

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'बी' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ B ” BENCH, AHMEDABAD

सर्वश्री प्रदीप कुमार केडिया, लेखा सदस्य एवं महावीर प्रसाद, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
And SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.2949/Ahd/2014
(निर्धारण वर्ष / Assessment Year : 2011-12)

Assistant Commissioner of Income Tax, Circle – 4, Baroda	बनाम/ Vs.	M/s. Narayan Realty Limited. A-4, Amarkunj Society -2 B/h, Spandan Appt. Urmi Vaccine Road Baroda.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCN 7562 N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Shri Mudit Nagpal, Sr.D.R.
प्रत्यर्थी की ओर से/Respondent by :	Shri K. K. Parikh, A.R.

सुनवाई की तारीख / Date of Hearing	25/07/2017
घोषणा की तारीख/Date of Pronouncement	05/09/2017

आदेश / O R D E R

PER SHRI MAHAVIR PRASAD, JUDICIAL MEMBER :

This is an appeal by the department against the order of the Commissioner of Income Tax(Appeals)-III, Baroda, dated 20/08/2014, in the matter of assessment under section 143(3) of the Income tax Act, 1961 ('the Act hereinafter') for the Assessment Year (AY) 2011-12, on the following Grounds:

Whether the ld. CIT(A) was correct in facts and circumstances of the case and in law in allowing the deduction u/s.80IB(10) of the Act, to the assessee, without appreciating the fact that the assessee has entered into separate agreements with individual buyers for construction work and thus carried out construction of residential houses as a contractor, rendering it ineligible for deduction u/s.80IB(10) of the Act.

- 2 -

2. The relevant facts as culled out from the materials on record are as under:-

During the year under consideration, the assessee company was engaged in construction and development of housing project and purchase and sale of land and shown total net profit (before tax) at Rs. 5,39,32,763/-. The profit of business has been claimed as deduction at 100% from the total income of the assessee company u/s.80IB(10) of the Act for Rs. 60,25,639/- on the scheme of Narayan Gardens, Baroda.

2.2 To substantiate its claim, the assessee has filed copy of layout plan, the audit "report in Form 10CCB etc. for the housing project. However, on perusal of supporting documents filed in favour of the claim of deduction u/s.80IB(10), it has been observed that permission for development / *Raja Chitthi* issued by the local authority, Vadodara Mahanagar Palika, shows name of the applicants in whose name the project is approved as Ratilal Bhikhabhai and other six i.e. total seven successors of Chandubhai Chhotabhai. This document categorically states that permission for construction is granted as per the approved plan enclosed with it and the permission is subject to various rules and bye laws laid down by the Gujarat Town Planning and Urban Development rules, Vadodara Urban Development Authority, General Development Control Regulation etc.

2.3 As perused from the documents furnished, it is noticed that the permission for development / *Raja Chitthi* issued by the local authority is not in the name of the assessee. Moreover, the land on which the housing

- 3 -

project constructed is also not owned by the assessee. As per section 801B(10) of the Act, the basic requirement for claiming deduction is approval of housing project by local authority in the name of an undertaking developing and building projects. It is also required that the area of land on which the housing project is constructed be owned by the assessee.

2.4 Accordingly, one of the laid down in the provisions of section 801B(10) of the Act, relating to the approval of the said project had not been complied with by the assessee in as much as it had not taken the approval from Local Authorities for the development and construction of the said project. Hence, the assessee could not be regarded as the builder and developer within the meaning of the provisions of section 80IB(10) of the Act and therefore did not become eligible for deduction u/s.80IB (10) of the Act, as claimed by it.

2.5 Thereafter, a show cause notice was served to the assessee then assessee vide its letter dated 30/12/2013 submitted as under:

*“01. **Justification for me Claim under Section 80IB(10):** We would like to state that: the assessee is engaged in the business as Builder and Developer at Baroda and the issues raised by your good selves have been arisen mainly in Baroda only, looking to the Similar Modus Operandi applied by most of the assesses’ engaged in the similar business in Baroda. The Income Tax Appellant Tribunal, Ahmedabad **Benches-A**, has decided all the issues raised in the case of your assessee in the case of *M/s Radhe Developers and Others - ITA No. 2482/Ahd/2006*, A.Y.2003-04 along with other 44 cases vide their order dated 29-06-2007. Since the facts of your assessee are **identical** to that of others as specified in the said ITAT Order, we request your good*

selves **to** decide the case on the merits of the case as decided **in** the cases referred **hereinabove and allow** the Deduction **U/s.80 IB (10)** of the Income Tax Act, 1961 as claimed by your appellant and delete the addition made by the LAO.

We would also like to submit herewith that the LAO has disallowed our claim in the earlier assessment years i.e. A.Y.2004-05, 2005-06, 2006-07, 2007-08 and 2008-09 also, for which we preferred an appeal with CIT(A) Baroda, and the **same** has been allowed in our favour by the CIT(A), then the department preferred the appeal with ITAT, Ahmedabad, which has also been decided in favour of your assessee, we therefore request your good selves to allow the claim u/s.80IB(10).

Without prejudice to above we would also like to state that:

The **amended provisions of section 80IB(10)** of the Income tax Act, 1961 provide **for** complete tax exemption **in** respect of income derived by an undertaking engaged in developing and construction of residential housing projects **within** a demarcated area. For ready reference the exact extract **of** the mid section **8018(10)** as amended up to date by the Finance Act 2003, is as follows:

Section 80 IB (10)

The amount of profit in the case of an undertaking **developing** and building housing projects **approved** before the 31st day of March, 2006 by a local authority shall be hundred per cent of the profits derived in the previous year relevant **to** any assessment year from such housing project if –

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

Thus, the salient features of the scheme to enjoy tax-free income in respect **of** residential housing project are as under:

- 5 -

- d) *The housing project should be approved latest before 31.03.2006 by a local authority,*
- e) *The commencement of development and construction should start on or after 01.10.1998.*
- f) *The project of residential housing should be on a minimum area of one acre land.*
- g) *Each of the residential units must net have a built-up area in excess of 1000 sq.ft. for Delhi & Mumbai or in its neighborhood of 25 kilometers. For other towns and villages the maximum built-up area is of 1500 sq. feet.*

*Thus, from the above discussion we come to the conclusion that to enjoy the tax free income from the housing projects the most important condition is the formal approval of the building plans must be done from the local authority latest before 31.03.2006. Another important condition is that the size of the housing project has to be on a minimum area of **one** acre but there is no restriction on the upper limit for the size of the plot. Similarly, there is a restriction on the maximum built-up area of a residential unit but there is no restriction on the minimum area of each residential unit.*

*From the above discussion we come to the conclusion, as a **business-entity-assessee** to enjoy share of tax free income from residential housing, our efforts **have** been to identify the land & proceed to **get** the plan approved.*

*Now from all **the** above discussions & in view of the salient **features of** the scheme to enjoy tax free income in respect of residential **housing project**, we now write to submit on your reasons - "that since the land of the scheme do not pertain to us, since the ownership of land of the scheme lies in the hands of persons other than our firm, besides the permission **of** the scheme issued by the local authority is **also** to the **personal** other than our firm & it is therefore proposed to disallow the claim u/s.80IB(10) of the Act," as under:*

*No where either within main provisions of section 80IB(10) nor within any explanations (if any) given in **follow** up with main provisions of section 80IB(10) if it is mentioned that the ownership of the land should be or ought to be in the name of the undertaking or that the ownership of the land of the scheme should lie in the*

hands of the undertaking engaged in the development & construction of the housing project.

*No where either within main provisions of section 80IB(10) nor within any explanations (if any) given in **follow** up with main provisions of section 80IB(10) if is mentioned that the formal approval of the building plan must be done from the local authority must be in the name of the undertaking or must be or ought to be issued by the local authority in the name of the undertaking engaged in the development & construction of the housing project.*

3. From the above Para 01 & 02 immediate here in above we write to submit that in order to enjoy the tax free income within the provision of section 80IB(10) the very important condition is that the housing project is required to be on a minimum area of one acre lane irrespective of the fact who owns the said land. If is therefore submitted that in order to enjoy the tax free income within the provision of section 80IB(10) the undertaking engaged in the development & construction of the housing project should be in possession of land having minimum area of one acre for such purpose without having any ownership rights of such land but with development rights for the housing project to be built & construct on such land from the person or persons who owns or own such land.

4. From the above Para 01 & 02 immediate here in above we write to submit that in order to enjoy the tax free income within the provision of section 8016(10) the second very important condition is that the formal approval of the building plan must be done from the local authority & it is therefore stated that the importance is of formal approval of the building plan from the local authority & that importance is not of the fact that the formal approval of the building plans is done in the name of or issued in the name of person or persons owning the land & that the formal approval of the building plan is not issued in the name of the undertaking engaged in development & construction of the housing project. We have to state that the local authority use to issue the formal approval of the building in the name of the land owning person or persons & since as per the rules & regulations of the local authority, the formal approval of the building required to be issued in the name of the land owning person & persons irrespective, of the fact who is going to develop & construct such building of the housing project. Thus,

- 7 -

the very important condition is one that formal approval of the building plan is done by the local authority & not one that it is not issued in the name of the undertaking engaged in the development & construction of the housing project but in the name of the person or persons owning the lane of such housing project.

Under our forgoing core submission we farther now submit that:

(a) We are engaged in the development, building & construction of housing project namely – Narayan Garden on land owned by various farmers whose power of attorney obtained on payment of consideration for land, by the partnership firm M/s. Narayan Realty (Formerly Narayan Land & Estate Co.), in the name of one of the partners Shri Jayantibhai D. Panchal and/or shri Pranav J. Panchal/or Shri Kartik J. Panchal & at the same time our firm is engaged as builders & developers of this housing schemes “Narayan Garden” under memorandum of arrangements in regard to the development & construction rights of the said scheme. Since all the basic terms & conditions as required to be complied within the provisions of section 80IB(10) of the IT Act, 1961 have been fully complied with without any violation including that of having furnished audit report in prescribe form with return of the accountant i.e. Chartered Accountant who within his such report expressed his opinion that the undertaking satisfies the conditions stipulated in section 80IB(10) and the amount of deduction claim as per the provision of Income Tax Act and meets out the required condition after audited the books of account of the undertaking relating to the said housing project. In view of such full & complete statutory compliance in the implementation of the housing projects "Narayan Garden" we write to submit that our undertaking is fully entitled to the claim of deduction under section 80IB(10) in respect of this scheme, since we have rightly claimed the deduction (if any) in respect of our housing projects "Narayan Garden after having satisfied all the conditions stipulated in section 80IB(10) and the amount of deduction claim as per the provisions of Income Tax Act and meets out the required conditions after having audited the books of account of the undertaking relating to the said housing project. In view of such full & complete statutory compliance in the implementation of the housing project “Narayan Garden” we write to submit that our undertaking is fully entitled to the claim of deduction (if

- 8 -

any) in respect of our housing projects “Narayan Garden” after having satisfied all the conditions stipulated in section 80IB(10) and meets the required condition of the said section.

2.5 The assessee has submitted that it had derived income from construction / development activity of housing project, therefore, its income is eligible for 100% deduction u/s.80IB(10) of the I.T. Act as it had satisfied all the condition laid down under the Act. It has also contended that, in the Act it is no where provided that the person should be owner of the land on which the housing project. The Housing Project was satisfying the conditions of area and was duly approved by the local authority. In respect of approval of the local authority in the name of original land owner it was submitted that the housing project under consideration was duly approved by the local authority as prescribed provision of section 80IB of the Act. There is no specific provision in the relevant section that the approval of the local authority must be obtained by the person who carries on construction activity. The assessee firm had carried out necessary activities to develop the housing project therefore it was claimed that deduction u/s.80IB of the Act is allowable in the case. The assessee has relied upon the Hon'ble ITAT Ahmedabad's decision in the case of Radhe Developers and Others- ITA No. 2482/AHD/2006, A.Y. 2003-04 along with other 44 cases vide their order 29.06.2007.

3.6 The reply of the assessee has been carefully considered. In assessee's own case in AY 2009-10 & 2010-11, the AO had disallowed the claim u/s.80IB(10) of the assessee and the action of the AO was also upheld by the CIT(A), In AY 2010-11, the findings of the AO are reproduced as under:

“I have carefully considered the submission of the assessee. On verification of the development agreement and other furnished during the course of assessment proceedings, it is observed that the assessee had attempted to vindicate other means of purchase vis-à-vis various agreement for purchase of land by virtue of an agreement purported for development as being the equivalent of a valid purchase agreement the registration of which imminently alters the ownership of such land from the erstwhile owners to the assessee. However, in the of the assessee for the housing project, the owners of the land have been shown as other than the builder and developer. It is to be stated here that the right of

- 9 -

possession is separate and distinguishable from the ownership right The ownership rights are unencumbered in that it does not suffer from hardships of any kind, legal or otherwise, to facilitate the freedom appurtenant to such rights for its complete enjoyment. On verification of reply vis-a-vis details & documents filed during the course of assessment proceedings, following facts have emerged:

- i) The assessee was not the owner of the land on which construction activities were carried out/project was built up.*
- ii) The has not taken the approval of the housing project from the local authority. The sam3.e was taken by the other people who are entire separate entity in the eyes of law.*
- iii) The land owners have sold the pieces of land to unit holders directly and assessee had acted as a confirming party.*
- iv) Assessee has acted merely as a contractor as it has entered into construction agreement with the unit holders.*
- v) The assessee has never sold the house to the unit holders as there was no registered document in respect thereof.”*

3. But learned AO was not convinced with the reply of the assessee and total addition of Rs.5,30,91,460/-.

4. Against the said order assessee preferred first statutory appeal before the learned CIT(A) who partly allowed the appeal of the assessee.

5. We have gone through the relevant record and impugned order. Learned AR cited an order of Coordinating Bench in Assessee's own case in ITA Nos.2293/Ahd/2012 and 2095/Ahd/2013 for A.Ys 2009-10 & 2010-11 respectively. In this case, Hon'ble Bench observed as follows:

In view of the aforesaid facts, we respectfully following the case of Satsang Developments in ITA No.1011, 2498 and 1221 of 2012 order dated 12/11/2013 has allowed the deduction to assessee by holding as under:-

“4.2. In addition to above two objections, the ld.CIT (A) has raised one more objection that the assessee has sold the land to the Unit holders separately and has done the construction of units under separate agreement/contract and, therefore, the assessee is not eligible for deduction u/s.80IB(10) of the Act because as per ld.CIT(A), profit earned by the assessee in respect of sale of land is not eligible for deduction u/s.80IB(10) of the Act and similarly, the profit earned by the assessee for construction activities is not eligible for deduction u/s. 80IB(10) because the assessee is doing the construction as a contractor for a work and not as a builder or developer and, therefore, the assessee is not eligible for deduction u/s.80IB(10) of the Act. Against these objections of Ld.CIT (A), the assessee is in appeal before us.

5.2 Regarding the 3rd objection that the assessee has sold land to the unit holders separately and has done the construction units under a project agreement/contract, it was submitted that it is a joint activity although the agreement and land sale-deed are executed separately, but for this reason alone, it cannot be said that the assessee is not a builder or a developer. He placed reliance on the following Tribunal decisions:-

Sl.No (s)	Decision in the case of. ...	Reported in....
1.	DCIT vs. SMR Builders (P.)Ltd	(2012)24 Taxman.com 194 (Hyd.)
2.	Sky Builders & Developers vs. ITO	(2011)14 Taxman.com 78 (Indore)
3.	M/s. Vardhman Builders and Developers vs. ITO	ITA No.559/Ind/2010 dated 09/05/2012
4.	Raghava Estates Vs. Dy.CIT	ITA N os. 248 & 49/Vizag/2009 dated 04/08/2011

5.2 He submitted that in the case of Vardhman Builders & Developers (supra) also, the assessee had entered into a separate agreement for sale of land and separate agreement for construction of housing on such land and under these facts, it was held by the Tribunal in that case that merely because of two separate agreements, the claim

of the assessee for deduction u/s.80IB (10) of the Act cannot be declined if other conditions are being satisfied.

5.3. He further submitted that in the case of DCIT vs. SMR Builders (P) Ltd. (supra) also, the facts were that the assessee had sold flats in a semi-finished stage. In that case, the AO had noted that as per the sale-deed, the assessee-company has sold undivided share of land with super-structure of semi-finished built-up area for a certain consideration. The AO held that the semi-finished structure has never been considered as a residential unit. It was also noted by the AO in that case that on the same date when the sale deed was executed, a construction agreement was also entered into with the transferee for further construction of the same flats by the builder company itself. He submitted that the facts in the present case are similar. He also pointed out that in that case, it was held by the Tribunal that the stand of the Revenue with regard to the semi-finished condition of the flats is devoid of any merit in as much as what is sought to be constructed and sold by the assessee is a residential units and what is sought to be purchased by the buyer is the ownership of the specified unit and registration of flat in semi-finished condition is only to facilitate the convenience of the parties and agreement for development and completion of balance work in relation to the flats is only an incidental formality and this cannot be viewed as fatal to the claim of the assessee for deduction u/s.80IB(10) of the Act. It was also held by the Tribunal that the entire work from the stage of the commencement to the stage of making the residential unit habitable have been carried out by the assessee only and, therefore, assessee is eligible for deduction u/s.80IB(10) of the Act.

9.2. Now we take up the third and last objection of ld.CIT (A) that the assessee had sold the land separately and undertook the construction work as per a separate agreement and, therefore the assessee is not a builder or a developer but a land dealer and contractor. In this regard, in our considered opinion, the issue involved is squarely covered in favour of assessee by the decision of ITAT Indore Bench rendered in the case of M/s.Vardhman Builders and Developers vs. ITO (supra). It is noted by the Tribunal in that case that the assessee had entered into an agreement for a sale of land and a separate agreement for construction of the house on the land and, therefore, the facts are similar. Under these facts, it was held by the Tribunal in that case that the claim of the assessee for deduction u/s.80-IB(10) of the Act cannot be declined if other conditions are being satisfied. Similarly, in the case of DCIT vs.

SMR Builders (P.) Ltd. (supra) also, the assessee sold the land along with semi-finished structure to the buyers and as per separate agreement, agreed for construction for completion of balance work. Hence, the facts of this case are also similar because in that case also, the land was sold separately along with partial and unfinished construction of flats and, thereafter, construction agreement was entered into to carry out the balance construction work and under these facts, it was held by the Tribunal in that case that such agreement for construction to complete the balance work is only an incidental facilitation to protect interest of the parties and therefore, the assessee is eligible for deduction u/s.80IB(10) of the Act. Similarly, in the case of Raghava Estates vs. Dy. CIT (supra) on which reliance was placed by the Id.AR of the assessee, the facts are similar. In that case also, the assessee had sold the plots separately and thereafter, constructed the houses and under these facts, the Revenue held that the assessee has to be considered as a mere contractor and, therefore, the assessee is not eligible for deduction u/s.80-IB(10) of the Act. This goes to show that the facts in that case were identical. In that case, it was noted by the Tribunal that the assessee had chosen to register the plot in the name of the buyer on payment of specified amount in order to achieve cost saving and to ensure reliability and thereafter, the assessee had proceeded to construct the house as per building plan obtained in the name of the plot-owners on payment of subsequent installments. It is also noted that the assessee had also developed various public amenities within the project. Thereafter, it was held by the Tribunal that on a totality of a fact, the Tribunal is of the view that the assessee has undertaken developing and building housing projects as per the scheme provided in section 80-IB (10) of the Act.

9.3. Since the facts in the present case are similar to the facts in above noted three Tribunal decisions, we do not find any defect in the construction in the present case and hence respectfully following these decisions, we decide the issue in favour of the assessee. There is no other objection of the Ld. CIT(A) regarding allowability of deduction to the assessee u/s. 80IB(10) of the Act. Hence, we direct to grant the deduction to the assessee u/s. 80IB(10) of the Act.

9. Before us, the Revenue could did not place any contrary decision on record nor could distinguish the facts of the case which was relied by the Assessee. In view of the aforesaid facts, we respectfully following the aforesaid decision of the co-ordinate Bench of the Tribunal, in the

- 13 -

case of Satsang Developers (supra) hold that Assessee is eligible for deduction u/s 80IB(10). Thus this ground of Assessee is allowed.

*10. This the appeal of Assessee is **allowed.**”*

6. The assessee has derived income from construction/development activity of housing project, therefore, its income is eligible for 100% deduction u/s.80IB(10) of the I.T. Act as it has satisfied all the condition laid down under the Act. In the Act it is no where provided that the person who is claiming deduction should be owner of the land of the housing project. The Housing Project was satisfying the conditions of area and was duly approved by the local authority. The assessee firm carried out necessary activities to develop the housing project, therefore, it was claimed that deduction u/s.80IB of the Act is allowable in the case and same is allowable in this case.

7. In the result, appeal filed by the department is dismissed.

This Order pronounced in Open Court on	05/09/2017
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Sd/-
(प्रदीप कुमार केडिया)
लेखा सदस्य
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Ahmedabad; Dated 05/09/2017
Priti Yadav, Sr.PS

Sd/-
(महावीर प्रसाद)
न्यायिक सदस्य
(MAHAVIR PRASAD)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-III, Baroda.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad