IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

Before Shri Shailendra Kumar Yadav, Judicial Member,
and Shri R.K.Panda, Accountant Member.

ITA.No.822/PN/2011
(Asstt. Year : 2007-08)

DCIT, Circle-3,
Pune .. Appellant

Vs.

Magarpatta Township Development &
Construction Co.,
13, Megaspace, Solapur Bazar Road,
East Street,
Pune – 411001. .. Respondent

AND

C.O. No.04/PN/2012
(Asstt. Year : 2007-08)

Magarpatta Township Development &
Construction Co.,
13, Megaspace, Solapur Bazar Road,
East Street,
Pune – 411001. .. Appellant

Vs.

DCIT, Circle-3,
Pune .. Respondent

Appellant by	:	Shri S.K.Singh, CIT(DR)
Respondent by	:	Shri Sunil Pathak/ Shri D.R.Barve
Date of Hearing	:	08.08.2012
Date of Pronouncement	:	18.09.2012

ORDER

PER SHAILENDRA KUMAR YADAV, JM:

The Revenue's appeal and the cross objections of the assessee are arising from the same order of CIT(A). So they are being disposed of by this common order for the sake of convenience. The appeal of the Revenue has been filed on the following grounds:

1. The order of the learned Commissioner of Income-tax (Appeals) is contrary to law and to the facts and circumstances of the case.

2. The learned Commissioner of Income-tax (Appeals) grossly erred in holding that the income derived by the assessee from the letting out of premises of the 'Cyber City' has to be assessed as business income and not as income under the head "House Property" as had been taken in the assessment.

3. The learned Commissioner of Income-tax (Appeals) grossly erred in holding that the services provided by the assessee to the tenants in Cyber City were in the nature of extensive and specialize services and, therefore, the premises let out by the assessee could not be regarded as bare tenement but the complex one with infrastructure facilities, the income derived there from which is not separable from letting out of the building."

4. The learned Commissioner of Income-tax. (Appeals) grossly erred in failing to appreciate that the assessee had let out the premises in exercise of the property rights vested in it, i.e., as any ordinary house owner would turn his property to profitable account, and also the assessee had neither occupied not let out the premises for the purpose of any business carried on by it and, in the circumstances, the profits derived from the premises could only be assessed under the head "Income from House Property" within the provision of Sec. 22 of the Income-tax Act, 1961.

5. The learned Commissioner of Income-tax (Appeals) grossly erred in failing to appreciate that the primary object of the assessee was to let out the properties in order to derive income there from and not to exploit them commercially and merely because certain infrastructure has been provided to facilitate such letting out, such provision can by no means amount to carrying on complex commercial activities so as to invest the letting out with the character of business.

6. The learned Commissioner of Income-tax (Appeals) grossly erred in failing to appreciate that the infrastructure and services provided by the assessee to the tenants were such as any ordinary house owner would provide depending on the nature of the tenement and, therefore, the mere factum of such provision would not alter the nature of the income derived from the property when the dominant intention is to derive income there from.

7. The learned Commissioner of Income-tax (Appeals) grossly erred in attaching undue importance to a clause in the agreement as per which the cost involved in the services is built into the cost per sq.ft. as per the tenancy agreement and without . appreciating that the assessee has provided the services in the properties so that the same could be let out to the target groups.

8. The learned Commissioner of Income-tax (Appeals) grossly erred in failing to appreciate that the infrastructure and services provided by the assessee were incidental to the letting out of the properties and also in failing to appreciate that the very fact that substantial income as per the agreement was towards rent on the let out of the super area and not towards provision of services would testify to the above.

9. The learned Commissioner of Income-tax (Appeals) grossly erred in holding that if any disallowances u/s. 43B, 40(a)(ia) and 35(1)(va) relates to the 'Helliconia' project, then the assessee's claim of deduction u/s. 80-IB(10) in respect of this project would have to be considered on the correspondingly enhanced income.

10. The learned Commissioner of Income-tax(Appeals) grossly erred in failing to appreciate that disallowances u/s. 43B, 40(a)(ia) and 35(1)(va) do not give rise to any income "derived from" the undertaking and, therefore, such income can by no means be considered for computing deduction u/s. 80-18{10) as per the ratio of the decision of the Hon'ble Apex Court in the case of Sterling Foods Ltd., 237 ITR 579 (S.C) and Pandian Chemicals, 262 ITR 278 (S.C)

2. The main issue in Revenue's appeal is with regard to treatment of rental receipts for letting out the premises in Cyber City in Magarpatta City Project. The Assessing Officer noticed that assessee had shown receipts of Rs.36,97,05,084/- under the head other income which was in the nature of rental receipts for letting out premises in the Cyber City in the Magarpatta City Project. These receipts were treated by the assessee as business income and depreciation was claimed for the assets of Cyber City amounting to Rs.24,87,04,429/-. The proportionate expenses which could be apportioned to the activity of letting out of Cyber City was computed in the order at Rs.6,11,56,123/-. It was observed by Assessing

Officer that actually the assessee was incurring losses if the expenses on account of interest are also considered. The Assessing Officer asked the assessee as to why income on account of the receipt from letting out of the premises in Cyber City should not be treated as income from house property. It was explained on behalf of the assessee before the Assessing Officer that the Magarpatta City Project of the assessee consisted of I.T. Park, commercial complexes, schools and residential complexes, etc., and the Memorandum of Articles of the company was to develop and maintain I.T. Parks, which was therefore a systematic business activity of the assessee. This I.T. Park had been for use to various software/other companies and the I.T. Park of the company was recognized/sanctioned u/s.80IA of the Act. Further, the buildings in the I.T. Park were shown as business assets in the schedule of fixed assets of the company, and were depreciable assets. It was also contended on behalf of assessee that the I.T. Park was well equipped with the required infrastructure, and various facilities and services like provisions of furniture and fixture, Air-conditioner Plant, various machineries, 24-hours' security guards, provision for electricity in the common I.T. Park campus etc. It was also submitted that these points were explained during the assessment proceedings of the earlier years as well wherein such income has been accepted as business income in said earlier years. Further, the local authority, i.e., Pune Municipal Corporation and the Maharashtra State Electricity Development also considered the I.T. Park projects as commercial projects and accordingly the taxes and rates were applied.

3. The Assessing Officer relying on the provisions of section 22 of the Act regarding chargeability under the head income from house property, examined this chargeability in the assessee's case under this head as business income. For this purpose, the Assessing Officer analysed the issue in light of legal preposition on this issue

and following main conclusions were drawn by the Assessing Officer:

i) The rental income from a building whether a commercial or residential was to be assessed under the head income from house property.
ii) If the main intention was to let out property then it was to be considered as income from house property.
iii) This was true even it was derived from shops and stalls, and even if it was earned by company formed with the object of developing and setting up of markets.
iv) If the main intention was to exploit the property by way of own complex commercial activities, in that event alone it should be treated as business income.
v) When income obtained is not so much because of bare letting of tenements but because of facilities and services rendered in such case, the nature of business income. When the letting was only incidental to the main business of the assessee, then also it was income from business.
vi) When income was due to exercise of property rights, it should be assessable under the head income from property.
vii) If income falls under the head income from property, it was to be taxed u/s.22 only, and cannot be taken on section 28 on the ground that the business of the assessee was to exploit property.
viii) If the property was given on leave and license basis, it is to be treated as income from house property. This character is not changed even if the hiring is inclusive of certain insignificant and incidental services like heating, cleaning, lighting and sanitation.
ix) If the property was let out for a fixed amount for a fixed period, the likelihood of it being income from house property is more.

4. The Assessing Officer then analysed the provisions of lease agreement entered between the assessee and the software companies. The Assessing Officer observed that while lease rent from the premises was charged at Rs.14.30 per sq.ft., the amount charged towards maintenance was only Rs.0.50 per sq.ft. Therefore, it was stated that the rent was predominantly for the space and the prime intention was to let out the property on a monthly rent, and there was no complex commercial activity involved in this letting out. He also observed that it was not a case that the leasing of the property was incidental or subservient to the

main business of the assessee. The maintenance charges received were subservient to the exploitation of the properties. The Assessing Officer further observed that the assessee's contention that it was in the business of running and maintenance of I.T. Park, and therefore, it was a business income, was also not tenable, since the properties were exploited in a basic and simple way of letting out on a monthly basis and there was no complex commercial activity involved as envisaged in the Apex Court judgement in the case of CIT vs. Shambhu Investments Pvt. Ltd. (2003) 263 ITR 143 (SC). It was stated that though the properties collectively formed an I.T. Park and was recognized as such, it did not alter the basic nature of activity of letting out of the properties. The Assessing Officer also relied on the decision of the ITAT Pune Bench in the case of Nutan Warehousing Ltd. (2007) 106 TTJ 137 to hold that income derived from the letting out of the premises of the I.T. Park known as Cyber City was assessable under the head Income from House Property which was computed as under:

Total rental receipts (License fees)	Rs.36,97,05,084/-
Less: 30% for repairs	Rs.11,09,11,525/-
Income under the head House Property	Rs.25,87,93,559/-

5. Further, the Assessing Officer disallowed the depreciation claimed on the Cyber City building, furniture and plant and machinery totalling to Rs.24,87,04,429/- of which the break up was given on page 16 of the assessment order. Further the common expenses under the head Administrative Expenses, i.e., employees' cost and marketing cost, totalling to Rs.39,05,24,415/- was apportioned to the letting out activity in the ratio of license fee to total receipts, which worked out to 15.66%. Out of the total expenses claimed at Rs.39.05 crores mentioned above, the expenses apportioned to letting out, working out to Rs.6,11,56,123/- was also added back. Thus, the income from business was computed at Rs.14,76,15,597/- as against income from business shown in

return, which was Rs.20,74,60,129/-. Accordingly, the gross total income became Rs.25,87,93,559/- + Rs.14,76,15,595/- = Rs.40,64,09,154/- as against the gross total income shown under the head business income at Rs.20,74,60,129/- which resulted in net addition of Rs.19,89,49,025/- to the total income.

6. Matter was carried before the first appellate authority wherein various contentions were raised on behalf of the assessee and CIT(A) after considering the various contentions on behalf of the assessee, has decided this issue in favour of the assessee by holding that the assessee's income was to be assessed as business income. Same has been opposed before us on behalf of the Revenue. The Ld. Departmental Representative contended that the CIT(A) erred in holding that income derived by the assessee from the letting out of premises of the 'Cyber City' has to be assessed as business income and not as income under the head "House Property" as had been taken in the assessment. The CIT(A) was not justified in holding that the services provided by the assessee to the tenants in Cyber City were in the nature of extensive and specialize services and, therefore, the premises let out by the assessee could not be regarded as bare tenement but the complex one with infrastructure facilities, the income derived there from which is not separable from letting out of the building. The CIT(A) failed to appreciate that the assessee had let out the premises in exercise of the property rights vested in it, i.e., as any ordinary house owner would turn his property to profitable account, and also the assessee had neither occupied nor let out the premises for the purpose of any business carried on by it. In the circumstances, the profits derived from the premises could only be assessed under the head "Income from House Property" within the provision of Sec. 22 of the Income-tax Act, 1961. The CIT(A) failed to appreciate that the primary object of the assessee was to let out the properties in order to derive income there from and not to exploit them commercially and merely because certain infrastructure has been provided to

facilitate such letting out, such provision can by no means amount to carrying on complex commercial activities so as to invest the letting out with the character of business. The CIT(A) failed to appreciate that the infrastructure and services provided by the assessee to the tenants were such as any ordinary house owner would provide depending on the nature of the tenement and, therefore, the mere factum of such provision would not alter the nature of the income derived from the property when the dominant intention is to derive income there from. The CIT(A) grossly erred in attaching undue importance to a clause in the agreement as per which the cost involved in the services is built into the cost per sq.ft. as per the tenancy agreement and without . appreciating that the assessee has provided the services in the properties so that the same could be let out to the target groups. The CIT(A) failed to appreciate that the infrastructure and services provided by the assessee were incidental to the letting out of the properties and also in failing to appreciate that the very fact that substantial income as per the agreement was towards rent on the let out of the super area and not towards provision of services would testify the above. The CIT(A) erred in holding that if any disallowances u/s. 43B, 40(a)(ia) and 35(1)(va) relates to the 'Helliconia' project, then the assessee's claim of deduction u/s. 80-IB(10) in respect of this project would have to be considered on the correspondingly enhanced income. The CIT(A) also failed to appreciate that disallowances u/s. 43B, 40(a)(ia) and 35(1)(va) do not give rise to any income derived from the undertaking and, therefore, such income can by no means be considered for computing deduction u/s. 80-IB(10) as per the ratio of the decision of the Hon'ble Apex Court in the case of Sterling Foods Ltd., 237 ITR 579 (S.C) and Pandian Chemicals, 262 ITR 278 (SC). In this background it was submitted that the order of the CIT(A) be vacated and that of the Assessing Officer be restored.

7. On the other hand, the Ld. Authorised Representative submitted that the assessee has not merely given the premises on

rent but letting out is coupled with well equipped amenities, facilities and services to I.T. companies. The assessee has claimed depreciation on the cost of the buildings constructed and further claimed proportionate expenditure incurred on maintenance of the premises. Attention was drawn to the Profit and Loss Account in respect of Cyber City Project. The Assessing Officer held that the said rental income in the form of license fees is assessable as income from house property as the main intention of the assessee was to exploit the property by way of letting out on rent. Various reasons given by the Assessing Officer to hold that the rental income is taxable as income from house property are summarised as under:

i) The A.O. on page 13 of the asst. Order has stated that as per the rent agreement between the assessee and Exl. Services.com (India) Pvt. Ltd., the assessee is receiving Rs.14.50/- per sq.ft. as lease rent and only Rs.0.50/- per sq.ft., as maintenance charges. Hence, according to him, the rent received is predominantly for renting the space and therefore, the income is taxable as income from House Property.
ii) According to the Assessing Officer the primary object of the assessee was to give the premises on rent and no complex commercial activity was carried out by the assessee.
iii) The Assessing Officer refers to the decision of Hon'ble Supreme Court in the case of Shambhu Investments Pvt Ltd. (supra) to hold that the rent received was for mere letting out of the premises and hence, the income was taxable as Income from House Property. The Assessing Officer has further relied upon the decision of ITAT Pune in the case of Nutan Warehousing Pvt. Ltd. (supra).

8. The Ld. Authorised Representative submitted that CIT(A) has held that income from leasing I.T. Park should be assessed as business income since the assessee has provided various complex integrated services, facilities and equipments and hence, the assessee had conducted a systematic and complex activity to earn profit. The various reasons given by the CIT(A) for allowing the claim of the assessee are as under.

i) The assessee has constructed I.T. Park with well equipped and excellent infrastructure along with various specialised integrated amenities and services in the form of car parking area with cabins, independent air-conditioning rooms with multiple compressors, chilled water systems, double skin AHUs to take care of noise, chiller units, air purification systems, 100% power back up with diesel generators, independent transformer to control electricity load, special security systems with dog squads, 24 hours manned CCTV, sineage, club memberships, toilet blocks with sensors as per lessee's specifications, fibre and satellite connectivity, radio microwave tower with office, cell phone boosters and independent cafeteria terrace.

ii) In the earlier years, the rental income received is taxed as business income and not as income from house property. The copy of the assessment order for A.Y. 2004-05 is given on page 118-124 of the paper book filed by assessee. The CIT(A) has noted that as per principle of consistency, the stand of the assessee should be accepted.

iii) In para 3.10 of his order, the learned CIT(A) has stated that the observation of the Assessing Officer that rent of Rs.14.50/- per sq.ft. is not for other amenities is not correct. He has reproduced the relevant clause of the agreement with exl. Service.com (India) pvt. Ltd. and wherein it is clearly mentioned that the said amount of Rs.14.50/- per sq.ft. is including the charges for providing the additional amenities. The copy of the said rental agreement with exl. Service.com (India) Pvt. Ltd. is given on pages 86 to 117 of the paper book. On page 105, the various amenities provided by the assessee are mentioned which are as under:

i. Cab Parking

ii. Car parking
iii. Club membership
iv. Air conditioning
v. Power back up
vi. Hooked up electricity load
vii. Signage
viii. Toilet blocks with sensors
ix. Fibre and Satellite connectivity
x. Radio Microwave
xi. Cell Phone Boosters
xii. Independent Cafeteria Terrace

iv) Accordingly, the CIT(A) appreciated that the rental income of Rs.14.50/- per sq.ft. received by the assessee is for letting out of the premises as well as for providing various additional amenities. Apart from that, the assessee provides services of plumber, electrician, mechanic, watchman, gardener, etc. and the assessee looks after the maintenance of the software park. The assessee has a number of persons on its pay role for the above purpose.

v) The CIT(A) further notes that the assessee has incurred Rs.445.75 crores on providing various infrastructure facilities in the IT Park. The details of the same are given on page 137 – 138 of the paper book. The point to be appreciated is that the assessee has incurred substantial expenditure on providing additional amenities which clearly indicate that the assessee's intention was to earn income from complex letting out of the premises.

vi) It is also to be noted that the assessee has incurred substantial expenditure on maintenance of the infrastructural facilities provided.

vii) The learned CIT(A) thereafter refers to various decisions of the courts to hold that the income received complex commercial activities of letting out premises was taxable as business income and not as income from house property as determined by the learned Assessing Officer.

viii) The assessee places reliance on the following decisions wherein the courts have held that the rental income received from complex commercial activities is to be taxed as income from business and not as income from House Property:

1. ITAT, Bangalore – Global Tech Park (P) Ltd. (2008) 119 TTJ (Bang) 421.
2. ITAT, Bangalore – Golflink Software P. Ltd. (ITA.No.52 & 53/Bang/10)
3. ITAT, Mumbai – Harvinderpal Mehta (2009) 122 TTJ (Mumbai) 163.
4. ITAT, Mumbai – Shanaya Enterprises (ITA.No.3647/Mum/2010)
5. ITAT, Mumbai – Gesco Corporation (ITA.No.3404/Mum/06)
6. ITAT, Mumbai – Krishna Land Developers. (ITA.No.1057/Mum/2010)

In this background it was submitted that assessee has exploited the business assets to conduct a systematic business commercial activity. The main intention of the assessee in leasing out the IT Park was to exploit the property commercially by way of providing various integrated services and hence, the same may be treated as business income. It was submitted that the case laws as listed at Sl.No. (i), (ii) and (vi) are of software parks and on identical facts, the rental income is treated as business income. Therefore, the above issue is covered in favour of the assessee by the above decisions. Regarding the issue of deduction u/s.80IB(10) in respect of disallowances made u/s.40(a)(ia) or 43B, it was submitted that the assessee has claimed deduction u/s.80IB(10) in respect of the housing projects. There were disallowances on account of section 40(a)(ia), 43B and 35(1)(va). The assessee stated that due to such disallowances, the business income increased and hence, the deduction u/s.80IB(10) should be allowed on the enhanced business income. The Assessing Officer has not allowed the claim of the assessee and held that the deduction u/s.80IB(10) is not available in respect of the amounts which are disallowed u/s.

40(a)(ia) or 43B. The CIT(A) accepted the claim of the assessee by relying on the following decisions:

a. CIT vs. Gem Plus Jewellery India Ltd. [330 ITR 175]
b. S.B.Builders & Developers vs. ITO [136 TTJ 420 (Bom)]
c. ITO vs. ComputerForce [136 TTJ 221].

In this background, Ld. Authorised Representative submitted that order of the CIT(A) on the issue be upheld.

9. After going through the above submissions and material on record, we find that the assessee is engaged in construction business and has developed a township under the name and style of Magarpatta City Project. The assessee has constructed and let out the I.T. Park called Cyber City. Income received from the letting out of the above said commercial premises was offered to tax by assessee as income from business which is evident from the copy of the computation of the return placed at page 80 of the paper book. The assessee has explained that in Magarpatta City Project, there was a development of Information Technology (IT) Park, which was approved u/s.80IA and was a bonded area under the Software Technology Park of India (STPI) norms. It had huge airconditioning plants, chillers, etc., and special security guards with dog squad. The assessee has invested huge amounts in installation of many specialised amenities/equipments like transformers for the I.T. Park, special power sub-stations to ensure uninterrupted power supply, providing for 24 hours manned CCTVs, fibre satellite connectivity, radio microwave cell phone boosters, restaurants etc., and the premises had been provided to the I.T. companies with all these facilities and amenities. The total investment made was to the tune of Rs.445.75 crores in the I.T. Park for creating the specific infrastructure required for the I.T. Park. The income from the license agreement with the software companies to whom I.T. Park premises had been let out has been regularly shown as business income in the earlier years. There is nothing on record to suggest

that same has been disturbed in any manner. In this regard attention was drawn to decision of the Hon'ble Bombay High Court in the case of Ocean City Trading (India) Pvt. Ltd., in ITA No.2417 of 2009 dated 12.03.2010 speaks on emphasising on the principle of consistency. According to us consistency should be observed unless there is any thing contrary on record.

10. Coming to the license fee earned from letting out of premises in I.T. Park was a continuous/systematic activity which was in the nature of complex commercial activity. Since licensee were engaged in the I.T./Software business, the services were provided by the assessee round the clock, because the licensees were working according to the timings in the USA/Western countries. The assessee has specified as to how the normal renting of premises was different from the giving of premises to I.T. companies for I.T./software work alongwith the numerous services and facilities in these premises. All the premises were provided with huge airconditioning plants for central airconditioning, special electrification, uninterrupted power supply, etc. Due to the peculiar nature of work and odd hours of work, there were arrangements for restaurants, gymnasium, banking facilities in the premises, security service with dog squad, etc. Attention was drawn to the lease agreement with one of the software company exl. Services.com (India) Ltd., wherein para 15 of the said agreement reads as under:

> "The Lessor shall also provide to the lessee certain additional amenities in the Demised Premises, as detailed in Schedule-II herein. The cost of providing such additional amenities has already been included in the monthly rent and the lessee shall not be required to pay to the lesser any additional amount(s) towards it."

This shows that monthly lease rent/license fee of Rs.14.30 per sq.ft. included cost of providing such additional services and amenities as has been given in detail in Schedule-II of the license agreement and nothing extra has been charged from the lessee for this. It is

evident from Schedule-II of the agreement that the amenities/services provided were also technical one and of a major nature, e.g. provision of independent AC Plant with multiple compressors, chilled water system and double skin AHU's (to take care of noise), airconditioning chiller configuration with adequate AHU's, which included adequate provision for getting fresh air into the premises via Mechanical system, and two chiller units; a 100% power back up with auto switchers for the entire power given on lease on a 24 hours basis, inclusive of generators etc.; independent transformers of 600 KW per floor to the lessee for sole use of its requirement in the tower, 24 hours manned CCTV in common areas and basement area, fibre and satellite connectivity and a radio microwave tower which would be provided by the STPI, cell phone boosters, and unlimited access to the premises 24 x 7, and in 365 days in a year, with support services like security and parking. Apart from these a substantial parking area were also provided for 50-car parking and 20 two-wheeler parking and 60 cabs parking etc., for the tower building. Such services were indeed of a complex commercial nature and cannot be treated as merely incidental to mere letting out of the premises. In Schedule-II and the earlier mentioned para 15 of the lease agreement that for provision of these specialized services, the cost/rent were included in the per sq.ft. lease rental amount of Rs.14.30. Therefore, the Assessing Officer was not justified in stating that this amount of Rs.14.30 per sq.ft. merely represents letting out of the space. So far as the amount of Rs.0.50 per sq.ft. towards maintenance charges is concerned, it was basically for maintaining and cleaning of the premises, toilets, drainage etc. The agreement also makes it clear that this amount of Rs.0.50 per sq.ft. was for maintenance of water lines, and for drains, garbage disposal, common areas etc., whereas the specialised services and infrastructure as incorporated in Schedule-II is included in the monthly lease rent amount as specified in clause 15 of the agreement as stated above. Thus, it was made clear as to how these specialised services for I.T.

companies were of complex nature and therefore, the intention and object of the company was to develop I.T. Park as a systematic commercial activity to earn profit and not just earning of rental income. The Hon'ble Supreme Court in the case of Shambhu Investment Pvt. Ltd., (supra) has laid down that if the property whether furnished or unfurnished was let out with an intention to have rental income, it would be assessable as income from house property. On the other hand, if the primary object is to exploit the property by way of complex commercial activities, the income from the same was to be considered as business income. The case of Shambhu Investment (supra) does not go against the assessee. One point which was emphasised in said case is that the assessee has recovered the entire cost of the property let out to the occupier by way of interest free advance received from them. Therefore, it was held that in such a case the assessee was not exploiting the property for commercial business activity and the provisioning of some furnishing was merely incidental to the bare letting out of the property. In case before us, the assessee has not recovered major cost of the building and infrastructure and providing a host of services with recurring operating cost as discussed above.

11. The decision of ITAT Pune Bench in the case of Nutan Warehousing Pvt. Ltd. (supra) relied on by the Assessing Officer has been set aside and remanded to the Assessing Officer for reconsideration by the Hon'ble Bombay High Court. The Hon'ble Bombay High Court has set aside the matter to examine the prime object of the assessee whether it was to simply let out the property or to exploit a commercial asset by carrying on a commercial activity of warehousing. The Hon'ble Allahabad High Court in the case of CIT vs. Goel Builders (2010) 235 CTR 472 (All.) wherein the assessee was operating the commercial complex named Goel Complex and it was held that from the very beginning the construction of the building itself was for commercial purposes and therefore, the rental income was held to be assessable as business

income. The Hon'ble Bombay High Court in the case of Mohiddin Hotels (2006) 284 ITR 229 (Bom), has held that when the subject matter that is let out is not a bare tenement, but the complex one with infrastructure facilities, the income derived therefrom which is not separable from letting out of the building, such income shall not be treated as income from house property. ITAT Mumbai Bench in the case of Gesco Corporation Ltd. (2009) 31 SOT 32 (Mum) wherein assessee has let out commercial premises as business centre and a large number of specialised services and facilities were provided in these business centres, like airconditioning, power backup, water filtration plant, security system through CCTV, state of art computer-telephone integration, video conferencing facilities, secretarial services, the Tribunal held as under:

> "It was clearly discernible from the agreements that the parties had entered into the arrangement with the assessee with the intention of using the services and amenities. The assessee was giving space with services and facilities which were varied and wide and such activities together would definitely constitute an organized structure for making profits and would necessarily constitute a business. Thus the assessee had created a commercial infrastructure and the services rendered were complex commercial/business activities. A perusal of agreements and the stipulations contained therein would not leave any doubt about the commercial character of the relationship between the parties, as distinguished from that merely of a landlord and his tenant. Occupation of space was inseparable from the provision of services and amenities."

In Gesco Corporation Ltd., ITAT Mumbai Bench has distinguished the facts from Shambhu Investments Pvt. Ltd. (supra). In case of Prestige Estate Projects (P) Ltd. (2010) 129 TTJ 680 (Bangalore), following the decision of Gesco Corporaiton Ltd., and Harvindarpal Mehta (HUF) vs. DCIT (2009) 122 TTJ 163 (Mum), has decided the similar issue in favour of assessee. In the said decision, the premises was related to a business centre with multifarious facilities like central airconditioning services, attendants, sweepers, fax machine, furniture, receptionists, telephone operators, common

waiting/guest room with attached toilets, etc. and it was held that the receipts from such activities alongwith these facilities was to be assessed under the head income from business rather than the income from house property or income from other sources, as the object of the assessee was to run the business centre by exploiting the property and not merely letting out the property. The Hon'ble Gujarat High Court in the case of CIT vs. Saptarshi Services 265 ITR 379 (Guj), which also related to the leasing out a business centre with various services, has decided the issue in favour of the assessee and the SLP filed on behalf of the Revenue was dismissed by the Hon'ble Supreme Court as reported in 264 (ST) 36. In this background, it is clear that assessee has provided various complex integrated services as mentioned in Schedule-II to the lease agreement with the I.T. Company. The services are vast and the amenities provided were in the nature of plant and machinery as contended by the assessee and it has been established by the clauses of the agreements that the cost of providing these services was also included in the lease rent of Rs.14.30 per sq.ft. The assessee also clarified that cost involved in the services provided to the particular company i.e., exl Services.com was Rs.2.83 crores which was almost 40% of the land and building cost of that tower. By no stretch of imagination such extensive and specialized services which could only be utilised by the IT/Software/BPOs businesses to be located in the I.T. Park could be treated as forming part of income from house property. It is certainly a constitution of organised structure for carrying out business activities. Section 22 provides only for rental income out of building or land appurtenant thereto, whereas in the case before us, complex and varied services provided and the huge investment therein were in the nature of plant and machinery which could be included within the expression building or land appurtenant thereto. Thus, the assessee has conducted systematic activity to earn profit and accordingly income was to be assessed as income from business. In view of the submissions made on behalf of the assessee, and

analysis of various clauses and Schedule-II of the agreement entered with the I.T. company, CIT(A) was justified in holding that in assessee's case the said income was to be assessed as business income. This reasoned factual finding need no interference from our side. We uphold the same.

12. The issue in Ground No.9 to 10 pertains to claim of deduction u/s.80IB(10) in respect of disallowance made u/s. 40(a)(ia)/43B. The assessee company has claimed deduction u/s. 80IB(10) in respect of the housing projects. There were disallowances on account of section 40(a)(ia), 43B and 35(1)(va). The assessee stated that due to such disallowances, the business income increased and hence, the deduction u/s.80IB(10) should be allowed on the enhanced business income. The Assessing Officer has not accepted the claim of the assessee and has held that the deduction u/s. 80IB(10) is not available in respect of the amounts which are disallowed u/s. 40(a)(ia) or 43B.

13. In appeal, the learned CIT(A) has accepted the claim of the case. In para 5.3 to 5.5 of his order, the CIT(A) has allowed the claim of the assessee by observing as under:

> "5.3 I have considered the submissions of the appellant and material available on record. The appellant has cited certain decisions in favour of its claim. It is contended by the appellant that the turnover was from the same source in respect of the claim u/s.80IB(10), and therefore, it was entitled for the deduction after including the statutory disallowances, i.e. on the correspondingly enhanced income. In the judgement of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Gems Jewellery India Ltd., (2010) 233 CTR 248 (Born.) the claim of deduction u/s.10A was made due to enhanced profit after disallowance u/s.43B. The Hon'ble Bombay High Court observed as under:
>
> > "As a matter of fact the question of law which is formulated by the Revenue proceeds on the basis that the assessed income was enhanced due to the disallowance of the employer's as well as the employees' contribution towards PF/ESIC and the only question which is

> canvassed on behalf of the Revenue is whether on that basis the tribunal was justified in directing the Assessing Officer to grant the exemption uls.10A. On this position, in the present case it cannot be disputed that the net consequence of the disallowance of the employer's and the employees' contribution is that the business profits have to that extent been enhanced. There was an add back by the Assessing Officer to the income. All profits of the unit of the assessee have been derived from manufacturing activity. The salaries paid by the assessee, it has not been disputed, relate to the manufacturing activity. The disallowance of the PF/ESIC payments has been made because of the statutory provisions - s.43B in the case of the employers contribution and s.36(v) r.w.s.2(24)(x) in the case of the employees' contribution which has been deemed to be the income of the assessee. The plain consequence of the disallowance and the add back that has been made by the Assessing Officer is an increase in the business profits of the assessee. The contention of the revenue that in computing the deduction u/s. 10A the addition made on account of the disallowance of the PF/ESIC payments ought to be ignored cannot be accepted. No statutory provision to that effect having been made, the plain consequence of the disallowance made by the Assessing Officer must follow."

5.4 Therefore, the Hon'ble Bombay High Court has allowed deduction u/s.10A on an enhanced profit due to disallowance u/s.43B on the basis that all the profits of the units of the assessee have been derived from manufacturing activity only, and there were no statutory provisions that income enhanced due to such disallowance could not be considered for the deduction.

5.5 The appellant has also cited the decision of the Ahmedabad bench in the case of ITO vs. Computer Force (2011) 136 TTJ 221 (Ahd.), ITA Nos.1636/Ahd/2009, 2441/Ahd/2007, 2442/Ahd/2007 and 1637/Ahd/2009 order dtd.30.7.2010, which also relates to deduction u/s.80IB for unit located in Daman, which was a backward area. The Assessing Officer had disallowed the claim u/s.80IB on the enhanced income due to disallowance u/s.40(a)(ia). However, the CIT(A) and the ITAT allowed the claim, stating that the enhanced income due to this disallowance was eligible income under the head 'Profits and gains of business and profession', on which claim u/s.80lB was allowable. Another decision given by the assessee was that of the Mumbai Bench in the case of S.R.Builders and Developers vs. ITO in ITA.No. 1245/Mum/2009, A.Y. 06-07, order dtd. 14.5.2010. This was a case related to deduction u/s.801B(10) itself, and here the

issue was regarding non-allowability of deduction u/s.80IB(10) on the enhanced income due to disallowance u/s.40(a)(ia) amounting to Rs.4,50,12,485/-. The Tribunal held that as per the section 80IB(1) the assessee was to be allowed deduction in respect of profits and gains derived from any business mentioned in section 80IB(10), i.e., for an undertaking developing and building housing projects. It was held by the Tribunal as under:

> "The section falls under chapter VIA of the Act, under the sub-head "C-Deductions in respect of certain incomes". There is no indication in the section as to what would be considered as profits and gains "derived" from the eligible business. Section 80AB, introduced by the Finance (No.2) Act, 1980 w.e.f. 1.4.1981 however states that where any deduction is required to be made under any section falling under Chapter VI-A under the head "C-Deductions in respect of certain incomes" in respect of any income of the nature referred to in that section, then, "notwithstanding anything contained In that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income". In our humble opinion, this section affords a complete answer to the problem posed before us.
>
> In other words, under section 80AB the income that is derived from the eligible business must be computed in accordance with the provisions of sections 30 to 43D, as provided in section 29. Section 29 provides that the income chargeable to tax under the head "profits and gains of business" shall be computed in accordance with the provisions contained in sections 30 to 43D. Unquestionably, section 40(a)(ia) is a section falling between sections 30 to 43D and therefore effect must be given to the same in computing the profits and gains derived from the eligible business, which in this case is a housing project. It follows that if the assessee has not deducted tax from any payment which it was required to or has failed to deposit the tax within the prescribed time limit, it cannot be claim any deduction in respect of the payment while computing the profits derived from the eligible business. The payment has to be disallowed and added back to the profits, thereby swelling the same. The resultant figure of profits, enhanced by the amount of disallowance, would be eligible for the deduction uls.80IB(10)."

> 5.6. In view of the ratio of these decisions, it is abundantly clear that in the appellant's case also deduction u/s.80IB(10) was liable to be allowed in case there were enhanced income on account of such statutory disallowances u/s.43B, 40(a)(ia) & 36(1)(va) etc. as mentioned above; since the nature of receipts on the credit side of Profit and Loss Account for the eligible housing project u/s.80IB(10) was the same, and the disallowance was of the expenditure on the debit side, which would only result into enhancement of the net profit. Technically, i.e. for academic purposes, therefore, the appellant's claim is liable to be allowed. However, in this case, it has already been held that the appellant is not eligible for deduction u/s.80IB(10) pertaining to its Cosmos Project. The Assessing Officer has held in the assessment order that the claim u/s.80IB(10) was allowable to the appellant for its Heliconia project. Thus, if any disallowance u/s.43B, 40(a)(ia) & 35(1)(va) etc. relates to the Heliconia project, that only can be considered for claim u/s.80IB(10) on the correspondingly enhanced income. Subject to this discussion, therefore, this ground of appeal will be treated as partly allowed."

14. After going through the above submissions and material on record, we are not inclined to interfere in the finding of the CIT(A) on the issue. The CIT(A) observed that turnover was from the same source in respect of the claim u/s.80IB(10). Therefore, it was entitled for deduction after including the statutory disallowance i.e., on correspondingly enhanced income. Hon'ble jurisdictional High Court in the case of CIT vs. Gems Jewellery India Ltd., (supra), has allowed the claim of deduction made u/s.10A on enhanced profit. We also find the Mumbai Bench of the Tribunal in the case of S.R.Builders vs. ITO in ITA.No.1245/Mum/2009 for A.Y. 2006-07 dated 14.05.2010 has decided the appeal in favour of the assessee, wherein issue of deduction u/s.80IB(10) was involved. In the said case the issue was regarding non-allowability of deduction u/s.80IB(10) on enhanced income due to disallowance u/s. 40(a)(ia) amounting to Rs.4,50,12,485/-. The Tribunal held that as per section 80IB(10) the assessee was to be allowed deduction in respect of profits and gains derived from any business mentioned in section 80IB(10), i.e. for undertaking developing and building housing projects. In view of above, assessee was held entitled for deduction u/s.80IB(10) in case there was enhanced income on

account of statutory disallowance u/s.43B, 40(a)(ia) and 36(1)(va), etc. In the instant case nature of receipts on credit side of Profit and Loss Account for eligible housing projects u/s.80IB(10) was the same and disallowance of expenditure on the debit side would only result into enhancement of net profit. Accordingly, the assessee's claim was liable to be allowed in view of the ratio of the decisions cited (supra). As stated above, assessee is not eligible for deduction u/s.80IB(10) pertaining to its Cosmos project. The Assessing Officer has held in assessment order that sum of claim u/s. 80IB(10) was allowable to assessee for its Heliconia project. Thus, if any disallowance u/s.43B, 40(a)(ia) or 36(10(va) etc., relate to Heliconia project that only can be considered for claim u/s.80IB(10) and corresponding enhanced income. This reasoned finding of the CIT(A) on the issue needs no interference from our side. We uphold the same.

15. In the result, the appeal of Revenue is dismissed.

16. In the Cross Objections, the assessee has raised the following grounds:

1) The learned CIT(A) erred in confirming the disallowance of deduction of Rs.13,62,01,380/- u/s.80IB(10) in respect of 'Cosmos Project' constructed by the assessee.

2) The learned CIT(A) was not justified in holding that –
   a. Because flats in Building 'Prime' had built up area exceeding 1500 sq.ft., the entire 'Cosmos Project' did not qualify for deduction u/s.80IB(10) in respect of its profits.
   b. Even if, one flat in a project exceeds the built up area limit prescribed under the section 80IB(10), the deduction is to be disallowed in respect of the entire project and it cannot be allowed in respect of the other flats/buildings which satisfy the various conditions in the section.
   c. In view of Bombay H.C. decision in the case of Brahma Associates, the proportionate deduction u/s.80IB(10) could not be allowed in respect of the flats which satisfied the conditions u/s.80IB(10).

3) The learned CIT(A) failed to appreciate that –
   a. There were in all 25 buildings in the 'Cosmos Project' out of which except 'Prime' building all other buildings satisfied the conditions of built up area limit of 1500 sq.ft. and therefore, the deduction u/s.80IB(10) should have been allowed in respect of the profits from such buildings.
   b. Without prejudice, the project for the purposes of deduction u/s.80IB(10) had to be considered as consisting of other 24 buildings in the 'Cosmos Project' excluding the 'Prime' building and as these 24 buildings satisfied the various conditions u/s.80IB(10), the deduction u/s.80IB(10) had to be allowed in respect of the profits from these 24 buildings.
   c. Just because a couple of adjacent flats were combined into one flat by the purchasers later on, the deduction u/s.80IB(10) could not be denied in respect of the project.
   d. The assessee had already offered the profits in respect of the building 'Prime' ascertained on 'stand-alone basis' to tax.
   e. The building plan of building 'Prime' has independent sanction of Pune Municipal Corporation (P.M.C.).

4) The respondents prays for deduction u/s.80IB(10) in respect of entire profits computed after making additions/disallowances in respect of the 'Cosmos Project' consisting of 24 buildings excluding 'Prime' building.

17. The issue raised by assessee by way of cross objections is with regard to disallowance of deduction u/s.80IB(10) amounting to Rs.13,62,01,380/-. The Assessing Officer noted that in respect of assessee's projects Daffodils and Helliconia, which were completed in the earlier years relevant to assessment year under consideration, only residual receipts of Rs.20,000/- and Rs.16,67,600/- had been shown in the year under consideration. However, the receipt from the project Cosmos which amounted to Rs.122,78,44,857/- form the major portion of the sale proceeds shown during the year. Additionally for Erica project a loss of Rs.8,56,900/- was shown. The Assessing Officer has made reference u/s.131(1)(d) to a registered valuer Shri Lele to verify the fulfilment of conditions given u/s.80IB(10) against which the report

dated 28.12.2009 was submitted by him. In respect of the Cosmos project, the registered valuer gave a finding that in the Prime building in the project, which is one of the 24 buildings of the project, all the flats have built up area of more than 1500 sq.ft. Further, he reported that 28 other flats of other buildings I, N, R, S, T, U, V, W & Z were also combined and had built up area exceeding 1500 sq.ft. for each of the combined units. In response to the show cause letter issued by the Assessing Officer, the assessee has explained that the building Prime was separate and completion of the residential units in these buildings was also separate. It was therefore, admitted that the built up area of each of the units in the Prime building exceeded 1500 sq.ft. but the assessee had offered the total profit of these building for taxation and did not make claim u/s.80IB(10) on the same. It was contended on behalf of assessee that the entire claim should not be rejected since it was separately approved and completed. The assessee also cited the judgment of the ITAT, Nagpur Bench regarding proportionate deduction u/s.80IB(10), even if a few residential units exceeded the built up area of 1500 sq.ft.

18. In respect of valuer's observation regarding combination of adjacent flats, it was contended by the assessee that these were sold as independent units through separate agreements, the MSEB meters were separate, there were two separate entrances at the time of handing over possession and the municipal taxes assessment was also separate. It was further contended that only flats No.102 and 103 referred by the registered valuer were actually combined, but those also were not combined at the time of sale, but were sold to two separate individuals and the owners might have combined the same later. Therefore, it was stated that claim u/s.80IB(10) should not be disallowed on this basis. The Assessing Officer has dealt this issue, from page 28 onwards of his order, of deduction u/s.80IB(10) related to the Cosmos Project. This project consisted of 24 buildings A to Z (excluding Q, X & Y) and Prime. All these

buildings had been sanctioned by a common sanction order vide commencement certificate dated 4.8.2004 issued by PMC, which were revised on various dates. It was pointed out that the assessee has accepted that all the 45 flats in Prime building under the Cosmos project had built up areas exceeding 1500 sq.ft. The Assessing Officer gave details of completion certificate for all the buildings, and all the 85 flats in the 24 buildings, on page 28 and 29 of the assessment order. Therefore, he observed that the building Prime commenced and completed as a part of the entire project named Cosmos consisting of 24 buildings and it was not sanctioned separately by the local authority. Thus it was integral part of the Cosmos project.

19. The Assessing Officer further observed that provisions of section 80IB(10) speaks regarding sanction to a housing project and not to an individual building in the project and what was important was whether there are separate sanctions for Prime building or not. According to the Assessing Officer, in fact, building plan for Prime was an enclosure/Annexure of common sanction issued by Pune Municipal Corporation for entire Cosmos Project consisting of 24 buildings and there was no separate building plan sanctioned for building Prime. Thus, the Assessing Officer concluded that since flats in Prime building were all having built-up area exceeding 1500 sq.ft., Cosmos project has failed to satisfy the mandatory condition u/s.80IB(10) rendering it ineligible for deduction u/s.80IB(10) of the Act. Further, it was stated that as per valuer report, Flats No.101 and 102 in 'I' Building were combined of which combined area exceeded 1500 sq.ft., which again violated condition given u/s.80IB(10). This was the additional point for disqualification of Cosmos project. The Assessing Officer further observed that alternative plea of the assessee to allow proportionate deduction in view of the decision of Nagpur Bench in the case of Air Developer was not tenable in law due to the decisions of Mumbai Bench in the

case of Laukik Developers, 105 ITR 657 and Special Bench of ITAT, Pune in the case of Brahma Associates, 119 ITD 255 (Pune)(SB).

20. The Assessing Officer also made discussion about Daffodils and Erica projects, and arrived at the finding that these were also not eligible for deduction u/s.80IB(10). However, it was noticed that there was no claim in the year for these projects. Further, in respect of Heliconia project, the Assessing Officer has given the finding that the claim of deduction was allowable and it was worked out at Rs.1,05,566/- in the assessment order, on the sales of Rs.16,97,456/-.

21. Matter was carried before the first appellate authority, wherein various contentions of the assessee were raised and the CIT(A) having considered the submissions raised on behalf of the assessee, disallowed the claim of assessee on main as well as alternative grounds for proportionate deduction. Same has been opposed before us and various contentions were raised on behalf of assessee in this regard and requested to allow the claim. On other hand, Ld. Departmental Representative supported order of Revenue authorities below.

22. After going through rival submissions and material on record, we find that the assessee had claimed deduction u/s.80IB(10) in respect of the Cosmos Project. The Assessing Officer has denied the deduction on the ground that the built up area of the units in building Prime included in the said project exceeded 1500 sq.ft. Thus, the Assessing Officer has disallowed the claim of the assessee. The Assessing Officer has further stated that the two flats in building 'I' were combined and after combining, the built up area of the combined units exceeded 1500 sq.ft. On these two grounds, the learned Assessing Officer has disallowed the claim of the assessee. In this regard Ld. Authorised Representative submitted that the assessee itself has excluded Prime Building and the

deduction has been claimed on the remaining 24 buildings. The contention of the assessee has been that the words 'housing project' are not defined in the section and therefore, it cannot be considered as what is sanctioned by the corporation. It has been held in various cases that whatever portion of the project satisfies the conditions of the section should be considered as a housing project for the purposes of section 80IB(10). We find that Hon'ble Bombay High Court in the case of CIT vs. Vandana Properties [ITA.No.3633 of 2009 with ITA.No.4361/2010] has observed as under:

> "17. The first question to be considered herein is, whether, in the facts of the present case, construction of 'E' building constitutes building a 'housing project' under section 80IB(10) of the Act.
>
> 18. The expression 'housing project' is neither defined under Section 2 of the Act nor under section 80IB(10) of the Act. Even under the Mumbai Municipal Corporation Act, 1988 as also under the Development Control Regulations for Greater Mumbai, 1991, the expression 'housing project' is not defined. Therefore, the expression 'housing project' in section 80IB(10) would have to be construed as commonly understood.
>
> 19. As rightly contended by Mr.Inamdar, learned Senior Advocate appearing on behalf of the assessee and Mr.Mistri, learned Senior Advocate and Mr.Joshi, learned Advocate appearing on behalf of the intervenors, the expression 'housing project' in common parlance would mean constructing a building or group of buildings consisting of several residential units. In fact, the Explanation in section 80IB(10) supports the contention of the assessee that the approval granted to a building plan constitutes approval granted to a housing project. Therefore, it is clear that construction of even one building with several residential units of the size not exceeding 1000 square feet ('E' building in the present case) would constitute a 'housing project' under section 80IB(10) of the Act."

22.1. We find that the Pune Bench in the case of DCIT vs. Aditya Developers [ITA.No.791 & 792/PN/2008] has observed as under:

> "6.1. Likewise, in the case of Vandana Properties vs. ACIT (supra), the Mumbai Bench of the Tribunal has decided the issue in favour of the assessee. In that case, the assessee had plan for 4 independent buildings 'A', 'B', 'C' & 'D' but, so far as 'E' is concerned only planned when the status of 'the surplus land was converted as "within ceiling limit" and the assessee could get additional FSI for launching Wing 'E', wing 'E' was planned and construction was commenced after 1st October 1998 and building/wing 'E' was an independent housing project as contemplated u/s.80IB(10). The Tribunal held that the concept of housing project does not mean that should be the group of buildings and only then same is called a "housing project". It was further held that building/wing 'E' cannot be passed with earlier buildings, i.e., A, B, C & D which work was commenced in the year 1993 whereas plan for wing 'E' was approved for only once in the year 2002. It was held further that the conclusion drawn by the authorities below that the commencement of wing 'E' is a continuation of the existing project is erroneous."

22.2. We also find that the Pune Bench in the case of Rahul Construction Co. Vs. ITO [ITA.No.1250/PN/09 & 707/PN/2010] has observed as under:

> "10. In view of above discussion, we come to the conclusion that for verification of eligibility of benefit claimed u/s. 80 IB (10) of the Act by the assessee on buildings A1 to A5 in "Atul Nagar" and buildings B1 to B6 in "Rahul Nisarg Co-Operative Housing Society Ltd.", the assessing authority has to verify as to when the building plans for these buildings were firstly approved by the local authority and taking the said date of approval a starting point, he has to verify as to whether these buildings were completed within the prescribed time limit i.e. 31st March 2008 on the basis of the Completion Certificate in respect of such housing project issued by the PMC. When we examine the facts of the present case under the above background, we find that the authorities below have not disputed the fact furnished in this regard by the assessee that under the project "Atul Nagar" consisting of buildings A1 to A5, the first building plan for A type was approved by the PMC on 29.4.2003 vide Commencement Certificate No. 4269 (page No. 4 of the paper book). However, actual construction of A type building was executed as per the revised plan vide No. C.C. 4101/27/6/2003 (PAGE No. 5 of the paper book). The size of the plot on which the A type building i.e. A1 to A6 have been constructed is 1,39,466 sq.ft. The project A type building i.e. A1 to A5

consists of 360 residential units and the construction has been completed between 10.1.2005 to 31.8.2005 (page Nos. 6 to 9 of paper book). The authorities below have also not disputed this material fact that residential units has a maximum built up area of 1500 sq.ft. Likewise, these material facts that B Group buildings in "Rahul Nisarg Cooperative Housing Society Ltd.," have been constructed on land area of 138203 sq.ft., has not been denied by the authorities below. They have also not denied these material facts that the first building plan was sanctioned on 29.4.2003 vide Commencement Certificate No. 4269 issued by the PMC (Page No. 16 of the Paper Book). The other material facts like actual construction was executed as per the revised plan sanction on 20th March 2004 vide CC No. 2225 (page No. 17), the project consists of 396 flats and construction of these flats have been completed on 14.7.2006 as per the Completion Certificate issued by the PMC (Page Nos. 13 to 18 of paper book) are not in dispute. The authorities below have also not denied that built up area of each of these flats does not exceed 1500 sq.ft. It is also not in dispute that both the projects are entirely a residential project and there is no commercial area therein. Under the above circumstances, we are of the view that the assessee is very much entitled to the claimed deduction u/s. 80 IB (10) of the Act on the buildings A1 to A5 in "Atul Nagar" and buildings B1 to B6 in "Rahul Nisarg Co-operative Housing Society Ltd." The issue is therefore decided in favour of the assessee. We thus while setting aside the orders of the authorities below on the issue, direct the A.O to allow the claimed deduction u/s. 80 IB(10) in question. The related grounds are accordingly allowed.

11. In result, appeal is allowed."

22.3.We find that ITAT Mumbai Bench in the case of Mudhit Madanlal Gupta vs. ACIT [51 DTR 271(Mum)(Trib)] has observed as under:

"Deduction under s.80-IB – Income from developing and building housing project – Conditions precedent – Assessee engaged in construction business entered into a joint development agreement for construction of residential flats – Total plot measured approximately 7633.82sq.mtrs. – Deduction was denied by AO on the grounds that (i) assessee had completed only A, B and C wings upto 31st March, 2008 and D wing was not completed (ii) total project area was 1.88

acres and since assessee's share was only 51 per cent of the built-up area, the project area was of less than one acre and (iii) in some of the flats units area exceeded 1000sq.ft. – Not justified – CIT(A) was satisfied that each unit of the residential flat in all the three wings was less than 1000 sq.ft. and some of those flats were later converted by the buyers by joining the same wherever the buyers had purchases more than one unit and since Revenue has not filed any cross-objection against this finding, the same has become final and binding on the Revenue – Independent units are residential units and have to be treated as separate housing projects for the purpose of deduction under s.80-IB(10) as long as they fulfil the other conditions prescribed under the Act – There is no requirement that such undertaking of assessee should be the owner of such land – Assessee is a developer of the whole of the project and, therefore, the share could not be allocated only in terms of 51 per cent of the land area because the whole project is developed and constructed by the assessee and 49 per cent share is going to the land owners in respect of the land cost – Area under the project was about 7000 sq.mtrs. which was meant for development and which is more than one acre and, therefore, deduction cannot be denied on this ground – Assessee was therefore entitled to deduction under s.80-IB(10)."

22.4. We find that ITAT Bangalore Bench in the case of Dy.CIT vs. Brigade Enterprises (P) Ltd. [119 TTJ 269 (Bang.)] has observed as under:

"Deduction under s.80-IB – Income from developing and building housing project – Different units of a group project – Where some of the residential units in a bigger housing project, treated independently, are eligible for relief under s.80-IB(10), relief should be given pro rata and should not be denied by treating the bigger project as a single unit, more so, when assessee obtained all sanctions, permissions and certificates for such eligible units separately – Assessee undertook a development project in an area of 22 acres 19 guntas consisting of 5 residential blocks, row houses, oak tree place, a club, a community centre, a school and a park and claimed deduction under s.80-IB(10) in respect of two residential units only which if taken separately, were eligible for the relief – AO treated the entire project as a single unit and denied relief under s.80-IB in entirety – CIT(A) allowed relief under s.80-IB(10) treating the said two units as independent units – Justified – Material on record showed that the various local authorities duly inspected the plot and sanctioned plan for each of the blocks separately – Group housing approval was approval of a master plan as a concept –

> Further, the use of the words "residential unit" in cl.(c) of s.80-IB(10) means that deduction should be computed unit-wise – Therefore, if a particular unit satisfies the condition of s.80-IB, the assessee is entitled for deduction and it should be denied in respect of those units only which do not satisfy the conditions – Again, the accounting principles would also mandate recognition of profits from each unit separately."

23. As regards the two flats combined in Building I, it is submitted that the flats are combined by the customers. The assessee has received completion certificate independently for the two units and therefore, the Assessing Officer is not justified in calculating the built up area by combining the two units. The assessee submits that if units are combined by the customers, the built up area should be computed independently and the assessee cannot be denied the deduction. For this proposition, the assessee places reliance on the following decisions –

a. Haware Constructions Pvt. Ltd. [64 DTR 251 (Mum)]
b. Emgeen Holdings P. Ltd. vs. DCIT [ITA.No.3594 & 3595/Mum/09]
c. DCIT vs. Arcade Bhoomi Enterprises [ITA.No.366/Mum/10]

23.1. We find that the ITAT Mumbai Bench in the case of Haware Constructions (P) Ltd. vs. ITO (2011) 64 DTR (Mum)(Trib) 251, has held as under:

> "Deduction under s. 80-IB - Income from developing and building housing project-Built up area exceeding 1,000 sq. ft.-Built-up area of each flat as approved by CIDCO is less than 1,000 sq. ft. as per the approved plan and the assessee has sold each flat under separate agreements and not sold two flats by combining them together as one flat to one party-Further, there is no evidence on record to suggest that the assessee has drawn the plan in such a manner that each residential unit is shown as smaller than 1,000 sq. ft. merely to get the benefit of deduction under s. 80-IB(10)-It is also not the case of the Revenue that each flat in the housing project could not have been used as an independent or as a self-contained residential unit and that there would be a complete habitable residential unit only if two or more flats are joined together-Therefore, merely because some of the purchasers have purchased more than one flat and combined the same, assessee's claim for deduction under s. 80-IB(10) cannot be

disallowed-Further, the condition that not more than one residential unit in the housing project is allotted to one person not being an individual has been inserted by Finance (No.2) Act, 2009, w.e.f. 1st April, 2010, and hence, it is not applicable to the facts of the case."

23.2. We find that the ITAT Mumbai Bench in the case of Emgeen Holdings P. Ltd. vs. DCIT in ITA.No.3594 & 3595/Mum/09, has observed as under:

"7. We find that the deduction u/s.80IB(10) has been declined by the Assessing Officer on the ground that size of the residential unit was in excess of 1,000 sq.ft which, in turn, proceeds on the basis that the flats sold to the family members admittedly by separate agreements, should be treated as one unit. We are unable to approve this approach. We have noted that the size of each flat, as evident from building plan as duly approved by Municipal authorities was less than 1,000 sq.ft. We have also noted that it is not even revenue's case that each of flat on standalone basis was not a residential unit. Even if flats were constructed or planned in such a way that two flats could indeed be merged into one larger unit, as long each flat was an independent residential unit, deduction u/s.80IB(10) could not be declined It is important to bear in mind the fact that what section 80IB(10) refers to is 'residential unit' and, in the absence of anything to the contrary in the Income tax Act, the expression 'residential units' must have the same connotations as assigned to it by local authorities granting approval to the project. The local authority has approved the building plan with residential units of less than 1,000 sq.ft, and granted completion certificate as such. That leaves no ambiguity about the factual position. We have further noted that the prohibition against sale of more than one flat in ,a housing project to members of a family has been inserted specifically with effect from 1st April 2010, and, in our humble understanding, this amendment in law can only be treated as prospective in effect. What is, therefore, clear is that so far as pre-amendment position is concerned, as long a residential unit has less than specified area, is as per the duly approved plans and is capable of being used for residential purposes on standalone basis, deduction u/s.8018(10) cannot be declined in respect of the same merely because the end user, by buying more than one such unit in the name of family members, has merged these residential units into a larger residential unit of a size which is in excess of specified size. That precisely is the case before us. While on the subject, it is useful to take note of legislative amendment by the virtue of which legislature put certain restrictions on sale of residential units to certain family members of a person who has been sold a residential unit in

the housing project. Section 80IB(10) now provides an additional eligibility condition that in a case where a residential unit in the housing project is allotted to any person being an individual no other residential unit in such housing project is allotted to any of the following person, namely (i) the individual or the spouse, or the minor children of such individual (ii) the HUF in which such individual is a karta (iii) any person representing such individual the spouse or minor children of such individual or the HUF in which such individual is a karta. The explanation memorandum explained the legislative amendment as follows: (314 ITR(St) 203)

"Further, the object of the tax benefit for housing projects is to build housing stock for low and middle income households. This has been ensured by limiting the size of the residential unit. However, this is being circumvented by the developer by entering into agreement to sell multiple adjacent units to a single buyers. Accordingly. it is proposed to insert new clauses in the said sub-section to provide that the undertaking which develops and builds the housing project shall not be allowed to allot more than one residential unit in the housing project to the same person, not being an individual and where the person is an individual no other residential unit in such housing project is allotted to any of the following person:-

(I) Spouse or 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 minor children of such individual or the Hindu undivided family in which such individual is the karta.

This amendment will take effect from the 1st April 2010 and shall accordingly apply in relation to assessment year 2010-2011 and subsequent years."

8. It is thus clear that the aforesaid amendment has been brought with prospective effect i.e. from 1st day of April 2010, and there is no indication whatsoever to suggest that these restrictions need to be applied with retrospective effect. The amendment seeks to plug a loophole but restricts the remedy with effect from 1st day of April 2010, i.e. AY 2010-2011. The law is very clear that unless provided in the Statute, the law is always presumed to be prospective in nature. It will therefore, be contrary to the scheme of law to proceed on the basis that wherever adjacent residential units are sold to family members, all these residential units are to be considered as one unit. If law permitted so, there was no need of the insertion of clause (f) to section u/s 80IB(10). It will be unreasonable to proceed on the basis that legislative

amendment was infructuous or uncalled for -particularly as the amendment is not even stated to be 'for removal of doubts'. On the contrary, this amendment shows that no such eligibility conditions could be read into pre-amendment legal position.

9. As regards the AO's stand that the assessee himself has offered the deduction u/s.80IB(10) in respect of these units during the course of survey proceedings, it is only elementary that neither statement recorded ujs.133A has an evidentiary value, nor a legal claim can be declined only because assessee, at some stage, decided to give up the same. In view of these discussions, and bearing in mind entirety of the case, are of the considered view that the deduction ujs.80IB(10) ought to have been allowed to the assessee entirely. To this extent, we modify the order of the CIT(A) and allow further relief to the assessee."

23.3. We find that the ITAT Mumbai Bench in the case of Arcade Bhoomi Enterprises vs. DCIT in ITA.No.366/Mum/2010, has taken similar view.

24. In view of above discussion, we hold that CIT(A) was not justified in holding that flats in building Prime had built up area exceeding 1500 sq.ft., the entire Cosmos Project did not qualify for deduction u/s.80IB(10) in respect of its profits. There is nothing on record to suggest that assessee has claimed deduction in respect of building Prime wherein built up area of its units is exceeding 1500 sq.ft. In fact there were 25 buildings in Cosmos Project out of which except building Prime, all other buildings satisfy the conditions of built up area limit of 1500 sq.ft. Therefore, deduction u/s.80IB(10) should be allowed in respect of profit from such buildings. This view is fortified by the decisions in Vandana Properties (supra) and Aditya Developers (supra) discussed above. As regards two flats combined together, the allegation is that some units were combined into one, so deduction u/s.80IB(10) should not be allowed. In this regard, assessee's stand has been that assessee conceived the flats as independent units and these were constructed as independent units. There is nothing on record to suggest that assessee himself has joined the adjacent flats. In this

situation, assessee should not suffer for its no fault if purchaser join the adjoining flats. This view is fortified by the decision of Mumbai Bench of ITAT in Haware Constructions Pvt. Ltd. (supra), Emgeen Holdings P. Ltd. (supra) and Arcade Bhoomi Enterprises (supra), etc., as discussed above. In view of above, we hold that assessee is entitled for deduction u/s.80IB(10) in respect of entire profits computed after making additions/disallowances in respect of Cosmos Project consisting of 24 buildings excluding Prime building. The Assessing Officer is directed accordingly.

25. In the result, appeal of Revenue is dismissed and cross objections of the assessee are allowed as indicated above.

Pronounced in the open court on this the 18th day of September, 2012.

Sd/-	Sd/-
(R.K.PANDA)	(SHAILENDRA KUMAR YADAV)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

gsps

Pune, dated the 18th September, 2012

Copy of the order is forwarded to:

1. The Assessee
2. The DCIT, Circle-3, Pune.
3. The CIT(A)-II, Pune.
4. The CIT-II, Pune.
5. The DR “B” Bench, Pune.
6. Guard File.

By Order

//TRUE COPY//

Private Secretary,
Income Tax Appellate Tribunal,
Pune.