**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 4476 OF 2015**
**(ARISING OUT OF SLP (C) NO. 24330 OF 2011)**

COMMISSIONER OF INCOME TAX-19
MUMBAI .....APPELLANT(S)

VERSUS

M/S. SARKAR BUILDERS .....RESPONDENT(S)

**W I T H**

**CIVIL APPEAL NO. 4477 OF 2015**
**(ARISING OUT OF SLP (C) NO. 9132 OF 2014)**

**CIVIL APPEAL NO. 4491 OF 2015**
**(ARISING OUT OF SLP (C) NO. 10290 OF 2014)**

**CIVIL APPEAL NO. 4485 OF 2015**
**(ARISING OUT OF SLP (C) NO. 9871 OF 2014)**

**CIVIL APPEAL NO. 4486 OF 2015**
**(ARISING OUT OF SLP (C) NO. 4652 OF 2015)**

**CIVIL APPEAL NO. 4479 OF 2015**
**(ARISING OUT OF SLP (C) NO. 4651 OF 2015)**

**CIVIL APPEAL NO. 4481 OF 2015**
**(ARISING OUT OF SLP (C) NO. 5769 OF 2015)**

**CIVIL APPEAL NO. 4487 OF 2015**
**(ARISING OUT OF SLP (C) NO. 7570 OF 2015)**

**CIVIL APPEAL NO. 4490 OF 2015**
**(ARISING OUT OF SLP (C) NO. 7575 OF 2015)**

**CIVIL APPEAL NO. 4483 OF 2015**
**(ARISING OUT OF SLP (C) NO. 7579 OF 2015)**

**CIVIL APPEAL NO. 4482 OF 2015**
**(ARISING OUT OF SLP (C) NO. 7578 OF 2015)**

**CIVIL APPEAL NO. 4489 OF 2015**
**(ARISING OUT OF SLP (C) NO. 8823 OF 2015)**

**CIVIL APPEAL NO. 4492 OF 2015**
**(ARISING OUT OF SLP (C) NO. 8390 OF 2015)**

**CIVIL APPEAL NO. 4478 OF 2015**
**(ARISING OUT OF SLP (C) NO. 8827 OF 2015)**

**CIVIL APPEAL NO. 4484 OF 2015**
**(ARISING OUT OF SLP (C) NO. 8828 OF 2015)**

**CIVIL APPEAL NO. 4493 OF 2015**
**(ARISING OUT OF SLP (C) NO. 8829 OF 2015)**

**CIVIL APPEAL NO. 4488 OF 2015**
**(ARISING OUT OF SLP (C) NO. 12063 OF 2015)**

**CIVIL APPEAL NO. 4480 OF 2015**
**(ARISING OUT OF SLP (C) NO. 8825 OF 2015)**

# J U D G M E N T

**A.K. SIKRI, J.**

Leave granted.

2) No doubt the assessees/respondents in all these appeals are different and even assessment years are different. But the question of law which is raised by the Income Tax Authorities (hereinafter referred to as the 'Revenue') is identical. The

assessees are subject to the jurisdiction of the different High Courts, all of whom had claimed the benefit of Section 80IB of the Income Tax Act ('Act' for short), namely, deduction in respect of profits and gains on the ground that their cases were covered by sub-section (10) of Section 80IB which provides for deduction of 100% of profits in the case of an undertaking developing and building housing projects when such profits are derived in the previous year relevant to any assessment year from such housing projects, provided the conditions contained in the said sub-section are satisfied. High Courts have taken the same view holding that these assessees would be entitled to the deduction under Section 80IB(10) of the Act. We may also point out at this stage itself that though Section 80IB has been on the statute book for quite some time, a new Section 80IB had been introduced by the Finance Act, 1999 w.e.f. 01.04.2000. All these cases are covered by the said Section, as introduced. However, insofar as sub-section (10) is concerned, with which we are directly concerned, there have been amendments in that provision from time to time. We are concerned with the amendment to the said sub-section carried out by Finance No.2 Act, 2004 w.e.f. 01.04.2005. In all these cases, though the housing projects were sanctioned much before the said

amendment but have been completed after 01.04.2005 when amended provision has come into operation. It is also not in dispute that the amendment is prospective in nature. Interestingly, when the housing project was approved by a local authority, which is the requirement under sub-section (10) of Section 80IB, as on that date, the conditions stipulated in the said sub-section were met by the assessees. However, condition in clause (d) which was laid down for the first time by the amendment made effective from 01.04.2005 is not fulfilled. In this scenario, the question is as to whether the new conditions mentioned in the amended provision have also to be fulfilled only because the housing projects in question, though started before 01.04.2005, were completed after the said date. The question of law, that arises for discussion that needs to be answered is thus common in all these appeals and can be formulated as under:

> "Whether Section 80IB(10)(d) of the Income Tax Act, 1961 applies to a housing project approved before 31.03.2005 but completed on or after 01.04.2005?"

3) As pointed out above, sub-section (10) stipulates certain conditions which are to be satisfied in order to avail the benefit of the said provision. Further, it is also clear that the benefit is available to those undertakings which are developing and building 'housing projects' approved by a local authority. Thus, this

Section is applicable in respect of housing projects and not commercial projects. At the same time, we are conscious of the fact that even in the housing projects, there would be some area for commercial purposes as certain shops and commercial establishments are needed even in a housing projects. That has been judicially recognised while interpreting the provision that existed before 01.04.2005 and there was no limit fixed in Section 80IB(10) regarding the built-up area to be used for commercial purpose in the said housing project. As would be noticed later, the extent to which such commercial area could be constructed was as per the local laws under which local authority gave the sanction to the housing project. However, vide clause (d), which was inserted by the aforesaid amendment and made effective from 01.04.2005, it was stipulated that the built-up area of the shops and other commercial establishments in the housing projects would not exceed 5% of the aggregate built-up area of the housing project or 2000 sq. feet, whichever is less (there is a further amendment whereby 5% is reduced to 3% and instead of the words "2000 sq. feet whichever is less" the words "5000 sq. feet, whichever is higher" have been substituted. However, we are not concerned with this amendment).

The question, thus, that arises for consideration is as to whether in respect of those housing projects which finished on or after 01.04.2005, though sanctioned and started much earlier, the aforesaid stipulation contained in clause (d) also has to be satisfied. All the High Courts have held that since this amendment is prospective and has come into effect from 01.04.2005, this condition would not apply to those housing projects which had been sanctioned and started earlier even if they finished after 01.04.2005.

4) As there is a commonality of issue and the judgments of the various High Courts have spoken in one voice which are questioned on identical grounds by the appellant Revenue, all these appeals were heard analogously and by this judgment, we propose to answer the question of law involved and as formulated above in order to give quietus to this surging debate.

5) Before we come to the grip of the aforesaid central issue, it would be of some relevance to mention certain other disputes which had arisen between the Revenue and the assessees/developers of the housing projects concerning interpretation of sub-section (10) of Section 80IB. That dispute primarily related to the meaning that is to be assigned to 'housing projects' prior to 01.04.2005

because of the reason that there was no clause (d) earlier and there is no express provision in this sub-section dealing with the consequence of having a commercial establishment within a housing project. One of the requirements contained in sub-section (10) is that in order to be entitled to have the deduction under this provision, housing project is to be approved by a local authority. It is a matter of common knowledge that there are Municipal Acts of specific Local Acts governing the construction of buildings, commercial as well as residential, in every State. For undertaking any such construction authority, it is necessary to have the building plans sanctioned from the local authorities in accordance with the provisions of such local acts. There are local laws relating to the development and building of "housing projects" by the developers/builders which also need a sanction from the local authorities as per the law prevailing in that particular area where the housing project is developed. Such local laws, while sanctioning the housing projects, also permit use of certain area in the housing projects in a specified manner for shopping and commercial purposes as well. The question that had arisen was – whether deduction under Section 80IB(10) would be admissible when commercial establishment is constructed in a housing project? That is, whether it would still

retain the character of housing project within the meaning of this provision. The Bombay High Court in the case of ***C.I.T.*** v. ***Brahma Associates***[1] held that since the expression 'housing project' is not defined under the Act, the intention of Parliament was that whatever is approved by the local authority under the extent rules as a housing project would be treated as 'housing project' for the purpose of this Section, inasmuch as sub-section (10) itself mandates that housing project is to be approved by a local authority as such an approval is a necessary condition for claiming the deduction under this provision. When the local authority has approved a housing project, whether 'residential' or 'residential cum commercial' the assessee is entitled to a deduction on the entire profit including the commercial establishments portion. We would also like to point out that following this judgment of the Bombay High Court, or independently, other High Courts had also taken similar view. Against the aforesaid judgments, special leave petitions were filed by the Revenue in this Court. All these SLPs have been disposed of by this Court vide order dated 29.04.2015, we would like to reproduce the said order in entirety hereunder:

> "All these special leave petitions are filed by the Revenue/ Department of Income tax against the judgments rendered by various High Courts

1 333 ITR 289

deciding identical issue which pertains to the deduction under Section 80IB(10) of the Income Tax Act, as applicable prior to 01.04.2005. We may mention at the outset that all the High Courts have taken identical view in all these cases holding that the deduction under the aforesaid provision would be admissible to a "housing project".

All the assessees had undertaken construction projects which were approved by the municipal authorities/local authorities as housing projects. On that basis, they claimed deduction under Section 80IB(10) of the Act. This provision as it stood at that time, i.e., prior to 01.04.2005 reads as under: -

Section 80IB(10) [as it stood prior to 01.04.2005]

"(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if, -

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

(b) the project is on the size of a plot of land which has a minimum area of one crore; and

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

However, the income tax authorities rejected the claim of deduction on the ground that the projects were not "housing project" inasmuch as

some commercial activity was also undertaken in those projects. This contention of the Revenue is not accepted by the income tax Appellate Tribunal as well as the High Court in the impugned judgment. The High Court interpreted the expression “housing project” by giving grammatical meaning thereto as housing project is not defined under the Income Tax Act insofar as the aforesaid provision is concerned. Since sub-section (10) of Section 80IB very categorically mentioned that such a project which is undertaken as housing project is approved by a local authority, once the project is approved by the local authority it is to be treated as the housing project. We may also point out that the High Court had made observations in the context of Development Control Regulations (hereinafter referred to as 'DCRs' in short) under which the local authority sanctions the housing projects and noted that in these DCRs itself, an element of commercial activity is provided but the total project is still treated as housing project. On the basis of this discussion, after modifying some of the directions given by the ITAT, the conclusions which are arrived at by the High Court are as follows: -

“30. In the result, the questions raised in the appeal are answered thus:-

a) Upto 31/3/2005 (subject to fulfilling other conditions), deduction under Section 80IB(10) is allowable to housing projects approved by the local authority having residential units with commercial user to the extent permitted under DC Rules/Regulations framed by the respective local authority.

b) In such a case, where the commercial user permitted by the local authority is within the limits prescribed under the DC Rules/ Regulation, the deduction under Section 80IB(10) upto 31/3/2005 would be allowable irrespective of the fact that the project is approved as 'housing project' or 'residential plus commercial'.

c) In the absence of any provisions under the Income Tax Act, the Tribunal was not justified in holding that upto 31/3/2005 deduction under Section 80IB(10) would be allowable to the projects approved by the local authority having residential building with commercial user upto 10% of the total built-up area of the plot.

d) Since deductions under Section 80IB(10) is on the profits derived from the housing projects approved by the local authority as a whole, the Tribunal was not justified in restricting Section 80IB(10) deduction only to a part of the project. However, in the present case, since the assessee has accepted the decision of the Tribunal in allowing Section 80IB(10) deduction to a part of the project, we do not disturb the findings of the Tribunal in that behalf.

e) Clause (d) inserted to Section 80IB(10) with effect from 1/4/2005 is prospective and not retrospective and hence cannot be applied for the period prior to ¼/2005."

We are in agreement with the aforesaid answers given by the High Court to the various issues. We may only clarify that insofar as answer at para (a) is concerned, it would mean those projects which are approved by the local authorities as housing projects with commercial element therein.

There was much debate on the answer given in para (b) above. It was argued by Mr. Gurukrishna Kumar, learned senior counsel, that a project which is cleared as "residential plus commercial" project cannot be treated as housing project and therefore, this direction is contrary to the provisions of Section 80(I)(B)(10) of the Act. However, reading the direction in its entirety and particularly the first sentence thereof, we find that commercial user which is permitted is in the residential units and that too, as per DCR. Examples given before us by the learned counsel for the assessee was that such commercial user to some extent is permitted to

> the professionals like Doctors, Chartered Accountants, Advocates, etc., in the DCRs itself. Therefore, we clarify that direction (b) is to be read in that context where the project is predominantly housing/residential project but the commercial activity in the residential units is permitted. With the aforesaid clarification, we dispose of all these special leave petitions."

6) The reason for recapitulating the aforesaid events pertaining to the earlier litigation is that before 01.04.2005, the legal position was that once the project is sanctioned by the local authority as 'housing project', the extent of area sanctioned for shops and commercial establishments in the said housing project was immaterial and had no bearing. Thus, irrespective of the said of area where shops and commercial establishments were permitted by the local authority in a housing project, it was still treated as housing project and further that while granting 100% deductions, the area covered by shops and commercial establishments was also includible. This position has changed with the insertion of clause (d) to sub-section (10). As per the amendment carried out and made effective from 01.04.2005, even if the local authority had sanctioned larger area for shops and commercial establishment, the benefit of Section 80IB(10) would not be admissible to these assessees/developers in case the area utilised for shops and commercial establishment exceeded 5% of

the aggregate built-up area of the housing project or 2000 sq. feet, whichever is less.

7) In the aforesaid scenario, we revert back to the question that is to be answered. We have already pointed out that the parties are *ad idem* that the amendment is prospective in nature and, therefore, it operates from 01.04.2005. We have also mentioned that in the instant appeals, all these assessees had got the housing projects sanctioned prior to 01.04.2005 and the construction of the said housing project also started before 01.04.2005. All other conditions mentioned namely the date by which approval was to be given and the dates by which the projects were to be completed as on the date when the project was sanctioned, are also met by the assessees. Notwithstanding this position, the argument of Mr. S. Gurukrishna Kumar, learned senior counsel appearing for the Revenue is that amendment w.e.f. 01.04.2005 is retroactive even if not retrospective. He has, thus, endeavoured to draw a fine distinction between the retroactive nature of amendment in contrast with retrospectivity of a provision. He argued that once the project is financed after 01.04.2005 and on the completion of the said project, a particular assessee has earned the income which is shown by the assessee in a particular assessment year, it is that assessment

year which would be the determinative factor and the law prevailing on the date relevant to the assessment year will have to be applied. On that basis, it was argued that since the assessment years are post 01.04.2005, clause (d) of sub-section (10) of Section 80IB of the Act gets attracted. In support of this plea, he referred to the judgment of this Court in ***Commissioner of Income Tax I, Ahmedabad*** v. ***Gold Coin Health Food Private Limited***[2] and, particularly, the discussion contained in paras 9 and 16 which are reproduced hereunder:

> "9. In *Reliance Jute and Industries Ltd. v. CIT,* (1980) 1 SCC 139, it was observed by this Court that the law to be applied in income tax assessments is the law in force in the assessment year unless otherwise provided expressly or by necessary implication.
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> 16. The law is well settled that the applicable provision would be the law as it existed on the date of the filing of the return. It is of relevance to note that when any loss is returned in any return it need not necessarily be the loss of the previous year concerned. It may also include carried-forward loss which is required to be set up against future income under Section 72 of the Act. Therefore, the applicable law on the date of filing of the return cannot be confined only to the losses of the previous accouting years."

8) He also referred to the decision in the case of ***The Karimtharuvi***

2 (2008) 9 SCC 622

***Tea Estate Ltd.*** v. ***The State of Kerala***[3] which is to the same effect.

9) Mr. J.D. Mistry, learned senior counsel who appeared on behalf of the assessees in some of these appeals emphatically countered the aforesaid arguments. In the first instance, he pointed out that this argument of retroactivity was not even raised by the Revenue in the High Courts or before the lower forum or even in the special leave petitions filed in this Court. He further submitted that it was necessary to keep the objective of the amendment in mind which would clearly evince that the conditions in clause (d) could not be applied in respect of those projects which had been sanctioned and commenced prior to 01.04.2005. He further argued that vested rights had accrued in favour of such persons which could not be taken away by the amendment. He also advanced various reasons, as would be noted later, necessitating the approach as to why the principle of tax law that the law in force in the Assessment Year is to be applied, insisting that it was a case where departure was needed and such a departure is recognised in certain circumstances, by the courts. He relied upon the judgments of this Court in ***Commissioner of Income Tax*** v. ***Shah Sadiq and Sons***[4] and ***Commissioner of Income***

3 AIR 1966 SC 1385 :: 60 ITR 262
4 (1987) 166 ITR 102 (SC)

***Tax (Central)-I, New Delhi*** v. ***Vatika Township Private Limited***[5]. Senior counsel who appeared for other assessees argued on the same lines drawing our attention to the reasons which are given by the High Courts in the impugned judgments and supporting those reasons.

10) We have given our due consideration to the respective submissions.

11) As pointed out above, the judgment pronounced by the Bombay High Court in ***Brahma Associates*** case has already been upheld by this Court on the interpretation given to the expression *'housing project'* occurring in sub-section (10) of Section 80IB of the Act. Interestingly, in the batch of appeals decided by the High Court in that very judgment, the issue with which we are concerned was also taken up. The Revenue had argued that clause (d) inserted with effect from 01.04.2005 should be applied retrospectively, which argument was repelled by the High Court. Therefore, for better understanding, we would like to begin our discussion with the meaning given to *'housing project'* along with the issue of retrospectivity of clause (d), as raised by the Revenue, which was dealt with by the High Court and repelled. That portion of the discussion contained in the High Court

5 (2015) 1 SCC 1

judgment, which has some bearing on the issue at hand, runs as under:

> "21. Thus, on the date on which the legislature introduced 100% deduction under the Income Tax Act, 1961 on the profits derived from housing projects approved by a local authority, it was known that the local authorities could approve the projects as houding projects with commercial user to the extent permitted under the DC Rules framed by the respective local authority. In other words, it was known that the local authorities could approve a housing project without or with commercial user to the extent permitted under the Development Control Rules. If the legislature intended to restrict the benefit of deduction only to the projects approved exclusively for residential purposes, then it would have stated so. However, the legislature has provided that Section 80IB(10) deduction is available to all the housing projects approved by a local authority. Since the local authorities could approve a project to be a housing project with or without the commercial user, it is evident that the legislature intended to allow Section 80IB(10) deduction to all the housing projects approved by a local authority without or with commercial user to the extent permitted under the DC Rules.
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> 22. It is not in dispute that where a project is approved as a housing project without or with commercial user to the extent permitted under the Rules/Regulations, then, deduction under Section 80IB(10) would be allowable. In other words, if a project could be approved as a housing project having residential units with permissible commercial user, then it is not open to the income tax authorities to contend that the expression 'housing project' in Section 80IB(10) is applicable to projects having only residential units.
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> 23. Once it is held that the local authorities could approve a project to be housing project without or with the commercial user to the extent permitted under the DC Rules, then the project approved with the permissible commercial user would be eligible for Section 80IB(10) deduction irrespective of the

fact that the project is approved as 'housing project' or approved as 'residential plus commercial'. In other words, where a project fulfills the criteria for being approved as a housing project, then deduction cannot be denied under Section 80IB(10) merely because the project is approved as 'residential plus commercial'.

24. The fact that the deduction under Section 80IB(10) prior to 1.4.2005 was allowable on the profits derived from the housing projects constructed during the specified period, on a specified size of the plot with residential units of the specified size, it cannot be inferred that the deduction under Section 80IB(10) was allowable to housing projects having residential units only, because, restriction on the size of the residential unit is with a view to make available large number of affordable houses to the common man and not with a view to deny commercial user in residential buildings. In other words, the restriction under Section 80IB(10) regarding the size of the residential unit would in no way curtail the powers of the local authority to approve a project with commercial user to the extent permitted under the DC Rules/Regulations. Therefore, the argument of the Revenue that the restriction on the size of the residential unit in Section 80IB(10) as it stood prior to 1.4.2005 is suggestive of the fact that the deduction is restricted to housing projects approved for residential units only cannot be accepted.

25. The above conclusion is further fortified by Clause (d) to Section 80IB(10) inserted with effect from 1.4.2005. Clause (d) to Section 80IB(10) inserted w.e.f. 1.4.2005 provides that even though shops and commercial establishments are included in the housing project, deduction under Section 80IB(10) with effect from 1.4.2005 would be available where such commercial user does not exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet whichever is lower. By Finance Act, 2010, clause (d) is amended to the effect that the commercial user should not exceed three percent of the aggregate built-up area of the housing project or

five thousand square feet whichever is higher. The expression 'included' in clause (d) makes it amply clear that commercial user is an integral part of housing project. Thus, by inserting clause (d) to Section 80IB(10) the legislature has made it clear that though the housing projects approved by the local authorities with commercial user to the extent permissible under the DC Rules/Regulation were entitled to Section 80IB(10) deduction, with effect from 1.4.2005 such deduction would be subject to the restriction set out in clause (d) of Section 80IB(10). Therefore, the argument of the revenue that with effect from 1.4.2005 the legislature for the first time allowed Section 80IB(10) deduction to housing projects having commercial user cannot be accepted.

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29. Lastly, the argument of the revenue that Section 80IB(10) as amended by inserting clause (d) with effect from 1.4.2005 should be applied retrospectively is also without any merit, because, firstly, clause (d) specifically inserted with effect from 1.4.2005, and therefore, that clause cannot be applied for the period prior to 1.4.2005. Secondly, clause (d) seeks to deny Section 80IB(10) deduction to projects having commercial user beyond the limit prescribed under clause (d), even though such commercial user is approved by the local authority. Therefore, the restriction imposed under the Act for the first time with effect from 1.4.2005 cannot be applied retrospectively. Thirdly, it is not open to the revenue to contend on the one hand that Section 80IB(10) as stood prior to 1.4.2005 did not permit commercial user in housing projects and on the other hand contend that the restriction on commercial user introduced with effect from 1.4.2005 should be applied retrospectively. The argument of the revenue is mutually contradictory and hence liable to be rejected. Thus, in our opinion, the Tribunal was justified in holding that clause (d) inserted to Section 80IB(10) with effect from 1.4.2005 is prospective and not retrospective and hence cannot be applied to the period prior to 1.4.2005."

12) The issues dealt with from paras 21 to 25 by the High Court already stands approved by this Court. In para 29, the High Court has held that clause (d) has prospective operation, viz., with effect from 01.04.2005, and this legal position is not disputed by the Revenue before us. What follows from the above is that prior to 01.04.2005, these developers/assessees who had got their projects sanctioned from the local authorities as *'housing projects'*, even with commercial user, though limited to the extent permitted under the DC Rules, were convinced that they would be getting the benefit of 100% deduction of their income from such projects under Section 80IB of the Act. Their projects were sanctioned much before 01.04.2005. As per the permissible commercial user on which the project was sanctioned, they started the projects and the date of commencing such projects is also before 01.04.2005. All these assessees were made known of the provision by which these projects are to be completed as those dates have been specified from time to time by successive Finance Acts in the same provision Section 80IB. In these cases, completion dates were after 01.04.2005. Once they arrange their affairs in this manner, the Revenue cannot deny the benefit of this section applying the principle of retroactivity even when the provision has no retrospectivity. Take for example, a case where

under the extant DC Rules, for shops and commercial activity construction permitted was, say, 10% and the project was also sanctioned allowing a particular assessee to construct 10% of the area for commercial purposes. The said developer started with its project much prior to 01.04.2005 with the aforesaid permissible use and the construction was at a very advanced stage as on 01.04.2005. Can it be argued by that Revenue that he is to demolish the extra coverage meant for commercial purpose and bring the same within the limits prescribed by the new provision if he wanted to avail the benefit of deduction under Section 80IB(10) of the Act, only because of the reason that the project was not complete as on 01.04.2005? As in such a case he filed his return for an assessment year after 01.04.2005 and for the purpose of assessment of the said return, law prevailing as on that date would be applicable? Answer has to be in the negative on the principle that with the aforesaid planning as per the law prevailing prior to 01.04.2005, these assessees acted and acquired vested right thereby which cannot be taken away. It is ludicrous on the part of the Revenue authorities to expect the assessees to do something which is almost impossible

13) In ***M/s. Reliance Jute and Industries Ltd.*** v. ***C.I.T., West***

***Bengal, Calcutta***[6], this Court had, no doubt, pointed out the cardinal principle of tax law that the law to be applied has to be the law in force in the assessment year. However, this is qualified by the exception when it is provided otherwise expressly ***or by necessary implication***, as is clear from the following observations:

> "6. The assessee claims a vested right under Section 24(2)(iii), as it stood before its amendment in 1957, to have the unabsorbed loss of 1950-51 carried forward from year to year until the loss is completely absorbed. The claim is based on a misconception of the fundamental basis underlying every income tax assessment. It is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year ***unless otherwise provided expressly or by necessary implication...***"

14) In the same paragraph, the Court also remarked that 'a right claimed by an assessee under the law in force in a particular assessment year is **ordinarily available** only in relation to a proceeding pertaining to that year'. Thus, it clearly follows that though normally the law which is in force in the assessment year would prevail, but this is not an absolute principle as the Court itself carved out exceptions thereto by making it clear that such exception can be either express or implied by necessary implication. Even the principle which is mentioned is qualified with

6 (1980) 1 SCC 139

the words *'ordinarily available'*.

15) On examining the scheme of sub-section (1) of Section 80IB of the Act, its historical turn around by amendments from time to time and keeping in view of the real purpose behind such a provision, we are of the view that in the peculiar scenario as projected in this provision, the aforesaid cardinal principle of tax law is not to be applied as, by necessary implication, application thereof stands excluded. We have already narrated the essence of this provision. For the purpose of discussing this particular issue, it is required to be noted that with effect from 01.04.2001, Section 80IB(10) stipulated that any housing project approved by the local authority before 31.03.2001 was entitled to a deduction of 100 per cent of the profits derived in any previous year relevant to any assessment year from such housing project, provided - (i) the construction/development of the said housing project commenced on or after 1.10.1998 and was completed before 31.03.2003; (ii) the housing project was on a size of a plot of land which had a minimum area of one acre; and (iii) each individual residential unit had a maximum built-up area of 1000 sq.ft., where such housing project was situated within the cities of Delhi or Mumbai or within 25 kms. from the municipal limits of these cities,

and a maximum built-up area of 1500 sq.ft. at any other place. Therefore, for the first time, a stipulation was added with reference to the date of approval, namely, that approval had to be accorded to the housing project by the local authority before 31.03.2001. Before this amendment there was no date prescribed for the approval being granted by the local authority to the housing project. Prior to this amendment, as long as the development/construction commenced on or after 1.10.1998 and was completed before 31.03.2001, the assessee was entitled to the deduction. Also by this amendment, the date of completion was changed from 31.03.2001 to 31.03.2003. Everything else remained untouched. Thereafter, by Finance Act, 2003, further amendments were made to Section 80IB(10), which read as under:

> "(10) The amount of profits in case of an undertaking developing and, building housing projects approved before the 31st day of March 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if -
>
> (a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October 1998;
>
> (b) the project is on the size of a plot of land which has a minimum area of one acre; and
>
> (c) the residential unit has a maximum built-up area

> of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place."

16) As can be seen from the aforesaid provision, now the only changes that were brought about were that with effect from 1.4.2002: (i) the housing project had to be approved before 31.03.2005; and (ii) there was no time limit prescribed for completion of the said project. Though these changes were brought about by the Finance Act, 2003, the Legislature thought it fit that these changes be deemed to have been brought into effect from 1.4.2002. All the remaining provisions of Section 80IB(10) remained unchanged.

17) Thereafter, significant amendment, with which we are directly concerned, was carried out by Finance (No.2) Act, 2004 with effect from 1.4.2005. This amendment has already been noted above. The Legislature made substantial changes in sub-section (10). Several new conditions were incorporated for the first time, including the condition mentioned in clause (d). This condition/restriction was not on the statute book earlier when all these projects were sanctioned. Another important amendment was made by this Act to sub-section (14) of Section 80IB with effect from 1.4.2005 and for the first time under clause (a) thereof

the words 'built-up area' were defined. Section 80IB(14)(a) reads as under:

> "(14) For the purposes of this section -
>
> (a) "built-up area" means the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units;"

18) Prior to insertion of Section 80IB(14)(a), in many of the rules and regulations of the local authority approving the housing project "built-up area" did not include projections and balconies. Probably, taking advantage of this fact, builders provided large balconies and projections making the residential units far bigger than as stipulated in Section 80IB(10), and yet claimed the deduction under the said provision. To plug this lacuna, clause (a) was inserted in Section 80IB(14) defining the words "built-up area" to mean the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls, but did not include the common areas shared with other residential units.

19) Can it be said that in order to avail the benefit in the assessment years after 1.4.2005, balconies should be removed though these were permitted earlier? Holding so would lead to absurd results

as one cannot expect an assessee to comply with a condition that was not a part of the statute when the housing project was approved. We, thus, find that the only way to resolve the issue would be to hold that clause (d) is to be treated as inextricably linked with the approval and construction of the housing project and an assessee cannot be called upon to comply with the said condition when it was not in contemplation either of the assessee or even the Legislature, when the housing project was accorded approval by the local authorities.

20) Having regard to the above, let us take note of the special features which appear in these cases:

(a) In the present case, the approval of the housing project, its scope, definition and conditions, all are decided and dependent by the provisions of the relevant DC Rules. In contrast, the judgment in ***M/s. Reliance Jute and Industries Ltd.*** was concerned with income tax only.

(b) The position of law and the rights accrued prior to enactment of Finance Act, 2004 have to be taken into account, particularly when the position becomes irreversible.

(c) The provisions of Section 80IB(10) mention not only a particular date before which such a housing project is to be approved by the local authority, even a date by which the housing project is to be

completed, is fixed. These dates have a specific purpose which gives time to the developers to arrange their affairs in such a manner that the housing project is started and finished within those stipulated dates. This planning, in the context of facts in these appeals, had to be much before 01.04.2005.

(d) The basic objective behind Section 80IB(10) is to encourage developers to undertake housing projects for weaker section of the society, inasmuch as to qualify for deduction under this provision, it is an essential condition that the residential unit be constructed on a maximum built up area of 1000 sq.ft. where such residential unit is situated within the cities of Delhi and Mumbai or within 25 kms. from the municipal limits of these cities and 1500 sq.ft. at any other place.

(e) It is the cardinal principle of interpretation that a construction resulting in unreasonably harsh and absurd results must be avoided.

(f) Clause (d) makes it clear that a housing project includes shops and commercial establishments also. But from the day the said provision was inserted, they wanted to limit the built up area of shops and establishments to 5% of the aggregate built up area or 2000 sq.ft., whichever is less. However, the Legislature itself felt that this much commercial space would not meet the

requirements of the residents. Therefore, in the year 2010, the Parliament has further amended this provision by providing that it should not exceed 3% of the aggregate built up area of the housing project or 5000 sq.ft., whichever is higher. This is a significant modification making complete departure from the earlier yardstick. On the one hand, the permissible built up area of the shops and other commercial shops is increased from 2000 sq.ft. to 5000 sq.ft. On the other hand, though the aggregate built up area for such shops and establishment is reduced from 5% to 3%, what is significant is that it permits the builders to have 5000 sq.ft. or 3% of the aggregate built up area, *'whichever is higher'*. In contrast, the provision earlier was 5% or 2000 sq.ft., *'whichever is less'*.

(g) From this provision, therefor, it is clear that the housing project contemplated under sub-section (10) of Section 80IB includes commercial establishments or shops also. Now, by way of an amendment in the form of Clause (d), an attempt is made to restrict the size of the said shops and/or commercial establishments. Therefore, by necessary implication, the said provision has to be read prospectively and not retrospectively. As is clear from the amendment, this provision came into effect only from the day the provision was substituted. Therefore, it cannot

be applied to those projects which were sanctioned and commenced prior to 01.04.2005 and completed by the stipulated date, though such stipulated date is after 01.04.2005.

21) These aspects are dealt with by various High Courts elaborately and convincingly in their judgments. It is not necessary to go into the detailed reasoning given by these High Courts. However, we would like to extract the following discussion from the judgment dated 25.07.2014 of the Bombay High Court in ITA Nos. 201 and 308 of 2012, where this very aspect is answered in the following manner:

> "36. There is yet another reason for coming to the aforesaid conclusion. Take a scenario where an Assessee, following the project completion method of accounting, has completed the housing project approved by the local authority complying with all the conditions as set out in section 80-IB(10) as it stood prior to 1st April, 2005. If we were to accept the argument of the Revenue, then in that event, despite having completed the entire construction prior to 1st April, 2005 and complying with all the conditions of section 80-IB(10) as it stood then, the Assessee would be disentitled to the entire deduction claimed in respect of such housing project merely because he offered his profits to tax in the A.Y. 2005-06. In contrast, if the same Assessee had followed the work-in-progress method of accounting, he would have been entitled to the deduction under section 80-IB(10) upto the A.Y. 2004-05, and denied the same from A.Y. 2005-06 and thereafter. It could never have been the intention of the Legislature that the deduction under section 80-IB(10) available to a particular Assessee would be determined on the basis of the accounting method followed. This, to our mind and

as rightly submitted by Mr. Mistry, would lead to startling results. We therefore have no hesitation in holding that section 80-IB(10) is prospective in nature and can have no application to a housing project that is approved before 31st March, 2005. As the deduction sought to be claimed under section 80-IB(10) is inseparably linked with the date of approval of the housing project, it would make no difference if the construction of the said project was completed on or after 1st April, 2005 or that the profits were offered to tax after 1st Apri, 2005 i.e. in A.Y. 2005-06 or thereafter. We therefore find no substance in the argument of the Revenue that notwithstanding the fact that the housing project was approved prior to 31st March 2005, if the construction was completed on or after 1st April, 2005 or if the profits are brought to tax in the A.Y. 2005-06 or thereafter, the said housing project would have to comply with the provisions of clause (d of section 80-IB(10). To our mind, we do not think that the condition/restriction laid down in clause (d) of section 80-IB(10) has to be revisited and/or looked at and complied with in the assessment year in which the profits are offered to tax by the Assessee. When the Assessee claims a deduction under section 80-IB(10), the Assessee is required to comply with such a condition only if it is on the statute-book on the date of the approval of the housing project and it has nothing to do with the year in which the profits are brought to tax by the Assessee. We have come to this conclusion only because we find that clause (d) of section 80-IB(10) is inextricably linked to the date of the approval of the housing project and the subsequent development/construction of the same, and has nothing to do with the profits derived therefrom. We may hasten to add that if a particular condition is not inseparably linked to the date of approval of the housing project, different considerations would arise. However, we are not called upon to decide any such condition and hence we are not laying down any general proposition of law, save and except that clause (d) of section 80-IB(10), being a condition linked to the date of the approval of the housing project, would not apply to any housing project that was approved prior to 31st March, 2005 irrespective of the fact that the profits of the

said housing project are brought to tax after the said provision was brought into force."

22) At this juncture, we would like to quote the following passage from ***Commissioner of Income Tax, U.P.*** v. ***M/s. Shah Sadiq and Sons***[7]:

> "14. Under the Income Tax Act of 1922, the assessee was entitled to carry forward the losses of the speculation business and set off such losses against profits made from that business in future years. The right of carrying forward and set off accrued to the assesee under the Act of 1922. A right which had accrued and had become vested continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. This is the effect of Section 6 of the General Clauses Act, 1897.
>
> 15. In this case the 'savings' provision in the repealing statute is not exhaustive of the rights which are saved or which survive the repeal of the statute under which such rights had accrued. In other words, whatever rights are expressly saved by the 'savings' provision stand saved. But, that does not mean that rights which are not saved by the 'savings' provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6(c) of the General Clauses Act, 1897. The right to carry forward losses which had accrued under the repealed Income Tax Act of 1922 is not saved expressly by Section 297 of the Income Tax Act, 1961. But, it is not necessary to save a right expressly in order to keep it alive after the repeal of the old Act of 1922. Section 6(2) saves accrued rights unless they are taken away by the repealing statute. We do not find any such taking away of

7 (1987) 3 SCC 516

the rights by Section 297 either expressly or by implication."

23) The aforesaid discussion persuades us to conclude that the judgments of the High Courts, which are impugned in these appeals, take correct view that the assesees were entitled to the benefit of Section 80IB(10). As a result, these appeals fail and are hereby dismissed.

**.....J.**
**(A.K. SIKRI)**

**.....J.**
**(ROHINTON FALI NARIMAN)**

**NEW DELHI;**
**MAY 15, 2015.**