* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision** : 24th September, 2012.

\+ **ITA Nos.485/2010 & 437/2011**

CIT .... Appellant
Through: Mr.Abhishek Marath, Sr.Standing Counsel with
Ms. Anshul Sharma, Advocate.

VERSUS

ANSAL HOUSING & CONSTRUCTION LTD. .....Respondent
Through: Mr.Ajay Vohra with Ms.Kavita Jha and
Mr.Somnath Shukla, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.(OPEN COURT):

For order see ITA No.480/2010.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

September 24, 2012
Bisht

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MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.(OPEN COURT):

These are three appeals filed by the Revenue under Section 260A of the Income Tax Act, 1961 ("Act" for short). They relate to the assessment years 2000-01 and 2001-02. ITA No.485/2010 and 480/2010 are directed against the common order dated 12th June, 2009 passed by the Income Tax Appellate Tribunal ("Tribunal" for short) for the assessment years 2000-01 and 2001-02 respectively in the appeals filed by the assessee against the orders passed by the CIT under Section 263 of the Act. ITA No.437/11 is an appeal filed by the assessee against the assessment framed by the Assessing Officer on 22nd March, 2006 under Section 143(3) read with Section 263 of the Act, consequent to the order passed by the CIT under Section 263.

2. We may first take up the appeals filed by the Revenue against the order passed by the Tribunal on 12th June, 2009 in the appeals filed by the assessee against the orders passed by the CIT under Section 263 of the Act. The CIT passed two separate orders for the assessment years 2000-01 and 2001-02 on the same day, that is, 24th March, 2005.

3. In respect of the assessment year 2000-01, the facts are these. The assessee is engaged in the business of real estate builder and developer. It filed a return of income on 31st November, 2000 declaring a total income of Rs.6,94,23,159/- which was scaled down to Rs.3,80,22,870/- by revised return filed on 27th December, 2001. The Assessing Officer issued notices under Section 143(2) and 142(1) which were complied with. The assessee also produced books of accounts which were test-checked as also various particulars and documents called for in the course of the assessment proceedings. The assessment order was passed on 28th March, 2003 under Section 143(3) on a total income of Rs.6,10,31,057/-. Two modifications were made by the Assessing Officer to the income returned. The first was an addition of Rs.2,17,73,665/- as notional annual letting value in respect of the flats remaining unsold with the assessee. The other was a disallowance of Rs.12,34,522/- under Section 80IB(10).

4. The CIT initiated proceedings under Section 263 of the Act on the ground that the assessment completed as above was erroneous and prejudicial to the interest of the Revenue. According to him the Assessing officer had allowed the deduction under section 80IB(10) without examining whether all the conditions prescribed by the Section were satisfied and that the Assessing Officer had allowed the deduction to the extent of Rs.2,76,72,148/- and

disallowed only a deduction of Rs.12,34,522/- on account of non-furnishing of completion certificates of the housing projects. In response to the notice issued under Section 263 the assessee filed detailed written submissions and contended that the deduction under Section 80IB(10) had been allowed by the Assessing Officer to the extent of Rs.2,76,72,148/- only after a detailed enquiry into the claim and that it was not permissible to the CIT to allege that there was no enquiry into the claim. It was submitted that the assessee commenced the development and construction of the housing projects only after 13th September, 1998. It was argued before the CIT that it was possible to interpret clause (a) of Section 80IB(10) to mean that even those undertakings which had commenced development and construction of the housing project before 1st October, 1998 were eligible for the deduction in the light of the expression "such undertaking has commenced". It was further submitted that the condition that the commencement of the development and construction of the housing project should be on or after 1st October, 1998 would render the earlier expression "such undertaking has commenced" meaningless. It would appear that in support of this claim the assessee had relied upon certain decisions. Details were also filed before the CIT to show that each flat in the housing project did not exceed the maximum built-up area of 1000 sq.ft. On these grounds it was pleaded that the proceedings under Section 263 be dropped.

5. As regards the built-up area of the flats in the housing projects, the CIT was of the view that no queries had been raised by the Assessing Officer at the assessment stage in regard to the calculation and these have to be gone into particularly in view of the clarificatory amendment brought about by the Finance Act, 2004. As regard the plea of the assessee that the deduction was

available even in respect of housing projects which were commenced prior to 1st October, 1998, the CIT held that the interpretation placed by the assessee upon the language of clause (a) of Section 80IB(10) would render the words "on or after the first day of October, 1998" appearing in the clause wholly redundant. According to the CIT, the Assessee had violated one of the basic conditions of the Section and did not place on record any evidence regarding the completion of the projects nor were any queries made by the Assessing Officer in this regard.

6. One more ground for which the CIT initiated proceedings under Section 263 was that the assessee had earned tax free dividend income of Rs.6,09,904/- but the Assessing Officer had not examined the applicability of Section 14A. On this ground too, the assessment was erroneous and prejudicial to the interest of the Revenue.

7. For the above reasons, the CIT set aside the assessment order and directed the Assessing Officer to make proper enquiries and frame a fresh assessment after affording opportunity of being heard to the assessee.

8. In respect of the assessment year 2001-02, the Assessing Officer completed the assessment under Section 143(3) of the Act by order dated 26th March, 2004 on a total income of Rs.4,94,62,914/- as against the returned income of Rs.2,86,59,000/-, the only addition being that of notional value of flats remaining unsold with the assessee, in the amount of Rs.2,08,03,914/-. The assessment was considered to be erroneous and prejudicial to the interest of the Revenue by the CIT who initiated proceedings under Section 263 of the Act on the same grounds as had been done by him in respect of the assessment year

2000-01. For the same reasons as in his order for the assessment year 2000-01, he set aside the assessment order and directed the Assessing Officer to reframe the assessment in accordance with law after making proper enquiries and after giving the assessee due opportunity of being heard.

9. Aggrieved by the orders passed by the CIT for both the years the assessee filed appeals to the Tribunal and submitted that full and complete details had been adduced by it before the Assessing Officer, that there was no lack of enquiry on the part of the Assessing Officer while completing the assessment and that the view taken by the Assessing Officer regarding the eligibility of the assessee for the deduction under Section 80IB(10) was an eminently reasonable and possible view which was supported by certain orders of the Tribunal and therefore the assessment cannot be considered to be erroneous or prejudicial to the interest of the Revenue. It was also submitted that the completion certificates were filed before the Assessing Officer and that he had taken a view based only on those and, therefore, the assessments were neither erroneous nor prejudicial to the interest of the Revenue. It was thus pleaded that the CIT had no jurisdiction to initiate proceedings under Section 263 and set aside the assessments on the ground of lack of enquiry or on the ground of erroneous allowance of the deduction.

10. The Tribunal passed a combined order on 12th June, 2009 for both the years. It noticed that the Assessing Officer had made enquiries about the claim of the assessee under Section 80IB(10) and had also discussed the same in the assessment order. According to the Tribunal, it was not a case of lack of any enquiry. As regards the interpretation placed on Section 80IB(10), the Tribunal held that there was no dispute that the project was approved by the

local authorities and was developed on land exceeding 1 acre, as required by the Section. The auditors had also certified that the projects were approved as per law; they also gave the dates of approval in respect of different projects as under:-

Project	**Size of the land**	**Date of approval of lay out plan of residential colony**
Golf Link I, Greater Noida	100 acres	30th May 1997
Golf Link II, Greater Noida	38.86 acres	11th March 1999
Avantika Aakriti	82.69 acres	14th October, 1996
East End Loni	87.10 acres	16th January, 1999

In addition to the above details, the assessee, (as found by the Tribunal in para 11 of its order), also furnished a calculation of the built-up area of the flats on the basis of which price was charged from the customers and the drawings as certified by the architects. It was made known in these calculations that the assessee had taken 50% of the verandah size and 25% of the platform size as appurtenant to the flat. Those calculations were made on the basis of the agreement entered into with the customers. The Tribunal noted that these calculations were accepted by the Assessing Officer in the absence of any statutory definition of the term "built-up area". As regard the observations of the CIT that the amendments made to Section 80IB(10) by the Finance (No.2)

Act, 2004 with effect from 1st April, 2005 had to be kept in view by the Assessing Officer as they were clarificatory in nature, the Tribunal opined that these amendments were substantial in nature and had effect only from the assessment year 2005-06. The Tribunal further held that even if some flats exceeded 1000 sq.ft. of built-up area that did not disentitle the assessee to the deduction; a proportionate deduction on flats which exceed the statutory limit of 1000 sq.ft. alone can be disallowed, as held by Calcutta, Delhi and Bangalore Benches of the Tribunal in certain cases.

11. With reference to the condition that the undertaking should have commenced or commences development and construction of the housing project on or after 1st October, 1998, the Tribunal observed as follows:-

> *"19. The submission of the assessee, as regards the last conditions, that construction of housing projects was to commence on or after 01.10.1998, is that the date of commencement of construction is to be adjudged after receipt of relevant statutory approvals. Any construction carried out before receipt of necessary approvals would not be authorized. In any case, there was only site development by filling of pits, leveling of land, construction of roads, wells, laying of sewerage and electricity lines, etc. Out of the four housing projects constituting subject matter of consideration in the assessment years and there is no dispute as regards commencement of construction with respect to two housing projects, viz., Golf Link II and East End Loni, which commenced after 01.10.98. The lay out plan for the construction of the housing colony, Golf Link-II was approved by the approving authority on 11th March 1999 itself. Similarly, lay out plan for development of housing colony at East End Loni was approved by the relevant authority on 16th January, 1999. As regards other two housing projects, viz.; Golf Link I and Avantika Aakriti, date of construction has to be seen from the date when the construction of the building plan of each house is approved by the relevant authority. The assessee had submitted sequence of events*

between assessee and the approving authority, as elaborated on page 2-7 of paper book. The relevant clause of building regulation provides that construction of residential building can be commenced after submission of the building plan. If within 30 days of the receipt of such plan no order, either sanctioning or refusing such building plan, is passed by the approving authority, the plan shall stand sanctioned on the expiry of the said 30th day. The approving authority has a right to refuse/ reject the building plan submitted by the developer and in that case, the developer would need to submit revised plan. On a perusal of the sequence of events, we find that building plans of each house submitted by the assessee were not sanctioned as such by the relevant authority before 01.10.98. The same were rejected and time and again modifications in plans were proposed by the authority. The approval of building plan was after 01.10.98 except for 26 houses in Avantika Aakriti project.

20. In the case of Nirmiti Construction v. DCIT : 95 TTJ 1117 (Pune), that merely because some expenses like cleaning of land or Puja expenses, etc. after purchase of land, were incurred before 01.10.1998. The building plan were sanctioned by the relevant municipal authority after the date. The Tribunal held it could not be said that the assessee had commenced construction before 01.10.98 to deny deduction under section 80-IB (10) of the Act. Mumbai Bench of Tribunal also held similarly in the case of Ganga Developers v. DCIT: (ITA No.9136/Mum/04) where also construction of commercial building was undisputedly started by the assessee before 01.10.98 but the approval for conversion of such constructed commercial building to be used for residential purposes was granted on 20.04.99. The Tribunal held that since the approval for residential house was granted after 01.10.1998, the construction of residential housing project shall be deemed to have commenced from 1.10.98 only and, therefore, benefit of deduction under section 80-IB (10) of the Act was allowed.

21. In view of the aforesaid two decisions, we are of the opinion that deduction under section 80-IB(10) has been rightly allowed on housing projects because the building plans of the residential units were approved after 1.10.98 only and the construction has to be

deemed to have been commenced on or after the date of the approval itself."

12. The Tribunal was of opinion that merely because there was a honest and bonafide difference of opinion between the assessee and the Assessing Officer on the one hand and the CIT on the other with regard to the interpretation to be placed on a provision of law or there was a possibility of more than one reasonable view of the statutory provision, it cannot be said that the assessment was erroneous or prejudicial to the interest of the Revenue. In this view of the matter, the Tribunal vacated the orders of the CIT passed under Section 263 of the Act for both the years. It may be added that the Tribunal placed reliance on the following judgments of the Supreme Court:-

(1) Malabar Industries Co. Ltd. V/s. CIT (2000) 243ITR 83, G.M. Mittal 263 ITR 255

(2) CIT Vs Max India Ltd. (SC) (2007) 295 ITR 282

13. The Tribunal however, observed that since no submissions were made by the assessee as regard the disallowance under Section 14A, the orders of the CIT on that issue had to be affirmed.

14. We are not persuaded to take a view different from the view taken by the Tribunal. A clear finding was recorded by the Tribunal that the assessee had filed the details and calculations about the built-up area of the residential units. It would be unreasonable to hold that the Assessing Officer ignored those details. Moreover the statutory auditors had clearly mentioned the dates of approval of the lay out plan of the residential colonies. The Assessing Officer

was thus made aware of the dates on which the approvals were granted in respect of each of the four housing projects. The more important aspect was the applicability of clause (a) of Section 80IB(10). On this aspect the Tribunal held that any construction carried out before the receipt of necessary approvals would be unauthorized and could not be recognized. It was found by the Tribunal that in any case there was only site development by filling of pits, leveling of land, construction of roads, wells, laying of sewerage and electricity lines etc. Further there was no dispute regarding the date of commencement of construction with respect to the projects, namely, Golf Link-II and East End Loni. The Tribunal has found that both these projects commenced after 1st October, 1998. With regard to the other two projects, namely, Golf Link-I and Avantika Akruti, the Tribunal held that the date of commencement of construction had to be reckoned from the date when the construction of the building plan of each project was approved by the concerned authority. On examination of the details of the chronological events furnished by the assessee, it was held by the Tribunal that the building plans of each house submitted by the assessee were not sanctioned as such by the competent authority before 1st October, 1998. They were rejected and time and again modifications were proposed by the authority; finally the approvals of the building plans were issued after 1st October, 1998, except for 26 houses in Avantika Akruti Project. The Tribunal has also referred to certain orders of the Pune and Bombay Benches of the Tribunal where the date of approval by the competent authority was considered crucial to determine the date of commencement of development or construction. This discussion of the Tribunal shows that the determination of the question as to when the undertaking commenced development and construction, in the absence of any statutory prescription, has to be decided in a

pragmatic and reasonable way. It would have been an entirely different issue had there been a statutory prescription of what would be the date of commencement of construction or development. It is certainly a debatable issue on which more than one plausible view is reasonably possible and merely because the Assessing Officer has taken one plausible view, it cannot be said that the assessment is erroneous or prejudicial to the interest of the Revenue. This position stands well settled by the judgments of the Supreme Court cited supra. The Tribunal applied the tests laid down in these judgments to the case.

15. For the above reasons, we are of the view that no substantial question of law arises for our consideration in ITA Nos.485/2010 & 480/2010. The orders of the Tribunal are accordingly upheld and the appeals filed by the Revenue are dismissed.

16. ITA No.437/2011 is consequential. It arises out of assessment order passed by the Assessing Officer on 22nd March, 2006 under Section 143(3) read with Section 263, giving effect to the order of the CIT. The Tribunal held as follows:-

> *"3. We have gone through the orders of the authorities below and found that assessee's claim of deduction u/s 80IB (10) was allowed by the AO while framing assessment u/s 143(3). The CIT invoked his power u/s 263 and held that prima facie there was no evidence on record to show that assessee company fulfills all conditions prescribed for claim of deduction u/s 80IB (10). Accordingly, the order framed u/s 143(3) was set aside with a direction to frame the assessment afresh. The assessee approached to the Tribunal against the order of CIT u/s 263 dated 24.03.2005. The Tribunal vide its order dated 12.06.2009 held that deduction u/s 80IB can be allowed only with respect to the units which did not exceed statutory limit of*

1000 sq. ft. and that assessee would not be entitled to reduction of the built up area in five houses in East of Loni and six houses in Avantika Akriti. In view of this decision of the Tribunal, we restore the appeal back to the file of the AO for deciding afresh in terms of the directions given by the Tribunal at para 17 of its order dated 12.06.2009."

17. In view of our decision in ITA Nos.485/2010, the fate of the present appeal is consequential and accordingly no substantial question of law arises for our consideration. The appeal is dismissed.

18. In the result all the three appeals filed by the Revenue are dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

September 24, 2012
Bisht