

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD “SMC” BENCH AHMEDABAD

BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER,  
AND SHRI S. S. GODARA, JUDICIAL MEMBER.

ITA Nos. 1147 to 1149/Ahd/2011 along with ITA Nos. 344 & 1671/Ahd/2013  
(Assessment Years: 2000-01 to 2003-04 & 2005-06)

M/s. Samrat Corporation  
C/o. V. P. Patel & Co. Adv.,  
A-102, Akshardham, Shahibaug,  
Nr. Underbridge, Ahmedabad - 4

Appellant

Vs.

Income Tax Officer,  
Ward – 9(3) / Ward – 9(1), Ahmedabad

Respondent

PAN: AALFS1024P

आवेदक की ओर से/By Assessee : Shri M. K. Patel, A.R.  
राजस्व की ओर से/By Revenue : Shri Roopchand, Sr. D.R.  
सुनवाई की तारीख/Date of Hearing : 12.09.2017  
घोषणा की तारीख/Date of  
Pronouncement : 20.09.2017

**ORDER**

**PER S. S. GODARA, JUDICIAL MEMBER**

These five assessee's appeals for assessment years 2000-01 to 2003-04 & 2005-06 emanate from the CIT(A)-XV, Ahmedabad's separate orders dated 31.01.2011 in first three assessment years and dated 16.11.2012 and 05.03.2013 in latter two assessment years in case nos. CIT(A)-XV/9(3)/415/09-10, CIT(A)-XV/9(3)/419/09-10, CIT(A)-XV/9(3)/418/09-10, CIT(A)-XV/9(1)/467/11-12 & CIT(A)-XV/ITO/9(1)/398/10-11, upholding Assessing Officer's identical action disallowing Section 80IB(10) deduction(s) of Rs.4,66,913/-, Rs.26,02,618/-,

Rs.40,58,946/-, Rs.45,68,013/- and Rs.20,70,360/-; respectively, in proceedings u/s. 143(3) r.w.s. 254 of the Income Tax Act, 1961; in short "the Act".

Heard both sides. Case files perused.

2. Learned representatives inform us at the outset that the sole substantive issue in all five instant appeals is that of correctness of both the lower authorities' identical action disallowing assessee's deduction claimed u/s. 80IB(10) of the Act qua the housing project in the name and style of a society M/s. Saundarya Co-operative Housing Society Ltd. involving the above specific figures; assessment year-wise. We thus treat assessee's first appeal ITA No.1147/Ahd/2011 for assessment year 2000-01 as the lead case.

3. Case records suggest the instant lis to be second round of proceedings before the tribunal. This assessee is a partnership firm comprising of nine partners holding variable share. It came to be constituted w.e.f. 15.10.1999. The assessee filed its return on 23.10.2000 stating nil income after claiming Section 80IB(10) deduction amounting to Rs.4,66,913/-. The same stood processed on 20.02.2002. The Assessing Officer thereafter formed reasons to believe that assessee's taxable income liable to be assessed had escaped assessment. He therefore issued Section 148 notice dated 18.05.2004. We find the assessee to have shown itself as a construction supervisor per its Form 3CD of audit report u/s.44AB of the Act. The Assessing Officer then framed re-assessment on 24.03.2005 disallowing the above deduction claim. The CIT(A) in his order dated 20.01.2006 partly accepted assessee's claim. The Revenue filed its appeal before this tribunal. A co-ordinate bench in its order dated 07.01.2009 remitted the issue back to the file of the Assessing Officer as under:

*"Since a copy of the relevant development agreement has not been placed before us while both the parties agreed that the matter needs to be reconsidered in the light of aforesaid decisions of the ITAT in the case of M/s. Shakti Corporation & others in ITA Nos. 1503/Ahd/2008 and M/s. Radhe Developers & Others in ITA No.2482/Ahd/2006, in the interest of justice, we vacate the findings of the ld.CIT(A) and restore the matter to the file of the AO with the*

*directions to analyze the relevant development agreement entered into by the undertaking of taxpayer with the landowner in the light of facts obtaining in the books of accounts maintained for the said undertaking by the taxpayer and other relevant documents, keeping in view the aforesaid decisions of the ITAT as also after allowing sufficient opportunity to the taxpayer and thereafter decide as to whether the undertaking of the taxpayer has indeed purchased the land for a fixed consideration from the land owner and has developed the housing project at its own cost and risks involved in the project. In the event the AO finds that the land had been purchased by the undertaking of the taxpayer and has all the dominant control over the project and developed the land at his own cost and risks, the AO should allow the deduction u/s.80IB(10) of the Act, in accordance with law. In case the AO finds that the undertaking of the taxpayer has acted on behalf of the land owner and has got only the fixed consideration from the land owner for the development of the housing project, the tax payer would not be entitled to any deduction u/s.80IB(10) of the Act. With these directions, ground no.1 in both the appeals is disposed of as indicated hereinbefore."(Emphasis supplied)*

4. The assessing authority took up consequential proceeding. The assessee filed its relevant document comprising of approved plan, Section 10CCB audit report, development permissions/Raja Chitti, local authorities BU sanction as well as its development agreement dated 06.03.2000 entered into with the owner society M/s. Saundarya Co-operative Housing Society Ltd. for developing the impugned housing project. The Assessing Officer framed consequential assessment on 21.12.2009 once again disallowing Section 80IB(10) deduction claim after taking into account the relevant clauses in assessee's above development agreement. He found the above society to be owning the project land in question. The said society had taken all steps to apply for construction claim as accepted in local authorities' action approving the project in question which nowhere indicated assessee's name to be mentioned therein. The Assessing Officer observed that the assessee had come in the picture only by way of the above development agreement which did not indicate any such development activity performed at its behest.

5. It emerges that the assessee had vehemently contended that ownership of project land no more found a valid criteria for the purpose of Section 80IB(10) deduction as per this tribunal's twin decisions in Radhe and Shakti Developers (supra). The Assessing Officer declined the said plea as well. He opined in

assessment order that the said case law had not been accepted at the department's behest so as to attain finality. He thereafter observed that the assessee had taken possession of the plot in question for construction activity without having any stake in admitting prospective bias or consideration money or finance etc. He then rejected assessee's reliance upon its development agreement to be not in the nature of conveyance deed executed by the society in its favour. The Assessing Officer's opinion accordingly was that the assessee's job in development of the above housing project was that of performing architectural and structural engineering functions along with finance, risk and reward in the housing project including sale of corresponding dwelling units to prospective buyers was akin to a civil contractor instead of a developer. He further considered clause "O" in development agreement stipulated the assessee to receive development charges @15% of the total receipts in addition to labour expenditure. The Assessing Officer accordingly concluded all this material to be sufficiently indicating the assessee to be a mere contractor only than developer not entitled for the impugned Section 80IB(10) deduction. He therefore made the disallowance in question amounting to Rs.4,66,910/-.

6. The CIT(A) confirms the Assessing Officer's above action disallowing assessee's deduction claim.

7. We have heard rival submissions. We have already indicated that the sole question arising for our apt adjudication is whether or not the assessee is entitled for Section 80IB(10) deduction in above set of facts. It is no more in dispute that Section 80IB(10) deduction does not envisage ownership of the plot in question relevant to a housing project as per this tribunal's decision in Radhe Developers case (supra). Hon'ble jurisdictional high court has upheld the same in its judgment reported as CIT vs. Radhe Developers (2012) 341 ITR 483 (Guj.). We are informed that hon'ble apex court has declined Revenue's Special Leave Petition as well on 27.07.2012 in a group case titled as ITO vs. Shri Gokul Corporation.

8. We further find that another co-ordinate bench decision in case of Shri Umeya Corporation vs. ITO ITA No.211/Ahd/2010 decided on July 7,2015 further holds that it is the entrepreneurial risk involved in development of a housing project than ownership of the project land which forms the decisive factor for the purpose of raising Section 80IB(10) deduction claim. Learned co-ordinate bench decision settles the issue as under:

*“3. So far as this grievance of the assessee is concerned, the relevant material facts are as follows. The assessee before us, a partnership firm, is engaged in the business of developing residential housing projects. During the course of the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has claimed a deduction of Rs 49,34,922 under section 80 IB (10) of the Act, but the assessee was not owner of the land on which housing project was developed. It was noted that "the assessee was not owner of the land on which the project was developed and the assessee had not acquired the dominant control over the project. The Assessing Officer was of the view that since the assessee did not own the land, since the necessary approval of the project was taken by the land owners and since the assessee has merely acted as an agent and as a contractor as it has entered into construction agreement with the landowners, the assessee is not eligible for deduction under section 80IB(10) of the Act. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. While rejecting the contentions of the assessee, learned CIT(A) observed as follows:*

*After going through rival submissions following points emerge:*

*1. In this case the appellant entered into Development Agreements with the Owners of land to carry out work on behalf of the owners.*

*The appellant invested no amount with respect to purchase of land. In the Shakti Corporation case Hon'ble ITAT found that the land has been purchased as well as developed by the appellant, but this is not the case here. Vide written submission dated 24.11.2009 it was once again stated that the appellant had not purchased lands but the lands owned by the other persons have been developed in terms of Development Agreement. Development Agreement dated 2.7.2003 was entered by the appellant with the land owner Shri Ramabhai Chaturdas Patel for construction of the housing project known as Someshwar and another Agreement dated 2.4.2004 was entered with Shri Parsotambhai Joitaram Patel for construction / development of the housing project known as Someshwar Part 2. The perusal of the Development Agreements shows that the projects were built by the appellant, bearing all costs and the profit margin would be apportioned by the developer (this is clear from clause 13 or the*

*Development Agreement), but at the very beginning of the Development agreement it has been mentioned that the Owner of the land is not the Developer, that the developer (appellant) had been appointed to develop / build by constructing tenements of the said properties along with the work of development of basic common infrastructure facilities, fid/ease refer to clause 1 of the Development Agreement) . Clause 2 of the Development Agreement states as under:*

*"The said Owner shall sell / allot to the desiring persons the plot/s either by himself or through the Developer/Builder being the party of the Second Part."*

*Thus in this case the land was never purchased by the appellant, neither any investment was made by the appellant towards cost of land. The appellant acted as an Agent / Contractor of the land owners and constructed the housing projects on the authority given by the land owners.*

*2 Reliance is placed on Hon'ble IT AT Mumbai Larger Bench, Mumbai decision in the case of M/s. B.T. Patil & Sons Belgaum Construction Private Limited dated 26.10.2009 (ITA No.1408 & 1409 / PN / 2003 AY 2000-2001 and 2001-02) where 80IA deduction has been denied holding the assessee to have entered into a Works Contract. In this decision in para 54 part of Memorandum explaining the provisions in the Finance bill 2007 has been quoted, relevant portion is reproduced below:*

*".....Accordingly, it is proposed to clarify that the provisions of section 80-IA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the said section. Thus in a case where a person makes the investment and himself executes the development work i.e. carries out the civil construction work, he will be eligible for tax benefit under section 80-IA. In contrast to this, a person who enters into a contract with another person (i.e. undertaking or enterprise referred to in section 80-IA) for executing works contract, will not be eligible for the tax benefit under section 80-IA."*

*Thus the Memorandum points out investment also to make a developer eligible for deduction. Hon'ble IT AT Mumbai decision cited above is applicable in the case of the appellant because the appellant has not A made any investment towards ownership of land or project. It was assigned construction / development of the housing projects by the land owners, though it incurred cost and derived profit but it was never the Owner of the project or of the land on which it was constructed. The individual plots on which tenements were constructed were purchased by the individual tenement buyers from*

*the land owners. The disallowance made by the AO u/s. 80IB(10) (on the grounds summarized in para 5 above) is therefore confirmed."*

4. *The assessee is not satisfied and is in further appeal before us.*
5. *We have heard the rival contentions, perused the material on record and considered facts of the case in the light of the applicable legal position.*
6. *We find that, in the case of CIT Vs Radhe Developers [(2012) 341 ITR 403 (Guj)], Hon'ble jurisdictional High Court had an occasion to consider the issue of ownership of land, on which housing project is developed, in the context of eligibility of deduction under section 80IB(10). Hon'ble jurisdictional High Court has, in this context, inter alia observed as follows:*

*32. Sec. 80-16(10) of the Act thus provides for deductions to an undertaking engaged in the business of developing and constructing housing projects under certain circumstances noted above. It does not provide that the land must be owned by the assessee seeking such deductions.*

*33. It is well settled that while interpreting the statute, particularly, the taxing statute, nothing can be read into the provisions which has not been provided by the legislature. The condition which is not made part of s. 80-18(10) of the Act, namely that of owning the land, which the assessee develops, cannot be supplied by any purported legislative intent.*

*34. We have reproduced relevant terms of development agreements in both the sets of cases. It can be seen from the terms and conditions that the assessee had taken full responsibilities for execution of the development projects. Under the agreements, the assessee had full authority to develop the land as per his discretion. The assessee could engage professional help for designing and architectural work. Assessee would enroll members and collect charges. Profit or loss which may result from execution of the project belonged entirely to the assessee. It can thus be seen that the assessee had developed the housing project. The fact that the assessee may not have owned the land would be of no consequence.*

*(Emphasis, by underlining, supplied by us)*

7. *In our humble understanding, therefore, in order to answer the question as to whether the condition precedent for deduction under section 80IB has been satisfied inasmuch as whether or not the assessee is engaged in "developing and building housing projects", all that is material is whether assessee is taking the entrepreneurship risk in execution of such project. When profits or losses, as a result of execution of project as such, belong predominantly to the assessee, the assessee is obviously taking the*

*entrepreneurship risk qua the project; and is, accordingly, eligible for deduction under section 80IB(10), in respect of the same. The assumption of such an entrepreneurship risk is not dependent on ownership of the land. The business model of "developing and building housing projects" by buying, on outright basis, and constructing residential units thereon could probably be the simplest business models in this line of activity, but merely because there is an improvisation in the business model or because the assessee has adopted some other business models for the purpose of developing and building housing project does not vitiate fundamental character of the business activity as long as the risks and rewards of developing the housing project] in substance, remain with the assessee. It is difficult, if not altogether impossible, to visualize all the business models that an assessee may use in this dynamic commercial world even as, in substance, the fundamental character of the business remains the same, but certainly such modalities or complexities of business models cannot come in the way of eligibility for an incentive which is for the purpose of 'developing and building a housing project'. There is no justification, conceptual or legal, in restricting eligibility of deduction under section 80IB(10) to any particular business model that an entrepreneur adopts in the course of developing and constructing housing project.*

8. As regards learned CIT(A)'s reliance on the decision of a larger bench of this Tribunal, in the case of **B T Patil & Sons (Belgaum) Constructions Pvt Ltd vs ACIT [(2010) 1 ITR (Tribunal) 703 (Mum)]**, what has been referred to by her is the view of the three member bench resolving the point of difference between the members of the division bench. However, this view was stillborn, and its relevance is confined to academic significance, for the reason that that while giving effect to the majority view, vide order dated 28<sup>th</sup> February, 2013 and on somewhat peculiar fact situation in this case, the final order of the Tribunal did not endorse these views. Quite to the contrary, following Hon'ble Bombay High Court decision in the case of **CIT Vs ABG Heavy Industries Ltd and Ors [(2010) 322 ITR 323 (Bom)]** and upon by taking into account Hon'ble Bombay High Court's specific directions in the case before the Tribunal, the Tribunal's final order had, inter alia, concluded as follows:

*.....while giving effect to the opinion of Third Member u/s.255(4) of the Act, we take view in conformity with order of jurisdictional High Court in case of ABG Heavy Industries Ltd. (supra) available at this time though contrary to the opinion expressed by the Third Member. So in view of above discussion, following the ratio of jurisdictional High Court in case of ABG Heavy Industries Ltd. supra), the Assessing Officer is directed to allow deduction u/s.80IA(4) of the Act to the assessee with regard to the projects in question for both the years.*

9. It is not even the case of the Assessing Officer that the assessee did not assume the entrepreneurship risks of the housing project. The format of arrangements for transfer of built up unit, and business model of the assessee for that purpose, is not decisive factor for determining eligibility of deduction

*under section 80 IB (10), but that is all that the authorities below have found fault with. The objections of the authorities below are thus devoid of legally sustainable merits. In view of the above discussions, and bearing in mind entirety of the case, we are of the considered view that the stand of the authorities below, in declining deduction under section 80IB(10) and on the facts of this case, is incorrect. We vacate the same and direct the Assessing Officer to delete the disallowance.*

10. *Ground no.1 is thus allowed.”*

9. We take cue from the above settled legal position to now come to assessee's development agreement dated 06.03.2000 with the owner society M/s. Saundarya Co-operative Housing Society Ltd. forming pages 43 to 47 in the paper book. The said agreement sufficiently indicates the assessee/first party to be both developer as well as contractor than the latter role only as follows:

*“And Party of the First Part will be appointed as a Developer and Contractor. The Terms & Conditions of this Agreement are as under:-*

- (A) *To book the Members for the unit to be constructed on the said land by Second Party.*
- (B) *At present cost of a unit is not fixed, as still Cost of the unit to be constructed on a aid land, and cost of the material, labours and usage of that is not received from the Second Party. And when Party of the Second part will give the cost of the unit to be constructed, after calculating and discussing with Labour Contractor total material require, Cost of the Material, Cost of the Labour etc. Rate of the unit will be fixed by second party aid accordingly first party will collect from members. The cost of the units does not include Lift Exp., Water, Boar, Motor Pump, General Connection Exp., and Cost of Electric Cable, and Architect Engineer Fees, because exact amount of all above exp. will be known after sometime and that will collect separately by First party.*
- (C) *As per this agreement First party will registered the members of the scheme and they will collect amount by cash or by cheque in favour of firm name and afterwards the first party will return this amount to second party.*
- (D) *Till the completion of all the units and handling over the possession of all the units. That means Party of the first part has full right whether to enter or to not enter the name as member in the second party till full payment of the unit receive by first party. And first party will hold the possession of any unregistered units or vacant units and for that second party will not have any objections. And Party of the first part will hold the possession of the unit till they receives the full amount of units and second party do not have any objection.*

- (E) *Party of the first, part will give only the list of the member, unit as & when it booked to second party. Party of the second part will registered that unit holder as a member of the society as & when it is inform by first party in written and by giving the full details of the payment to Second party. And it is also dearly mention trial' second party will not enter the name of the unit holder as a member of the society till they make the full payments of the unit as well as of the maintenance to first party, till that unit holder will not have direct contact or agreement with second party, and till that they are not the members of the society. First party has full responsibility of the amount transaction of such unit holder, and second, party does not have any liability.*
- (F) *As per this agreement first party has all rights to register the unit holder, to collect the amount of the units in their name to give the receipt of amount etc., and second party does not have any liabilities.*
- (G) *First Party has full rights to book any person, Firm, company, to make advertisement or handbill or hoardings, neon sign of the scheme or to give advertisement in any local, or national daily weekly or in monthly magazines etc. for the Scheme, But for this expenses will be born by First Party.*
- (H) *First party will keep all the agreements, letters, copies of approved plan etc. of the said scheme with them and they have lien over it.*
- (I) *Party of the First part appointed as a Developer/Contractor in pursuance of agreement. Second party are not to allow to book any members for the said scheme, party of the Second part is giving the promise that they have not registered and unit holder or not enter any person as a member of the society. To make it easier for the first parry the members of the second party at present will be also register by first party.*
- (J) *First, party has a right to appoint any agencies, experts etc. if require for the development of the scheme and salary, other expenses will be born by First party and second party will not be responsible.*
- (K) *First part is appointed as a Developer /Contractor by the Second party, hence without their permission, First party cannot transfer or assign their rights to any other person.*
- (L) *If any, problem arise for the booking of the unit holder or any legal problem arise then, all such legal actions will be taken by the first party and expenses will be born by the first party. Second party is not responsible or liable for it.*
- (M) *Party of the first part will not book any person, firm, company as a unit holder who has committed any default or doing any activity which is illegal in the eyes of Law and also any person who is connected with such firms, or company or any person forbidden by the second party in their "U" leaflet.*

- (N) *Party of the first part has right to show any papers regarding Land, property, Construction, Plans agreements to the unit holder if require, and they also have, right to make any Agreement, Declaration, Statement on Oath etc. with any person, firm, company who came to become a unit holder of the Said Scheme.*
- (O) *Second party has to pay the Development Charges to the first party on the basis of the Units they have booked. The development charge will be at the rate of 15% of the total receipts from the Members. First party has a right to collect 15% as a development Charges said Development charges is in addition to Labour Charges for which separate Agreement has been made.*
- (P) *Party of the first part can do any activity if require for obtaining loan to the members who will join the said Scheme and the second party will give the full support. And if for the Whole Scheme general loan is to be require from any institute and if at that time units of the said Scheme is to be mortgage 'then party of the second part will give a full support.*
- (Q) *Second party will agree to make any alteration in construction of unit or to provide special facility if any suggest by first party.*
- (R) *If Party of the First part commit any delay in fulfilling the terms or conditions of this agreements then party of the Second party will terminate this agreement immediately and Accounts with the First party is to be settle with in one month from the date of the cancellation of this agreement.”*

10. It thus emerges that the assessee only has undertaken the above entrepreneurial risk / reward in developing the above housing project after having acquired dominant control thereof. It had further discharged onerous responsibility inter alia of advertising the above housing project; if required followed by booking of allottees as well as collection of consideration money whereas the owner society never performed any such liability in developing its housing projects. We therefore accept assessee's arguments claiming itself to have developed the above housing project thereby raising Section 80IB(10) deduction claim. We accordingly delete the impugned disallowance of Rs.4,66,910/-. Its sole substantive ground as well as lead appeal ITA No.1147/Ahd/2011 succeed.

11. Both parties now take us to assessee's remaining four appeals (supra) involving identical deduction claim u/s.80IB(10) of the Act qua the very housing project in different assessment years. We therefore adopt the same course of action

herein as well. The impugned disallowance(s) of Section 80IB(10) deduction involving varying sums (supra) in these four assessment years is directed to be deleted.

12. The assessee succeeds in its all five appeals.

[Pronounced in the open Court on this the 20<sup>th</sup> day of September, 2017.]

Sd/-  
(PRAMOD KUMAR)  
ACCOUNTANT MEMBER  
Ahmedabad: Dated 20/09/2017

Sd/-  
(S. S. GODARA)  
JUDICIAL MEMBER

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /  
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण, अहमदाबाद ।