80-IB(10)(e) and 80-IB(10)(f) DEDUCTIONS – A Critical Analysis

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INTRODUCTION

In a developing country, there is always a need to encourage the assessees engaging in activities of setting up basic infrastructural facilities. Such an encouragement is given effect to, *inter alia* for assessees engaged in developing housing projects. The Income Tax Act, in particular has been playing a very crucial role in adducing impetus to assessees in engaging in housing projects by way of a benefit under Section 80-IB (10).

Section 80-IB (10) of the Income Tax Act is one such crucial provision that provides for a hundred percent deduction from the profits derived from the development of housing projects.

This is indeed a welcome provision, as substituted by the Finance Act (No. 2) of 2004. The clear law on the point is that, where an assessee develops housing projects, and complies with the procedural requirements as laid down in the provision, can claim a deduction equal to hundred percent of profits derived there from, in that relevant previous year.

However this provision is not absolute in its benefit, as there are certain practical difficulties while placing the provision on a comparative plane with the practice of development of housing units.

This article seeks to analyze the provision, and test the viability of its application, in the practice of development of housing projects.

PRE REQUISITES FOR CLAIMING THE BENEFIT

As any mandatory deduction provision stands out to be, where an assessee seeks to claim a deduction under this provision, will have to comply with certain procedural formalities, being:

(a) The project intended to provide for deduction will have to be approved by the local authority, as prescribed;

(b) The project to be eligible will have to comply with the minimum and the maximum built up area for residential units, subject to the maximum area that can be allotted for commercial units;

(c) The assessee, in order to claim the benefit, shall confine the allotment to not more than one, in case the project is allotted to a person, not being a resident, or in case of an individual, subject to restrictions regarding allotment to the family members of the initial allottee.

It is by necessary implication of understanding that, the objective of the tax benefit for housing projects is to build a housing stock for low and middle income households. This is intended to be ensured by limiting the size of the residential unit. However, this is being viewed as being circumvented by the developers by

entering into agreements to sell multiple adjacent units to a single buyer. [1]

Thus to prevent such indirect high-hand economic participation by selling multiple units and joining them resulting in a scheme vitiating the intent of the legislature was given effect to by the introduction of sub- clause (e) and (f) to 80-IB (10).

However, the equivalent disadvantage of these provisions are that the assessee in a genuine attempt to sell units to more than buyer, which may not always turn out to be an act in the nature of ousting the intent of the legislature is inequitably denied of the benefit.

For example, looking at Section 80-IB (10)(e) which states that,

"Not more than one residential unit in the housing project is allotted to any person not being an individual",

In such a case, if the developer-assessee allots more than one unit to a company, which is ultimately used by several different employees of the company, though the intent of the statute is given effect to, nevertheless, the provision *per se* is not being complied, and therefore, there are equal chances of the assesse's claim of deduction being disallowed.

At this juncture, therefore, there is a need to critically analyze the legal framework and the impact, in case of multiple allotment or , more than one unit is being allotted, to a single person, be it an individual, or a person not being an individual.

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[1] Memorandum to the Finance Bill, 2009.

MULTIPLE ALLOTMENTS

In the growing infrastructural era, there are situations, as highlighted above, where a developer of a project may allot more than one residential unit be it to individuals or any person other than individuals. The simple law on the point are the provisions of Section 80-IB(10), has introduced certain provisions in Finance Act, pertinently, sub-clause (e) and (f) similarly worded with respect to allotment, which are the subject matter of the present point of contentiousness.

First and foremost, Section 80 IB (10) (e) contemplates that,

"Not more than one residential unit in the housing project is allotted to any person not being an individual"

Further Sub-clause (f) provides,

"in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely:—

(*i*) the individual or the spouse or the minor children of such individual,

(*ii*) the Hindu undivided family in which such individual is the karta,

(*iii*) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta."

What the provision provides is that, no 'allotment' of more than one flat shall be made to a non individual person, after the provision comes into effect, for availing the benefit under this provision.

From the bare reading of the provision it is established that, the law contemplates on "allotment" of the residential property and does not provide for the completion of the sale.

INTERPRETATION OF 'ALLOTMENT'

Here, the provision contemplates a situation of "allotment" of the unit. Therefore, there is a need to look into what exactly is brought under the meaning of the term "allotment".

The term allotment on a practical parlance refers to a state of demarcating a particular property in favour of a particular person. Further, it also means, to divide property previously held in common among those entitled, assigning to each his ratable portion, to be held in severalty; to set apart specific property.[2] It is notable that, in ***Praveen Gupta v. ACIT***[3] where, in a move to identify the scope of the term allotment, it was held that,

[2] Black's Law Dictionary, 2nd Ed.

[3] ITA No.2558/Del/2010, Dated 31st March, 2010.

" by entering into an agreement to allot a flat, the assessee has identified a particular property which he is intended to buy from the builder and the builder is also bound to provide the applicant with that property by accepting certain advance amount and making agreement for balance payment as scheduled in the agreement."

Essentially, an allotment is necessarily the mere identification of a particular property which the prospective buyer intents to buy, and it is confined to that stage alone and does not include a sale agreement or other following formalities. However, it is a well settled proposition that, an allotment or a beneficial ownership confers title, and there is no question of whether the title flows on allotment of property, and it is only where the payment schedule of properties are not being complied with, that the allotment may stand cancelled.

However without prejudice to the generality, allotment, for the purpose of this provision is the act of identification of the property, intended for sale.

TIME OF THE TRANSACTION

It is relevant to note that these provisions that impose a bar on the allotment of more than one property, was introduced by the Finance Act (No.2) of 2009. This implies, there is a need to look into whether these provisions apply retrospectively.

It is necessary to note that, it has been held in a number of rulings that the said provision is prospective in nature and does not entail retrospective effect.

It is submitted that, in the case of ***Patel Jashwant Lal and Anr v. ITO***[4] it was the ruling that where there is an agreement to sell and any cheque payment has been made prior to the provision coming into force, Section 80-IB (10) shall not be denied.

Further, it is to note that, in the case of ***DCIT V. Mandavi Builders,***[5] that as it is not possible to forsee the amendment in 2010, it is not possible to withdraw the allotments made into, it is therefore not possible to apply provisions for transactions entered prior to 2010. This implies clearly that the provisions do not have a retrospective character. The court gave effect to this principle that,

> *"The assessee could not have foreseen the amendment to sec. 80-IB(10) and could not have restricted the allotment of more than one flat to the same individual or to somebody related to such a person.*
>
> *Therefore, the assessee could not have withdrawn the allotment after introduction of clauses (e) and (f). Therefore the provisions cannot apply to the transaction entered into by the assessee prior to the introduction or insertion of clauses (e) and (f) to sec. 80-IB(10) of the Act.*

[4] (2015) 38 ITR (Trib) 0135 (Ahmedabad)

[5] ITA 1734 and 1735/Bang/2013 dated 20th February, 2015.

Therefore, we are of the opinion that the provisions of sec. 80-IB(10)(e) and (f) are not applicable to all the above transactions of the assessee but are applicable to the allotment and bookings done after 1/4/2010. "

This implies, where a mere agreement to sell has been entered into, the contract is presumed to have been completed and thus, if the same is entered into prior to the date the amendment coming into effect, the provision shall not apply.

It is further worthwhile to mention that, a question arose as to whether the clause (d), which is also modeled as a clarificatory provision as in clause (e); nevertheless, the Supreme court held that such provisions are prospective in nature in ***CIT , Mumbai v. M/s. Sarkar Builders.***[6]

Moreover, the present provision i.e., sub clause (e) to Section 80IB (10), is modeled on similar clarificatory lines as that of sub clause (d), and therefore the ratio squarely applies here. The court ruled that the provision is prospective with respect to sub clause (d) on the ratio that, a construction already made cannot be cancelled, or reduced in size by virtue of the amendment. Similarly, an allotment already made prior to introduction of the clause cannot be cancelled anticipating the provision. Therefore, on *pari materia* application of the above, these provisions are prospective in nature.

[6] Civil Appeal No. 4476 of 2015, dated 15th May, 2015.

Therefore, where mere allotment is completed before the provision coming into force, the effect of Section 80 IB (10)(e) or (f) will not hit the assessee.

Further, it is notable that, giving effect to the above interpretation, it has been held in the case of ***Patel Jashwant Lal A and Patel Punamchand N v. ITO***[7], that where booking and allotment was made when the amendment was not in force, despite that the sale deed was executed after the amendment came into effect, the assessee- developer was made eligible of the benefit of the provision.

However, for the present day projects, it is not possible that it has been allotted prior to the provision coming into force. In such cases, in order to prevent the denial of benefit, the assessees may claim an alternative relief of pro rata deduction.

PRO RATA ELIGIBILITY

The term pro rata is defined as a division, proportionately, according to an exact rate.[8] Simply stated, it means a proportionate division relating to each of the respective portions.

On a critical analysis as to how exactly the principle of 'Pro rata' is applied here is that, the assessee may seek pro-rata deductions in case of units that have complied with the provisions, and the Assessing officer may disallow for the units that have not

[7] *Supra F.n 4*

[8] Black's Law Dictionary, 2nd Ed.

complied. The issue here is that, whether such proportionality can be claimed in respect of these provisions.

It is necessary to note that the Madras High Court in the case of ***CIT v. M/s. Arun Excello Foundations***[9] held that, in interpreting provisions with respect to Section 80 IB (10), held that in case of any violation, the assessee would not be entitled to 100% deduction, but would be entitled to pro rata deduction in respect of units satisfying the conditions.

This decision, infact bring a huge sign of relief to the assessee-developers who have commenced the project and have allotted multiple units post the amendment.

Nevertheless, this has also been reiterated that, even if some flats are not eligible under 80 IB (10), the remaining flats are eligible as held vide para 7 in the case of ***Emgeen Holdings Pvt. Ltd.***[10]

Furthermore, it is submitted that, it has been held in ***Elegant Estates, Chennai v.ITO***[11] the consequential disallowance has to be proportionate only. It is further submitted that, in the case of ***DCIT v. Brigade Enterprises (P) Ltd.,***[12] that disallowance if any under these provisions will have to be restricted to the extent of non compliance of the provisions alone. Further in ***Bengal***

[9] 29 Taxman.com 149 (Mad).
[10] I.T.A No.332/ Mum/2010, dated 11.05.2011.
[11] I.T.A. No.2902/Mds/2014, dated 25.02.2015.
[12] 24 DTR 371 Bangalore, (2008).

Ambuja Housing Development Ltd.,[13] it is to note that the tribunal allowed the assessee's claim on pro rata basis on 'qualifying units' under Section 80 IB (10).

Further, it is notable that, it was held recently in ***DCIT v. M/s. Mandavi Builders***[14] which is a direct case on the point, which provides for a pro-rata deduction in the case of qualified units. Further, the issue is now settled by the decision the Bombay High Court in ***Brahma Associates vs. Joint CIT***,[15] wherein it has been held that the assessee shall be eligible for deduction u/s 80-IB(10) insofar as there is compliance with the conditions of sec.80-IB(10) of the Act. Therefore, it is confirmed that the proportionate disallowance is to be made in respect of the transactions which have been made subsequent to the introduction of clauses (e) and (f) to sec. 80- IB(10) as well as the flats where there is violation u/s 80-IB(10)(c) of the Act.[16]

This implies, that the assessee- developer even if he had allotted more than one unit, can claim the benefit in respect of the other units, which are eligible.

SEPARATE SALE DEEDS

[13] ITA no.1595/Kol./2005, dated 24th March 2006

[14] ITA 1734 and 1735/Bang/2013 dated 20th February, 2015

[15] 333 ITR 0289

[16] *CIT v. M/s. Mandavi Builders, Supra* F.N. 14.

Apart from the above, there are certain other interpretations, if incorporated, the assessee may place himself in the slab of eligibility. Where multiple units are being sold by the assessee, it shall be prudent upon the assessee to sell the same vide separate title documents, in giving effect to the intent of the legislature and as well securing the benefit of deduction.

The premise is substantiated by the fact that, in the case of ***M/s. Sun city Housing v. JCIT***[17] , where there is sale of more than one unit being effected to persons being family members, however by a mode of executing separate sale deeds, separate electricity meters, the assessee cannot be considered to have sold the flat as a single unit, but as separate units. Thus, the benefit of section 80 IB (10) was accorded to the assessee. The court granted the benefit despite the fact that the end users had joined the flats, nevertheless, the separate sale agreement factor was taken into consideration.

CONCLUSION

[17] ITA: 4877/Mum/2012 dated 17.09.2014.

The provisions envisaged under this section, is indeed laudably a beneficial provision, but does not in its essence stand to the test of practicality.

There are several situations where the assessees without defeating the purpose of the legislature, may have appear to be defeating the provisions, and which will be of no avail.

Therefore, keeping in line with the circumstances mentioned above, the assessee, though prima facie might seem to have violated the provisions, nevertheless, where he is able to establish the intent being intact by reference to the above defences, the assessee's claim may not be disallowed.

Ultimately, this provision being beneficial in nature will have to be given effect to in a beneficial manner, in the best interest of the assessees, by striking an equitable balance with the intent of the stature, as explained by this article.