

HOW TO AVAIL OF MAXIMUM BENEFIT U/S 80-IB(10) OF THE INCOME TAX ACT

[In respect of undertaking(s) engaged in the development and construction of Housing Project(s)]

- By S.K. Tyagi

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Recently, I was approached by a Builder Group seeking a number of clarifications, in respect of the incentive granted U/S 80-IB(10) of the Income-Tax Act to Undertakings engaged in the development and construction of Housing Project(s). Apparently, the provisions of S.80-IB(10) look quite simple, but when one goes into the various conditions laid down U/S 80-IB(10) for claiming the benefit thereunder, one realises that there are a number of issues which baffle an ordinary tax-payer or a tax-practitioner and with which they get bogged down, while planning to start an Undertaking for the development and construction of Housing Project(s), with a view to availing of the benefit of S.80-IB(10) of the Act. The usual query referred in this connection is, whether the benefit of S.80-IB(10) of the Act could be availed of in respect of old / on-going Housing Project(s) already approved by a Local Authority.

In order to understand the aforesaid provisions of S.80-IB(10) in the correct perspective, it would be appropriate to examine the history of the provisions in relation to **“Tax-holiday to Undertakings engaged in developing and building Housing Projects”**.

For the first time, with a view to promoting investments in housing, a new sub-section (4F) was inserted in S.80-IA of the Income-tax Act; vide Finance (No.2) Act, 1998, with effect from 1.4.1999. Under this provision, an Undertaking engaged in developing and building housing projects was made eligible to claim deduction in respect of 100% of profits from such business, subject to certain conditions. The aforesaid S.80-IA(4F) is reproduced as follows:

“(4F) This section applies to an Undertaking, engaged in developing and building housing projects approved by a local authority subject to the condition that the size of the plot of land has a minimum of one acre, and the residential unit has a built up area not exceeding one thousand square feet;

Provided that the Undertaking commences development and construction of the housing project on or after the 1st day of October, 1998 and completes the same before the 31st day of March, 2001.”

As a consequential amendment, a new S.80-IA(5)(v) was also inserted with effect from 1-4-1999. The aforesaid S.80-IA(5)(v) is reproduced as follows:

“(5) The amount referred to sub-section (1) shall be –

- (v) in the case of a housing project referred to in sub-section (4F), hundred per cent of profits and gains derived from such business.”

From the aforesaid provisions of S.80-IA(4F), r.w.s. 80-IA(5)(v), it is clear that the other conditions for claiming 100% deduction in respect of the profits from an Undertaking engaged in developing and building housing projects, were as follows:

- (a) The project should be approved by a local authority;
- (b) The size of the plot of land should be at the minimum of one acre and the residential unit should have a built-up area not exceeding 1,000 sq.ft. ; and
- (c) The Undertaking should commence development and construction of the housing project after 30th of September, 1998 and complete the same before March 31, 2001.

The aforesaid provisions of S.80-IA(4F) were applicable in relation to Assessment Year (AY.) 1999-2000 and subsequent years.

The Finance Act, 1999 substituted and modified the provisions of the existing S.80-IA with new provisions to provide for deduction in respect of profits and gains from industrial Undertakings or enterprises engaged in infrastructure development (S.80-IA) and deductions in respect of profits and gains from certain industrial Undertakings other than infrastructure development undertakings (S.80-IB). The provisions regarding tax holiday to undertakings engaged in developing and building housing projects were brought U/S 80-IB(10) after the aforesaid amendment. The provisions of new S.80-IB(10) are reproduced as follows:

“**S.80-IB(10)** – The amount of profits in case of an undertaking developing and building housing projects approved by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if, -

- (a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes the same before the 31st day of March, 2001;
- (b) the project is on the size of a plot of land which has a minimum area of one acre; and

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

From the above provisions of S.80-IB(10) it is clear that the Finance Act, 1999 has modified the size of the residential units. After the amendment, the size of the residential units within the cities of Delhi and Mumbai and the area within twenty-five kilometres from the local limits of Delhi and Mumbai; should not exceed one thousand square feet, whereas at any other place, the size of the same should not exceed one thousand and five hundred square feet.

The provisions of S.80-IB(10) of the Income-Tax Act were further amended vide Finance Act, 2000. Under the existing provisions of S.80-IB(10), 100% deduction of the profits of an undertaking engaged in developing and building housing projects, approved by a local authority was allowed, if such undertaking had commenced or would commence development and construction of the housing project on or after October 1, 1998 and would complete the same before March 31, 2001. **After the amendment, a housing project approved by a local authority before March 31, 2001 and completed before March 31, 2003 will be allowed deduction U/S 80-IB(10).**

The provisions of S.80-IB(10), as amended by Finance Act, 2000 are reproduced as follows:

“**S.80-IB(10)** – The amount of profits in case of an undertaking developing and building housing projects **approved before the 31st day of March, 2001 by a local authority**, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if, -

- (a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes the same before the 31st day of March, 2003;
- (b) the project is on the size of a plot of land which has a minimum area of one acre; and
- (c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometers from the municipal limits of these cities and one thousand and five hundred square feet at any other place.”

(Emphasis supplied)

From the aforesaid provisions of S.80-IB(10), which are applicable with effect from 1-4-2001 i.e. for the AY 2001-02 and subsequent years, the final position emerges as follows:

- (i) As far as the approval of the housing project by the local authority is concerned, no time limit had been prescribed under the Act, except that such approval should be before 31-3-2001. Thus any housing project which have been approved by a local authority before 31-3-2001, would be eligible for the deduction U/S 80-IB(10).
- (ii) Regarding the commencement of development and construction of the housing project, the same should take place on or after 1-10-1998. This condition provides a lot of scope for tax planning, because the evidence in respect of the commencement of the development and construction of the housing project would depend upon the relevant records maintained by the tax-payer. In this context, it is also relevant to note that “development” here means the process of developing the land for the housing project and no hard and fast yardstick could be laid down regarding the evidence of commencement of such process of developing the land for the housing project.
- (iii) The development and construction of the housing project in question, should be completed before 31.3.2003. As there is enough time available, proper planning may be made so as to complete the development and construction of the housing project. In this respect, a completion certificate from the local authority would be relevant.
- (iv) The housing project should be developed and constructed on a piece of land with a minimum area of one acre; and
- (v) The built-up area of the residential unit constructed in the housing project should not exceed 1,000 sq.ft. in and around Delhi and Mumbai ; whereas such built-up area should not exceed 1,500 sq.ft. in any other place.

The meaning of the term “develop” and “development:

As per Concise Oxford Dictionary, Ninth Edition, the word “**develop**” means (a) to construct new buildings on land and (b) to convert land to a new purpose so as to use its resources more fully. The meaning of the expression “**development**” as per the aforesaid dictionary is the act of developing or the process of being developed.

The aforesaid meaning of the terms “develop” and “development” provide great scope for planning so as to bring adequate evidence on records, in order to prove that the development and construction of the housing project commenced or commences after 1-10-1998.

The meaning of the term “Housing Project”

For this purpose, one needs to look at the meaning of “house”. As per the Concise Oxford Dictionary, Ninth Edition, “house” means a building for human habitation. It also means a building for keeping animals or goods. Further it means a building of a boarding school, a place of public refreshment, a restaurant or an inn. It also includes a hotel. Thus, the meaning of a word “house” is very wide.

In addition, as per Law-Lexicon by Shri T.P. Mukherjee, p.817, the meaning of the word “house” extends to a building, which is used for business. The relevant parts from p.817 of the aforesaid Law-Lexicon, are reproduced as follows:

“The weight of judicial opinion is conclusively in favour of the view that the word “house” extends to a building which is used for business and should not be restricted to a mere dwelling house. See Land Law, Cases and Materials by R.H. Mandsley and E.H. Burn Third Edition, page 832.

In Corpus Juris Secundum Vol. 41 page 364 it is said that in a legal sense, the word “house” is more comprehensive, but it is not limited to a structure designed for human habitation and may mean a building or shed intended or used as a habitation or shelter for animals of any kind, a building in the ordinary sense or any building, edifice, or structure enclosed with walls and covered, regardless of the fact of human habitation [Tata E. & L. Co. v. Gram Panchayat Pimpri, A.I.R. 1976 SC. 2463 at 2466, 2467 : (1976) 4 S.C.C. 117 : (1977) 1 S.C.W.R. 30.”

The aforesaid definition of the word “House” gives a very wide scope to the meaning of the term “Housing Project”. However, in S.80-IB(10), there is a condition that the housing project has to consist of **residential units** with a maximum built-up area specified therein. Therefore, the term “Housing Project” as used in S.80-IB(10), may not include a shopping complex. But it may be stated here that shops or a club etc. as part of the housing project, for the benefit of the residents of such housing project, will not disentitle the housing project from the benefit of S.80-IB(10). As already pointed out, the term “Housing Project” may include a hotel, an inn etc. also.

There are various other conditions laid down U/S 80-IB(13), which are applicable to S.80-IB(10). As per S.80-IB(13), the provisions in S.80-IA(5) and S.80-IA(7) to S.80-IA(12) are also applicable to the housing project contemplated U/S 80-IB(10). Besides, there are other clarifications, which are relevant for availing of the benefit of S.80-IB(10). All these conditions and clarifications are dealt with as follows:

1. Other provisions applicable to an Undertaking, engaged in the development and construction of the housing project, as per S.80-IB(13).

As per S.80-IB(13), the provisions contained in Ss.80-IA(5) and S.80-IA(7) to (12) shall apply to the eligible business U/S.80-IB. S.80-IB(10) being a part of S.80-IB, will, therefore, also be subject to the aforesaid conditions laid down in S.80-IA(5) and Ss.80-IA(7) to (12) of the Act. These conditions are discussed, as follows:

(i) S.80-IA(5) – Determination of quantum of deduction

S.80-IA(5) provides that for determining the quantum of deduction, the profits of the business shall be computed as if such business was the only source of income of the assessee during the assessment year. It means the profits of the Undertaking are to be computed separately.

(ii) S.80-IA(7) – Audit by a Chartered Accountant

As per S.80-IA(7), where the assessee is other than a co-operative society or a company, then in respect of the Undertaking it is required to get its accounts audited by a Chartered Accountant and to furnish Audit Report in Form No. 10-CCB with the return of income.

(iii) S.80-IA(8) – Transfer of goods from other business to the eligible business

As per S.80-IA(8), in the case of transfer of goods to the eligible business by any other unit of the assessee, the transfer should be at the market rate prevailing on the date of transfer and the profits of the eligible business are to be computed as if the transfer has been made at the market value. There may be a tendency amongst the assesseees to transfer machinery or goods from the eligible business to other business of the assessee at inflated price with a view to increasing the profits of the eligible business in the year of transfer and derive higher deduction U/S 80-IB(10). S.80-IA(8), however, disallows any such move, for it requires determination of profits of the eligible business on the basis of the transfer being made at market value only.

Where, however, the Assessing Officer (A.O.) feels any exceptional difficulties, he may compute such profits on a reasonable basis.

(iv) S.80-IA(9) - No deduction under any other section

As per S.80-IA(9), the amount of profits which is claimed as deduction under S.80-IB shall not be eligible for any other deduction for any A.Y. under any other provisions of Chapter VI-A under the heading “C – Deduction in respect of certain incomes”.

(v) S.80-IA(10) – The A.O. is empowered to compute profits of eligible business on his own

As per S.80-IA(10), the A.O. is empowered to compute reasonable profits of the eligible business, if it appears that the assessee has arranged his business to reflect more than ordinary profits, which might be expected to arise in such eligible business.

(vi) S.80-IA(11) – The Central Government reserving power to disallow deduction to any class of industrial Undertakings.

As per S.80-IA(11), the Central Government has been empowered to issue notification for non-applicability of this deduction to any class of industrial undertakings or enterprises with effect from the date specified in the notification.

(vii) S.80-IA(12) – Application of provisions in case of transfer of an Undertaking in a scheme of amalgamation or de-merger.

As per S.80-IA(12), the scheme of amalgamation or demerger shall confer the benefit of the deduction on the amalgamated or the resulting Company.

2. Existing assessee can claim deduction U/S 80-IB(10) by identifying and earmarking a separate Undertaking for the purpose of development and construction of a Housing Project.

As per S.80-IB(10), the deduction under this provision is eligible with reference to an Undertaking of an assessee and therefore, an existing assessee may identify or earmark a separate Undertaking for the purpose of development and construction of Housing Project(s).

In other words, a new taxable entity viz. a company or a partnership firm, is not required to be formed for the purpose of availing of the deduction U/S 80-IB(10). The deduction under this incentive provision will also be available to an existing company or an existing partnership firm by identifying or earmarking an Undertaking specifically for the purpose of development and construction of the eligible Housing Project.

The aforesaid objective can be achieved by passing a Board Resolution of the Company or recording the Minutes of the partners of the firm for setting up and earmarking the Undertaking as a separate unit. For this purpose, the following requirements may be necessary:

- (i) The opening of a separate Bank Account for the Undertaking,
- (ii) Giving a distinct name, such as ABC Housing Project (a Division of PQR Pvt. Ltd.), or Phase-I or II, etc. of XYZ Project,
- (iii) Maintaining separate books of accounts for the Undertaking, and
- (iv) Compliance with other building rules and regulations, which would reflect the distinctness of the Undertaking, for the purpose of determination of the eligible amount of profits.

It may, however, be mentioned that if there are no other commercial and practical constraints, then setting up of a separate partnership firm or a company specifically for the purpose of development and construction of the eligible Housing Project would be preferable.

In the light of the aforesaid discussion, it may be concluded that an existing construction company can avail of the deduction U/S 80-IB(10) by setting up a separate Division within the same Company or partnership firm, as an Undertaking to develop and construct a Housing Project and for this purpose, the separate bank account, books of accounts etc. should be maintained in order to determine the amount of profits, of such separate Undertaking engaged in the development and construction of Housing Project(s).

3. Development and construction of more than one Housing Project by the same Undertaking at the same time.

The aforesaid separate Undertaking may carry out a number of Housing Projects at the same time and claim deduction U/S 80-IB(10) in respect of all the eligible projects. The deduction U/S 80-IB(10) will be available for each of the Housing Projects separately. Thus an Undertaking owned by an assessee, can take up the development and construction of more than one Housing Projects at the same time.

4. The assessee should be a developer and builder

The activity of developing and building a Housing Project, would essentially mean that the assessee should be a developer and builder. It means that the assessee who is a developer and builder in substance, would only be eligible for the deduction and a contractor, booking agent, advertising agent, broker etc. would not be eligible for the deduction.

As seen in practical life, normally the developer and builder enters into a Development Agreement with the landlord. The landlord allows the developer to develop the land and raise building or

buildings on the land. In such a case, the plan for the Housing Project may be passed in the name of the landlord, but it is the developer and builder, who has to undertake all the civil responsibility under the Central, State and Local Authorities regulations. The developer and builder need not be owner of the land. It is the entity recognised as a responsible person for developing and building the Housing Project that would be treated as a developer and builder and it is the undertaking of such an assessee which should be eligible for the deduction.

It may also be stated here that the availing of the labour services through the contractors by the developer and builder would not result in the denial of the deduction U/S 80-IB(10).

5. The date of commencement of the development and construction of the Housing Project

As already explained, the commencement of the development and construction of the Housing Project should take place on or after 1.10.1998 and the evidence in respect thereof would depend upon the relevant records maintained by the tax-payer. One of the conditions for claiming the deduction U/S 80-IB(10), is that the Undertaking has commenced or commences the development and construction of the Housing Project on or after 1.10.1998. Thus the crucial requirement for the eligibility of the deduction U/S. 80-IB(10) is that no construction activity of the eligible Housing Project should have commenced before 1.10.1998.

In the light of the aforesaid reasons, it is advised that the relevant records in this respect should be carefully maintained so that the same could be produced as evidence to prove that the development and construction of the Housing Project commenced or commences after 1.10.1998.

6. Completion of the Housing Project

One of the conditions U/S 80-IB(10), is that the eligible Housing Project should be completed before 31.3.2003.

The Housing Project may be considered to be completed if all the residential units comprising the project have become inhabitable. For this purpose, the Municipal Corporation or the Local Authority normally issues a Completion Certificate.

It is, however, observed in practice, that the Completion Certificates are normally delayed and they are issued much after the completion of a building or a Housing Project. To overcome the aforesaid

difficulty, it is suggested that the assessee may bring on record other pieces of evidence, which would prove the completion of Housing Project on a certain date. For this purpose, the following suggestions may be considered:

- (i) All the expenses relating to the Development and Construction of the project should be incurred prior to 31.3.2003.
- (ii) A certificate of completion of the project may be obtained from the Architect and Civil Engineer.
- (iii) In addition to the other compliance, a letter may be addressed to the Local Authority stating that the project has been completed on a certain date and that the same may be verified by immediate inspection of the project.
- (iv) The Income-Tax Department may be intimated about the completion of the project with the request that an on-the-spot inspection of the project may be made so as to certify the completion of the project.

7. Method of Accounting

There are two different methods for recognizing the income from a construction project, as required by the Institute of Chartered Accountants of India, under Accounting Standard-7 (AS-7). The same are as follows:

- (i) Percentage Completion Method ; and
- (ii) Project Completion Method

In the Percentage Completion Method or Work-in-Progress Method, the income is recognised with the progress of the project in respect of each of the previous years, which fall within the period of completion of the project and income is disclosed in the return and tax is paid thereon for each of the relevant previous years, accordingly.

On the other hand, under Project Completion Method, the entire income of the project is recognised only at the end i.e. on completion of the project.

What method, an assessee should follow, will depend upon a number of factors, which the assessee may take into account in order to decide the method of accounting to be followed by him for the project under consideration. It may, however, be stated here that in a case where the completion of the project is a crucial factor, as U/S 80-IB(10); it would be more advisable to follow the Project Completion Method.

8. Residential Units and Built-up Area

One of the conditions for the eligibility of the Housing Project U/S 80-IB(10), inter-alia, is that the built-up area of each residential unit in the Housing Project should not exceed 1000 sq.ft in and around Delhi and Mumbai and 1500 sq.ft. in any other place.

A residential unit may be a Bungalow, a row-house, a duplex bungalow or an ordinary flat or a similar accommodation, which could be treated as independent units for residence.

As far as the concept of built-up area is concerned, it has not been defined in the Act. In common parlance, alongwith the term built-up area, two other terms are also used, viz. Carpet Area and Super-Built-up Area. The “Carpet Area” would include the actual wall to wall area of the residential unit excluding the walls; “the Built-up Area” would include carpet area plus the area covered by the walls; and “the Super Built-up Area” would include the common utilities such as passage, staircase, lift, reception, etc., along with the Built-up Area . The term “Super Built-up Area” is not recognised by the Local Authorities.

It is the term “Built-up Area”, used in S.80-IB(10), that has to be understood in the context of each residential unit. Therefore, if one compares a flat, a row-house, a duplex bungalow etc., then the usual meaning of the term “Built-up Area” for all the residential units, leads to the area in the flat, row-house or duplex bungalow, as the case may be, inclusive of the area covered by the walls.

Accordingly, the common utilities such as passage, common staircase, lift, and reception forming part of Super Built-up Area, are to be excluded in the working of the Built-up Area for each residential unit.

9. Shops and Club House etc. in the Housing Project

In case of a pure and simple residential complex, there may not be any controversy regarding the eligibility of such Housing Project U/S 80-IB(10) of the Act. However, a controversy is likely to arise if the residential complex or the Housing Project has got a shopping centre and / or a club house. In this context, it may be stated that if the shopping centre and the club house are need-based and for the benefit of the residents of the Housing Project, then such a project would still be treated as a Housing Project and the deduction U/S 80-IB(10) could not be denied to such a Housing Project.

In this context, it is relevant to point out that the provisions of S.80-IB(10) are incentive provisions and therefore, the same must be construed liberally and in favour of the assessee so as to give full

effect to the intention of the Legislature. In this connection, it would be appropriate to reproduce a part of the judgement of the Apex Court on p.189 of the Report in the case of **Bajaj Tempo Ltd., Vs. CIT, [1992]196 ITR p.188 (SC)**, which is as follows:

“A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally ; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate it.”

In the light of the aforesaid judgement of the Apex Court, it may be stated that a shopping complex or a club house in a Housing Project which are meant for the benefit of the residents of the Housing Project should also be treated as a part of the Housing Project for the purpose of the benefit U/S 80-IB(10) of the Act.

10. Conclusion

A tax-payer may plan his affairs in the light of the aforesaid discussion in order to claim the benefit of S.80-IB(10) regarding the profits of an undertaking engaged in the development and construction of a Housing Project.

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