IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE H.T.NARENDRA PRASAD

I.T.A. NO.54 OF 2013, DATED:22-09-2020

THE COMMISSIONER OF INCOME-TAX, BANGALORE AND ANOTHER VS. M/ S. BRIGADE ENTERPRISES LTD., BANGALORE

JUDGMENT

ALOK ARADHE J.,

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the revenue.The subject matter of the appeal pertains to the Assessment year 2007-08.The appeal was admitted by a bench of this Court vide order dated 30.05.2013 on the following substantial questions of law:

(i) Whether the appellate authorities were correct in holding that the assessee firm is eligible for deduction under Section 80IB of the Income-Tax Act without appreciating that the assessee has not satisfied the requirements as laid down in clauses (a) to (d) of sub-Section (1) of Section 80IB of the Act?

(ii) Whether the appellate authorities were correct in allowing proportionate deduction under Section 80IB in respect of the individual units measuring less than 1500 sq.ft.Contrary to the provisions of Section 80IB of the Act, when Section contemplates fulfillment of condition of less than 1500 sq.ft.in respect of entire project?

(iii) Whether the appellate authorities were correct in holding that the assessee is entitled to deduction under Section 80IB (10) of the Act, admittedly when the commercial area in the project was more than 5% by holding that each residential block has to be taken into consideration for computing percentage of commercial area, when the provision contemplates fulfillment of conditions for the entire project and recorded a perverse finding

(iv) Whether the appellate authorities were correct in holding that the assessee is entitled to deduction under Section 801B of the Act, though the area of project is less than 1 acre by recording a finding that the area was measuring more than 1 acre at the time of submitting the project for approval and the same was reduced in compliance with the conditions imposed by the approval

authority i.e., BMP without taking into consideration the requirement of Section 80IB (10) of the Act, and recorded a perverse finding?

BACKGROUND FACTS:

2. Facts leading to filing of this appeal briefly stated are that the assessee is engaged in the business of construction, property development and real estate.The assessee filed return declaring an income of Rs.98,15,55,940/-. The return was processed under Section 143 (1) of the Act. However, the assessee filed a revised return of income on 30.03.2009, in which the income returned was reduced from Rs.98,15,55,940/-to Rs.49,96,89,936/-.In the revised return, the assessee claimed deduction under Section 80IB (10) of the Act to the extent of Rs.61,60,49,743/-as against deduction of Rs.11,19,14,742/-, which was claimed earlier.The case was selected for scrutiny and notice under Section 143 (2) of the Act was issued.The Assessing Officer by an order dated 31.12.2009 inter alia held that Section 80IB (10) of the Act does not permit a claim on proportionate basis, only in respect of units, which were less than 1500 square feet.It was also held that the assessee has used 60% of the total built up area for commercial purposes as against 5%, which is permissible in law.It was also held that the assessee company in almost every block had a housing unit, which was more than 1500 square feet and approval from Bruhat Bangalore Mahanagara Palike (BBMP) has been obtained for the entire project and not for individual units. It was also held that one of the housing units did not satisfy the condition of minimum area i.e., one acre.The Assessing Officer concluded that the assessee has failed to satisfy the conditions, which are sine qua non for claiming deduction under Section 80IB (10) of the Act. The Assessing Officer, assessed the total income of the assessee at Rs.105,56,89,820/and levied interest and initiated the penalty proceedings under Section 271 (1) (c) of the Act.

3. The assessee challenged the aforesaid order in an appeal before the Commissioner of Income Tax (Appeals).The Commissioner of Income Tax (Appeals) vide order dated 12.05.2010, inter alia held that claim of assessee under Section 80IB (10) of the Act was allowed for previous Assessment Years viz., 2004-05, 2005-06 by the Commissioner of Income Tax (Appeals) and the aforesaid orders has been upheld by the Income Tax Appellate Tribunal (hereinafter referred to as ' the Tribunal ' for short). Accordingly, the claim for deduction under Section 80IB (10) of the Act for Assessment Year 2007-08 was allowed and the order passed by the Assessing Officer was set aside.

4. Being aggrieved, the revenue filed an appeal before the Tribunal.The Tribunal by an order dated 07.09.2012 inter alia held that the issues involved in the appeal are covered by decisions passed by the Tribunal in the assessee's case in the Previous year and order of the Tribunal in respect of

Assessment Year 2004-05 has been upheld by this court in I.T.A.No.763/2009 dated 29.02.2012.It was further held that the assessee has also satisfied the requirement with regard to size of the land i.e., one acre.In the result, the appeal preferred by the revenue was dismissed.In the aforesaid factual background, the revenue has filed this appeal.

SUBMISSIONS:

5. Learned counsel for the revenue submitted that the benefit of deduction under Section 80IB (10) of the Act is extended not to an individual unit but to a housing project as a whole. It is further submitted that the housing project itself should be eligible for incentive under Section 80IB (10) of the Act and the conditions prescribed in clauses (a) to (f) of Section 80IB (10) have to be complied with.It is contended that the expression ' residential unit ' used in clause (c) of Section 80IB (10) of the Act, has to be read as ` residential unit comprised in the housing project '.It is further contended that assessee cannot claim each tower to be project by itself and the reliance by the Commissioner of Income Tax (Appeals) and the Tribunal with regard to decisions of previous assessment years in the case of assessee is misconceived as the dispute in the decisions of Previous assessment years related to built up area and therefore, the aforesaid decisions do not apply to the fact situation of the case. It is also urged that the conditions mentioned in clauses (a) to (f) of Section 80IB (10) of the Act are cumulative and have to be fulfilled by the assessee in order to claim the benefit of deduction under Section 80IB (10) of the Act. It is also argued that conditions (a) to (f) of Section 80IB (10) are in the realm of exemption provisions provisions and and have to be strictly construed and in case of any ambiguity, the benefit has to be given to the revenue.In support of aforesaid submissions, reliance has been placed on decisions in ' COMMISSIONER OF INCOME-TAX VS. M.K.KIRTIKAR ', (1959) 36 ITR 360 (SC), ' B.M.MALANI VS. COMMISSIONER OF INCOME TAX & ANR. ', (2008) 306 ITR 0196, ' RAMNATH & CO. VS. COMMISSIONER OF INCOME-TAX ', (2020) 116 TAXMANN.COM 885 (SC), and ' COMMISSIONER OF INCOME-TAX VS. VEENA DEVELOPERS ', (2016) 66 TAXMANN.COM 353 (SC).

6. On the other hand, learned counsel for the assessee did not dispute the proposition that in order to claim deduction under Section 80IB (10) of the Act, an assessee is required to satisfy the conditions mentioned in clauses (a) to (f) of Section 80IB (10) of the Act. It is submitted that Assessing Officer, Commissioner of Income Tax (Appeals) as well as Income Tax Appellate Tribunal have held that issue of proportionality is covered in the case of assessee by this court and even has been affirmed by the Supreme Court in the case of assessee itself.It is also argued that if the Assessing Officer has not taken a ground to deny the benefit to the assessee, the same cannot be urged in this appeal.It is also pointed out that in respect of Assessment Years 2004-05, 2005-06 and

2006-07, the assessee was given the benefit of proportionality and the aforesaid view has been affirmed by Supreme Court as Special Leave Petitions have been dismissed.It is also argued that where multiple approvals are granted and each approval has to be examined separately.It is also submitted that issue with regard to usage of commercial area in the project in excess of more than 5% has also attained finality in the case of assessee itself and the Assessing Officer has not disputed the fact that the assessee had obtained separate approvals in respect of different units.

It is further submitted that this court had also allowed the appeal of the assessee for Previous Assessment Year on different project on the issue of commercial use of area in a project and SLP against the order passed by this court has been dismissed.It is contended that the project includes park area, roads etc. and the Assessing Officer grossly erred in ascertaining the area of 1 acre by taking into account the built up area of the flats.In this connection, our attention has also been invited to finding recorded by the Tribunal in para 11 and it has been pointed out that the total area is 48.939 square feet, which is more than one acre and the land was surrendered after approval of the project.

In support of aforesaid submissions, reliance has been placed on decisions of Supreme Court in ' CIT VS. RAGHAVENDRA CONSTRUCTIONS ', (2013) 354 ITR 194 (KARNATAKA), ' CIT VS. VANDANA PROPERTIES ', (2013) 353 ITR 36 (BOMBAY), (2008) 119 TTJ 269 (BANGALORE), ITA 412/BANG/09, ITA 763/2009 C/ W 25/2009, ITA 1355/BANG/2010, ITA 61/2012, SLP AGAINST 25/2009 IN CC 2309/2013, SLP AGAINST 763/2009 IN CC 20865/2012, SLP AGAINST 61/2012 IN CC 9188/2013, R.P. WAS DISMISSED IN RP (C) NO.490 OF 2013, ' ACIT VS. ' G.R.DEVELOPERS IN ITA 405/BANG/2010, ' CIT VS. M/ S G.R. DEVELOPERS IN ITA NO.68/2011, ' CIT VS. M/ S G.R.DEVELOPERS IN ITA NO.355/2009, ' PCIT VS. OCEANUS DWELLINS (P.) LTD. ', (2017) 395 ITR 376 (KARNATAKA), ' CIT VS. SJR BUILDERS IN ITA NO.32/2012, ' CIT VS. ANRIYA PROJECT MANAGEMENT SERVICES (P.) LTD ', (2013) 353 ITR 12 (KARNATAKA), ' PCIT VS. SHREENATH BUILDCON ', R/TAX APPEAL NO.289/2008, ' PCIT VS. SHREENATH BUILDCON ", SLP NO.42736/2018, (2019) 110 TAXMANN.COM 390 (SC), ' VISWAS PROMOTERS (P.) LTD. VS. ACIT ', (2013) 214 TAMAN 524 (MADRAS), ' CIT VS. SREEVATSA REAL ESTAETS (P.) LTD. ', (2014) 222 TAXMAN 105 (MADRAS), and ' CIT VS. SG ESTATE ', 2015-TIOL-1834-HC-DEL-IT.

1. Learned Senior counsel for the assessee submitted that clause (b) and (c) of Section 801B (10) of the Act did not undergo any change even after the amendment therefore, irrespective of the fact whether the housing projects were sanctioned on or after 01.04.2005, the various decisions

rendered with regard to Section 80IB (10) in relation to clauses (b) and (c) continued to hold the field.It is also submitted that the Legislature has not used the word ' each ' residential unit in clause (c) of Section 801B (10) of the Act, whereas, in 165 provisions of the Act as well as the Income Tax Rules, the expression each ' has been used.It is also submitted that the Legislature in its wisdom did not use the word ' each ' despite amendment.

Learned Senior counsel for the assessee has invited our attention to the constitution bench of the Supreme Court in ' DILIP KUMAR AND CO., (2018) 95 TAXMANN.COM 327 (SC), with regard to principles of interpretation of a charging section as well as provision relating to exemption.It is also argued that there is no ambiguity in Section 80IB (10) of the Act.

8. By way of rejoinder, learned counsel for the revenue has submitted that in all the decisions on which reliance has been placed by the assessee, the sanction in respect of the housing projects was granted prior to 01.04.2005.It is reiterated that the expression ' residential unit ' used in Clause (c) of Section 80IB (10) of the Act has to be read as ` a residential unit in a housing project '.It is further submitted that reliance placed on decision in case of Vandana properties supra is of no assistance to the assessee as the decision in the aforesaid case was given in the peculiar facts of the case.

It is further pointed out that internal roads in the project were not handed over by the assessee to the BBMP.

LEGAL PRINCIPLES:

9. We have considered the submissions made by learned counsel for the parties and have perused the record.The object of Section 80IB (10) of the Act is to provide 100% deduction of the profits derived by an undertaking from developing and building housing projects.Section 80IB (10) was substituted by Finance Act No. (2) Act, 2004 with effect from 01.04.2005.Prior to the amendment, Section 80IB (10) and post amendment with effect from 01.04.2005, Section 80IB (10) reads as under:

Prior to 01.04.2005

(10) The amount of profitsin 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 kilometers from the municipal limits of these cities and and one thousand and five hundred square feet at any other place. "

AFTER 01.04.2005

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, 2008 by a local authority shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if,-

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes such construction,

(i) in a case where a housing project has been approved by the local authority before the 1st day of April, 2004, on or before the 31st day of March, 2008;

(ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1st day of April, 2004 but not later than the 31st day of March, 2005, within four years from the end of the financial year in which the housing project is approved by the local authority;

(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five years from the end of the financial year in which the housing project is approved by the local authority.

Explanation.For the purposes of this clause,-

(i) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority;

(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority;

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

Provided that nothing contained in clause (a) or clause (b) shall apply to a housing project carried out in accordance with a scheme framed by the Central Government or a State Government for

reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf;

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

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

(e) not more than one residential unit in the housing project is allotted to any person not being an individual; and

(f) in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely:— (i) the individual or the spouse or the minor children of such individual, (ii) the Hindu undivided family in which such individual is the karta, (iii) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta.

Explanation.For the removal of doubts, it is hereby declared that nothing contained in this sub section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State Government).

10. Thus, from close scrutiny of Section 80IB (10) of the Act, prior to its amendment with effect from 01.04.2005 as well as after its amendment with effect from 01.04.2005, it is evident that clauses (b) and (c) have not been subjected to any amendment and remain the same.Thus, the legal principles evolved by various courts with regard to interpretation with regard to clauses (b) and (c) of Section 80IB (10) of the Act, even after amendment remain the same.It is noteworthy that in Section 80IB (10) of the Act, the Legislature has used the expression ' housing project ' except in clause (c) where the expression ' residential unit ' has been used.

11. In order to claim the benefit of deduction under Section 80IB (10) of the Act, the assessee has to satisfy the following conditions:

(a) The project has to be approved by the local authority before 31.03.2007.

(b) The project is constructed on a plot of land having a minimum area of one acre.

(c) The built-up area of each residential unit should not exceed 11,500 sq.ft.in the cities of Delhi and Mumbai (including areas falling within 25 Kms. Of Municipal limits of these cities) and 1,500/-sq.ft.in other places.

(d) The built up area of the shops and other commercial establishments included in the housing project should not exceed 5% of the total built up area of the housing project or 2,000 sq.ft.whichever is less.

(e) The project has to be completed within four years from the end of the financial year in which the project is approved by the local authority.

12. At At this this stage, we may advert to the well settled legal principles with regard to interpretation of taxing statutes.It is trite law that subject is not to be taxed without clear words for the purpose and also that every Act of Parliament must be read according to natural construction of its word. The well established rule in the familiar words of Lord Wensleydale, reaffirmed by Lord Halsbury and Lord Simonds, is that ' if the person sought to be taxed comes within the letter of the law he must be taxed, however, great the hardship may appear to the judicial mind to be.On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be '.In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute.The Constitution Bench of the Supreme Court in STATE OF WEST BENGAL VS. KESORAM INDUSTRIES LTD. ', (2004) 10 SCC 201 cited a passage from JUSTICE G.P.SINGH'S TREATISE on Principles of Statutory interpretation summed up the following principles with regard to interpretation of taxing statute.

(i) in interpreting a taxing statute, equitable considerations are entirely cut of place.Taxing statutes cannot be interpreted on any presumption or assumption.A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency;

(ii) before taxing any person it must be shown that he fails within the ambit of the charging section by clear words used In the Section; and

(iii) if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject.There is nothing unjust in the tax-payer escaping if the letter of the law falls to catch him on account of Legislature's failure to express itself clearly.

The aforesaid principles were referred to with approval by another constitution bench decision of Supreme Court in ' COMMISSIONER OF CUSTOMS (IMPORT) MUMBAI VS. DILIP KUMAR AND COMPANY ', (2018) 361 ELT 577 (SC).

13. It is equally well settled legal proposition that exemption is available on complying with certain conditions, those conditions have to be strictly complied with.[See: 'EAGLE FLASK INDUSTRIES LTD., VS. COMMISSIONER OF CENTRAL EXCISE ', (2004) 7 SCC 377 AND ' STATE OF JHARKHAND VS. ANBAY CEMENTS ', (2005) 1 SCC 368, ' STATE OF BIHAR VS. KALYANPUR CEMENTS LTD. ', (2010) 3 SCC 274 and ' DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 11 (1), BANGALORE VS. ACE MULTI AXES SYSTEMS LTD. ', AIR 2017 SC 5660].The constitution bench of the Supreme Court in DILIP KUMAR AND COMPANY SUPRA has held that incentive provision is subjected to strict interpretation and until the stage of finding out the eligibility to claim deduction, the ambit and scope of the provision for the purpose of its applicability cannot be expanded or widened, but once, eligibility is decided in favour of a person claiming such deduction, it could be construed liberally with regard to other requirements, which may be formal or directory in nature. The aforesaid decision was referred to with approval by the Supreme Court in Ramnath & Co. supra.

ANALYSIS:

14. In the backdrop of aforesaid well settled legal principles, we may now examine the facts of the case in hand.The pivotal issue in this appeal is whether the assessee has complied with the conditions, which are sine qua non in order to claim benefit of deduction under Section 80IB (10) of the Act viz., the requirements contained in clauses (b), (c) & (d) of Section 801B (10) of the Act. We shall proceed to deal with the aforesaid issues ad seritum.

A. Requirement of project of the size of a plot of land which has a minimum area of 1 acre:

15. From perusal of para 14 of the order passed by the Assessing Officer, we find that the Assessing Officer has himself recorded a finding that the site area as per the plan, which was approved on 30.04.2005 is 48,939 square feet, which is more than one acre i.e., 45,560 square feet.It has further been found by the Assessing Officer that the assessee company had to hand over certain land to BBMP for development.It has also been found that after handing over of the land, the project has been constructed on an area of 38,573 square feet.The Commissioner of Income Tax (Appeals) by following the decision of the Income Tax Appellate Tribunal dated 29.08.2008 in case of assessee

itself for the Assessment Year 2004-05 has reversed the finding recorded by the Assessing Officer in this regard.

The Tribunal by an order dated 07.09.2012 has held that as per the approved plan, the total area of the land is 48,939 square feet, which is more than one acre and part of the land was handed over to the BBMP by the assessee for public purposes.It was further held that the land area area,, which was ultimately sold to the purchasers of various flats was only 38,573 square feet.The Tribunal by placing reliance on decision of Mumbai Bench of the Tribunal in M/ s Veedhi Builders Vs. ITO in ITA No.1212/2009 for Assessment Year 2005-06 held that size of the plot has to be taken as a whole and the area surrendered for the public purpose viz., for roads and gardens cannot be excluded.It is pertinent to note that Central Board of Direct Taxes (CBDT) has issued a letter dated 04.05.2001 to Maharashtra Chamber of Housing Industry and has clarified that any project, which has been approved by the local authority as a housing project should be considered adequate for the purpose of Section 10 (23G) and Section 80IB (10) of the Act. The aforesaid Circular was interpreted by Bombay High Court in COMMISSIONER OF INCOME TAX VS. ZVANDANA PROPERTIES supra and it was held that the housing project must be on a vacant plot of land having minimum area of one acre and in such a case, the assessee is entitled to benefit of deduction under Section 801B (10) of the Act. Similar view was taken by High court of Madras in ' COMMISSIONER OF INCOME TAX THIRUCHIRAPALLI VS. R.SETHURAMAN ', 2015-TIOL-1912-HC-MAD-IT as well as in ' COMMISSIONER OF INCOME TAX, CHENNAI VS. M/ S VOORA PROPERTY DEVELOPERS PVT. LTD. ', TAX CASE (APPEAL) NO.56/2015 DATED 09.03.2015.We respectfully concur with the view taken by the Bombay as well as Chennai High Courts.In the instant case, the housing project of the assessee was approved in respect of an area of 48,939 square feet, which is more than one acre i.e., 43,500 square feet, therefore, we hold that the assessee has complied with requirement contained in Clause (b) of Section 80IB (10) of the Act.

B. REQUIREMENT OF RESIDENTIAL UNIT HAVING A MAXIMUM BUILT UP AREA OF 1,500 SQUARE FEET:

16. The Assessing Officer has held that 32% of the units of the assessee are having an area of more than 1,500 square feet.It was further held that though the Income Tax Appellate Tribunal has recorded a finding in favour of the assessee that assessee is entitled to benefit of principle of proportionality for the Assessment Years 2004-05 and 2005-06, yet the aforesaid finding has not attained finality and the same is pending before this court in an appeal.The Commissioner of Income Tax (Appeals) by placing reliance on the order passed by the Tribunal in respect of previous Assessment Year viz., 2004-05 has held that the assessee is entitled to benefit of deduction under

Section 801B (10) of the Act proportionately in respect of residential units having built up area less than or equal to 1,500 square feet.

The aforesaid finding has been affirmed by the Tribunal vide order dated 07.09.2012 by placing reliance in case of the assessee in respect of previous Assessment Year i.e., 2005-06 as well as 2006 07. It is pertinent to note that the aforesaid view has been affirmed by a bench of this court in respect of another project of the assessee for the Assessment Year 2004-05 vide order dated 29.02.2012 passed in I.T.A.No.763/2009.It is also pertinent to note that similar view was taken in favour of the assessee in respect of Assessment Year 2005-06 and 2006-07 and the SLP against the order passed by this court has been dismissed vide orders dated 04.01.2013 and 14.03.2014 respectively.The aforesaid issue has therefore, attained finality.It is also pertinent to mention here that clause (c) of Section 80IB (10) of the Act, the Legislature has used the expression ' residential unit ' and has specifically omitted to use the expression ' each '.

It is also pertinent to mention here that in several Sections like Section 5A, 6 (5), 10 (10), 35D (1), 44AD (3), 80HHB, 801 (5), 153C, 153D, 158DA, 293A (3), 296 and 298 (4) of the Act as well as under Rules 2BA, 20 (4), 22 (3), 62 (3), 74 (2), 74 (6) and 104 of the Rules, the Legislature has expressly used the word ' each '.It is well settled rule of statutory interpretation that when a situation has been expressed differently, the legislation must be taken to have been tended to express a different intention.[SEE: 'COMMISSIONER OF INCOME TAX, NEW DELHI VS. EAST WEST IMPORT AND EXPORT (P) LTD ' 1989 (1) SCC 760].On plain reading of clause (c) of Section 80IB (10) of the Act, it is evident that the same does not exclude the principle of proportionality in any manner.Therefore, we hold that the Commissioner of Income Tax (Appeals) as well as the Tribunal have rightly found that the assessee has complied with the requirement contained in clause (c) of Section 80IB (10) of the Act.

C. REQUIREMENT OF COMMERCIAL AREA IN A PROJECT NOT EXCEEDING 5% OF THE BUILT UP AREA:

17. The Assessing Officer in para 11 of its order has recorded the submission of the assessee that in respect of each block, it has taken separate approval.The Tribunal vide order dated 07.09.2012 inter alia held that individual residential block has to be considered as separate project and the commercial space which is separate part of the project should not be considered.It was further held that similar view was taken by the Tribunal in case of the assessee for Assessment Year 2004-05, which has been upheld by this court in I.T.A.No.763/2009 and 25/2009 vide order dated 29.02.2012 and therefore, the assessee was held entitled to deduction under Section 801B (10) of the Act. It is pertinent to mention here that the assessee had preferred a Special Leave Petition, which was

dismissed by the Supreme Court.We therefore, hold that the assessee has complied with the requirement of clause (b) of Section 80IB (10) of the Act.

18. The Supreme Court in RADHASOAMI SATSANG VS. COMMISSIONER OF INCOME-TAX ' (1992) 60 TAXMAN 248 (SC) has held that even though principles of res judicata do not apply to income tax proceedings, but where a fundamental aspect permeating through the different Assessment Years has been found as the fact one way or the other and the parties have allowed the position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in subsequent year.For this reason also, in the facts of the case, a different view cannot be taken.On literal construction of the provision of Section 801B (10) of the Act it is evident that the aforesaid provisions do not suffer from any ambiguity, therefore, the decisions rendered by the Supreme Court in the case of DILIP KUMAR and RAMNATH & CO. supra have no application to the obtaining factual matrix of the case. For the aforementioned reasons, it is held that the assessee has complied with the requirements contained in clauses (a), (b), (c) & (d) of Section 80IB (10) of the Act. The substantial questions of law framed by a bench of this court are answered against the revenue and in favour of the assessee.

In the result, we do not find any merit in this appeal.The same fails and is hereby dismissed.