulations for Greater Mumbai, 1991. Thus, the Hon'ble High Court proceeded to observe that the expression 'housing project' in s. 80-IB(10) would have to be construed as commonly understood. Even in the case before us, there is no dispute that the expression 'housing project' is not defined in the Development Control Rules for PCMC and therefore, the concept of'housing project' as sought to be understood by the AO

based on the explanation of Chief Engineer. PCMC is not relevant for the purposes of s, 80IB (I0) of the Act. Thus, the argument of the Revenue to the effect that since SWRH and 'S'[1] projects have been approved by PCMC under a common approval, the two projects should be combined and considered as a single project for the purpose of s. under s. 80-IB(10) of the Act in our opinion is misplaced."

35. Therefore, in view of the facts of the case as well as the judicial precedents discussed above, we dismiss ground no. 3 of the Department's appeal. Ground nos. 4 & 5 of the Department's appeal being general in nature are not being adjudicated upon and are dismissed. In the result, the appeal of the department is dismissed.

36. As far as ground nos. 1 & 2 of the assessee's appeal are concerned, the first issue requiring adjudication is whether the projections open to sky are to be included or excluded in the calculation of the built-up area of a particulars residential unit. We find that this issue is covered in favour of the assessee by the decision of the ITAT Pune Bench in the case of Naresh T. Wadhwani vs DCIT (52 taxmann.com 360 Pune-Trib) wherein, in para 27, the Bench has held as follows:-

" 27. Considered in the above background, we conclude by holding that the Assessing Officer and thereafter the CIT(A) has erred in including the area of projected terrace (open to sky) for the purposes of computing 'built-up area' while examining the condition prescribed in

clause (e) of section 80IB(10) of the Act. Once the area of projected terrace (open to sky) is excluded then there is no dispute that the residual built-up area of six units in question falls within the prescribed limit of 1500 sq.ft. As a result, we hold that assessee fulfills the condition prescribed in clause (c) of section 80IB (10) of the Act with regard to the six units in question. Therefore, we set-aside the order of the CIT(A) and direct the Assessing Officer to consider that the six units in question fulfill the condition prescribed in clause (e) of section 80I B(10) of the Act and the assessee is entitled to the benefit of section 80IB(10) of the Act."

37. In the proceedings before us, the Department could not point out any judgment/judicial precedent to the contrary. We accordingly hold that the balconies open to the sky are to be excluded from the calculation of the built-up area of a particular residential unit. We, therefore, direct that the assessee be allowed the claim of deduction u/s 80IB (10) in respect of flats (at S.Nos. 2 & 3 as in the chart reproduced in on Para 28 of this order) which have been excluded from the benefit of deduction by including the balconies open to sky for the purpose of calculating the built-up area of the individual units.

38. The only issue remaining for adjudication after this is the claim of the assessee challenging the measurements of the DVO in respect of flats at Sl. no. 1 & 4 of the chart (Para 28 of this

order). It is the assessee's contention that the correct measurement is 988.79 sq ft whereas the DVO has calculated the build up area at 1029.28 sq. ft. It is also the assessee's plea that it had not been afforded a proper opportunity to explain the discrepancy before the Ld. CIT (A). Hence in the interest of justice, we deem it proper to restore this limited issue of discrepancy in measurement, as claimed by the assessee, to the file of the Assessing Officer for fresh examination and adjudication thereon after giving due opportunity to the assessee to present its case. In the result, the appeal of the assessee is partly allowed.

39. In the final result, both the appeals of the department are dismissed, the C.O. of the assessee is allowed and the appeal of the assessee is partly allowed.

Order pronounced in the Open Court on 30th May, 2016.

Sd/-	Sd/-
(G.D. AGRAWAL)	**(SUDHANSHU SRIVASTAVA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: the 30th May, 2016
'GS'

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT 4. CIT(A)
4. DR, ITAT

By Order

ASSTT.REGISTRAR