Section 80-IBA: Redevelopment of 80IB(10)

CA NIRAV VORA

Union budget 2017, the government has introduce new provision of section 80IBA w.e.f. 01.04.2017, providing 100% deduction of the profits and gains arising from "developing and constructing a housing project". The said provision is new avatar of erstwhile section 80IB(10).

To promote and develop new cities like Navi Mumbai and elsewhere, the competent local authority has provided that the housing project must have a certain minimum percentage of commercial area. However, while claiming deduction u/s. 80IB (10) erstwhile, the revenue refused benefit of deduction where the commercial units were constructed as a part of residential project. Since the definition of "housing project" was not provided under the said provision. The matter riddled with litigation which finally saw the door step of Supreme Court.

It was held by apex court, in the case of *CIT* v. *Veena Developers* [2016] 66 taxmann.com 353 (SC) that those projects which are approved by the local authorities as housing projects with commercial element therein, where the project is predominantly housing/residential project but the commercial activity in the residential units is permitted.

To overcome from such litigations, the government has made an attempt to capture the essence of various judicial pronouncements of The High Courts and the apex court rendered in the context of section 80IB(10) while enacting the new section 80IBA. It has been further amended in line with relaxation brought in with the Real Estate (Regulation and Development) Act 2016.

In respect to the new provision of section 80IBA, it is essential to ensure that whether the project under taken is qualify as a "housing project" which included commercial area in the sanctioned plan. If allowable, how much commercial area could be constructed to qualify for deduction?

To determine the eligibility for the deduction under section 80IBA, the first step is to consider whether the project is a "housing project" or not? The provision of sub section (6)(d) define "housing project" as a project consisting predominantly of residential units with such other facilities and amenities as the competent authority may approve subject to the provisions of this section.

Thus, the term "Housing Project" means the project duly approved by the competent authority as residential project. The above definition is in line with the decision of the Supreme Court in the case of *CIT* v. *Veena Developers* [2016] 66 taxmann.com 353 (SC) and thereby controversy has put to an end.

However, the use of the phrase "*subject to the provisions of this section*" at the end of the definition creates certain doubts. The provision of sub section 2(c)of section 80IBA restrict the area of shops and commercial establishment upto 3% of the aggregate carpet area. The question is where the commercial area is more than 3% of area approved by the competent authority whether such project will stand disqualified and will cease to be a "housing project" for the purpose of the deduction under section 80IBA. Once the basic requirement as provided in sub-section 6(d) i.e. approval from competent authority is fulfilled, one has to look at the conditions for deduction as provided in sub-section (2). One of the conditions is provided in sub-clause (c) which reads as under:

(c) "The [*carpet*] area of the shops and other commercial establishments included in the housing project does not exceed three per cent of the aggregate [*carpet*] area"

The combine reading of provision of sub section 6(d) and sub section 2, the essential condition for the purpose of eligibility of a project being defined as a

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"housing project" is approval of project as Residential Project from the competent authority. Even where the commercial area sanctioned in a housing project by the competent authority is more than 3% of the aggregate carpet area, the basic nature of the project will remain a "housing project". The sanction by the competent authority of a project which is predominantly residential will make it a housing project. This is what the definition contemplates and is in tandem with the ratio laid down by the apex court as stated earlier. The said sanction of competent authority is enough to make the project a "housing project".

After considering the definition and the judicial history leading to such definition, let us consider the sub-section (1) which provides for deduction to such housing projects. The said sub-section (1) states as under:

> (1) Where the gross total income of an assessee includes any profits and gains derived from the business of developing and building housing projects, there shall, subject to the provisions of this section, be allowed, a deduction of an amount equal to hundred per cent of the profits and gains derived from **such business**.

What the above section contemplates is that once the project qualifies as a housing project, the deduction of 100% would be subject to the provisions of section. The sub-section (2) clause (c) restricts the deduction of the profits derived from "such business". In the case where the housing project consisting of commercial area, the quantum of deduction would be restricted to profits and gains of upto 3% of the commercial area. In other words, any profit derived from commercial area exceeding 3% of total carpet area will be taxable. This is because if the intent of legislature was to restrict the benefit only to the projects which have commercial area of 3% there was no need to mention "*as the competent authority may approve*" in the definition of "Housing Project". By adding the requirement of approval of competent authority the eligibility condition of 3% commercial area has been made subservient to such approval.

The enactment of definition of "housing project" in section 80IBA(6)(d) is also totally in sync with the dictum of the Supreme Court in the case of *Veena Developers* (*supra*). The apex court has given a purposive interpretation to the benevolent provision. The new enactment does not take it away, rather it supports the apex courts view.

The above view is further conquered by the fact that the legislature has chosen not to include the requirement of approval by competent authority in sub-section (2) as a condition for deduction. The legislature has made such approval a part of the definition of "Housing Project" under sub-section 6(d). This means that once approval is obtained from competent authority, the said project becomes a "housing project" and benefit is allowable subject to the fulfilling of conditions as provided in sub-section (2). If the legislature desired to treat the approval of competent authority restricted to commercial area, being upto 3% as a condition for qualifying for deduction, the requirement of approval would have been incorporated in sub-section (2) along with clause (c) instead of in definition of "housing project".

In many satellite cities like Navi Mumbai and elsewhere the competent authorities (especially, new town development authorities) provide that the housing project must have a certain minimum percentage of commercial area. Usually these minimum limits are more than 3% carpet area as provided in sub-section (2)(c). Such projects would qualify as a "housing project"

for the purpose of section 80IBA., although for the purpose of 100% deduction the profit of "housing project" as provided in section 80IBA is to be restricted to 3% commercial carpet area only apart from residential area. For instance, CIDCO in Maharashtra provides for minimum 10% of FSI to be used for commercial purposes even in a residential project. Hence any attempt to restrict the deduction only to housing projects having 3% commercial area would create an undesired and irrational discrimination which would tether on unconstitutionality under Article 14 of The Constitution of India.

The legislature has qualified the definition of housing project to 3% carpet area for commercial area in aggregate to take care of the observation of the Bombay High Court in the case of *CIT* v. *Brahma Associates* [2011] 197 Taxman 459 / 9 taxmann.com 289. In the said decision the Mumbai High Court held that once the competent authority / local authority sanctions a project which is residential-cum-commercial then, irrespective of the percentage of commercial area, the deduction is available from the income of both residential as well as commercial units. Therefore, to overcome the decision of the Mumbai High Court the legislature has added the words "subject to the provisions of this section" to the definition of "housing project". This phrase restricts the benefit of deduction of income only to residential units and upto a maximum of 3% commercial area as provided in conditions of sub-section (2)(c). The said qualifying phrase cannot be interpreted to mean that where the commercial area exceeds 3% in aggregate the entire project ceases to be a "housing project". To interpret in the said manner would be violating the basic jurisprudence of benevolent provision which state that such beneficial provisions have to be liberally construed so as to advance the objective of the provision and not to defeat the same.

A word of caution here. Sub-section (2)(i) provides that for claiming the benefit of deduction from the "housing project" the assessee has to maintain separate books of account. It would be prudent that developer maintains separate books for the project upto 3% Commercial area and for balance commercial area separate books are maintained so as to be able to drive home his view point.

Conclusion

A perusal of the above analysis reveals that the litigation is going to ensue in the current avatar of section 80IBA also. The amendments are not clear enough for the taxman to be benevolent enough to grant the deduction, even though the purpose of such provision has been dictated by the apex court while administering decision in the case of *Veena Developers* (*supra*).