

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1503/PUN/2014

निर्धारण वर्ष / Assessment Year : 2009-10

Income Tax Officer,  
Ward – 4(5), Pune

.....अपीलार्थी / Appellant

**बनाम / V/s.**

M/s. Skyline Developers,  
D-436, Clover Centre,  
Moledina Road, Camp,  
Pune – 411001

PAN : AASFS6230J

.....प्रत्यर्थी / Respondent

Assessee by : Shri Pramod Shingte  
Revenue by : Shri Rajeev Kumar

सुनवाई की तारीख / Date of Hearing : 14-11-2017

घोषणा की तारीख / Date of Pronouncement : 10-01-2018

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM :**

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-II, Pune dated 31-03-2014 for the assessment year 2009-10.

2. The brief facts of the case as emanating from records are: The assessee is a builder and developer. The assessee filed its return of income for the impugned assessment year on 31-10-2009 declaring total income as Nil after claiming deduction u/s. 80IB(10) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The assessee is one of the constituents of Joint Venture (JV) Brahma Skyline. The assessee entered into joint venture agreement with Brahma Builders on 21-03-2006 for developing the land held by assessee. Brahma Skyline (JV) was floated to execute the project of developing a housing project on the land held by assessee. The assessee received Rs.9,62,83,200/- from the joint venture and claimed deduction of the entire income u/s. 80IB(10). The Assessing Officer declined the benefit of deduction to the assessee on the premise that deduction u/s. 80IB(10) is available only to an undertaking engaged in developing and building house project subject to fulfillment of conditions laid down in sub-section (10) of section 80IB. The assessee has only provided land and the constructions activities were taken care of by Brahma Builders. Since, the assessee is not builder and developer the assessee is not eligible to claim deduction u/s. 80IB(10) of the Act.

Aggrieved by the assessment order dated 27-12-2011, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) after analyzing the facts of the case and by placing reliance on the various decisions holding the owner of land to be eligible for claiming deduction u/s. 80IB(10) accepted the claim of assessee. Now, the Revenue is in appeal before the Tribunal assailing the order of Commissioner of Income Tax (Appeals).

3. The Revenue has raised following grounds assailing the order of Commissioner of Income Tax (Appeals) :

- “1) *The learned Commissioner of Income-tax (Appeals) erred in holding that the assessee was eligible for claiming deduction u/s.80IB(10) of the Act without appreciating that deduction u/s.80IB(10) was available to an undertaking engaged in developing & building housing project and the assessee had only provided the land to the joint venture formed i.e. Brahma Skyline JV.*
- 2) *The learned Commissioner of Income-tax (Appeals) erred in not appreciating that the assessee had carried out its obligation as builder & developer in development of 2,40,000 sq.ft. only and did not play any role as builder & developer in respect of construction of housing project on 4,63,103 sq.ft of land on which deduction u/s.80IB(10) was claimed and not allowed.*
- 3) *The learned Commissioner of Income-tax (Appeals) erred in not appreciating that the claim of deduction u/s.80IB(10) could only be considered in the hands of AOP and as no return of income had been filed by the AOP , the same could not be considered and the revenue sharing arrangements at 32:68 was intended to compensate the two members of Joint Venture for their respective contribution & expenses incurred.*
- 4) *The appellant craves leave to add, alter or amend any or all the grounds of appeal.”*

4. Shri Pramod Shingte appearing on behalf of the assessee submitted that the assessee had acquired land at Kondhwa Khurd, Pune from Kausar Baug Co-op. Housing Society vide development agreement dated 12-05-2005. As per the agreement the assessee was required to construct flats with a total area of 2,40,000 sq. ft. for the members of the society. The assessee constructed the flats on the area as agreed mutually between the said parties and the balance land admeasuring 4,63,103 sq. ft. was developed by the assessee with Brahma Builders through joint venture. The housing project developed by the assessee with Brahma Builders was named as ‘Emerald County’. The said project qualified for deduction u/s. 80IB(10) of the Act. The assessee received 32% of the sale proceeds of the

flats, whereas, Brahma Builders received 68% of the sale proceeds. The assessee incurred the expenditure on the cost of land, removal of encumbrances, marketing of flats etc. Brahma Builders constructed the flats and jointly marketed the flats with the assessee. It is not a case where the assessee has transferred the land to Brahma Builders and received consideration in lieu thereof. The assessee has derived profits from the housing project that qualifies for deduction u/s. 80IB(10) of the Act. The ld. AR asserted that the assessee is a developer and the land on which housing project 'Emerald County' was developed was held by the assessee as stock-in-trade. The ld. AR pointed that Brahma Builders had claimed deduction u/s. 80IB(10) in respect of their share of profits i.e. 68% of the proceeds arising on sale of flats. The assessee has claimed deduction u/s. 80IB(10) on its share i.e. 32% of the sale proceeds of the flats.

4.1 The fact that the assessee is one of the constituent of joint venture has not been disputed by the Department. It is also an admitted fact that both the constituents of joint venture have shared gross receipts from sale of flats. No income is offered in the hands of joint venture. Both the constituents of JV have disclosed income in their respective hands and has claimed deduction u/s. 80IB(10) of the Act, accordingly. Both the parties to the JV were acting on principle to principle basis. The ld. AR submitted that various Benches of the Tribunal have consistently held owner of the land on which housing project is developed which qualifies of deduction, eligible for deduction u/s. 80IB(10) of the Act. To support his submissions the ld. AR placed reliance on the following decisions :

- i. Commissioner of Income Tax Vs. Shravane Constructions, 22 taxmann.com 250 (Kar.);
- ii. Commissioner of Income Tax Vs. Mahalakshmi Housing, 41 taxmann.com 146 (Madras);
- iii. Income Tax Officer Vs. M/s. Shalom Sankalp Ventures in ITA No. 1696/Bang/2013 for assessment year 2008-09 decided on 03-11-2016;
- iv. Assistant Commissioner of Income Tax Vs. M/s. Sri Lakshmi Brick Industries in ITA Nos. 1644 to 1647/Mds/2012 for assessment years 2006-07 to 2009-10 decided on 22-11-2012;
- v. Deputy Commissioner of Income Tax Vs. M/s. AKS Housing Development Co. P. Ltd. in ITA No. 1766/Mds/2012 for assessment year 2009-10 decided on 30-11-2012.

5. On the other hand Shri Rajeev Kumar representing the Department vehemently defended the order of Assessing Officer in denying the benefit of deduction u/s. 80IB(10) of the Act. The ld. DR submitted that the assessee is not engaged in development of a housing project. Moreover, it is Brahma Skyline (JV) that has developed the housing project and not the assessee. The ld. DR prayed for reversing the findings of Commissioner of Income Tax (Appeals) and restoring the order of Assessing Officer.

6. We have heard the submissions made by the representatives of rival sides and have perused the orders of authorities below. We have also considered various decisions on which the ld. AR of assessee has placed reliance to support his contentions. The Revenue in appeal has primarily assailed the action of Commissioner of Income Tax (Appeals) in holding

that the assessee is eligible for deduction u/s. 80IB(10) of the Act. It is an undisputed fact that the assessee joined hands with Brahma Builders to form a joint venture Brahma Skyline for development of a housing project 'Emerald County'. Both the sides agreed to share sale proceeds of flats in the ratio of 32% and 68%, respectively. The assessee contributed the land after removal of encumbrances and also contributed in marketing of the flats. The assessee had acquired land from Kausar Baug Co-op. Housing Society vide agreement dated 12-05-2005. As per the said agreement the assessee constructed flats with a total built up area of 2,40,000 sq. ft. for the members of the society on the said land. On the remaining land admeasuring 4,63,103 sq. ft. housing project 'Emerald County' was developed by joint venture Brahma Skyline.

7. It is not disputed by the Department that Brahma Builders have claim deduction u/s. 80IB(10) in respect of their share of profits arising from sale of flats in the housing project 'Emerald County'. The Assessing Officer raised objection in granting the benefit of deduction u/s. 80IB(10) to the assessee primarily for the reason that the assessee is not a developer and builder. The objection raised by the Assessing Officer was overruled by the Commissioner of Income Tax (Appeals) by observing as under :

*"3.4.1 The appellant firm has thus constructed the residential portion meant for the members of the society and has incurred expenditure thereon as per the terms of agreement which clearly indicate the role of the appellant to be that of a builder and developer in the development of the property in terms of agreement with Kausar Baug co-op Hsg. society Ltd. Thus the appellant after having constructed the requisite area for the owner as per the agreement got the right to develop the balance and unutilized F.A.R. and sell the same which in fact, was a consideration for the area constructed by them of nearly 2,40,000 sq.ft in respect of the residential flats. It is only at this stage that the second part of the execution of the project was entered into by the appellant, i.e., after having received the permission by the owners of developing the balance land area, the appellant entered into the JV agreement with M/s. Bramha Builders dated 21-03-2006. In the light of the aforesaid fact it becomes apparent that the appellant firm carried out its*

obligation as a builder & developer in the development of 2,40,000 sq.ft. area and, therefore, the inference drawn on the part of the Assessing Officer to conclude that the appellant merely introduced land and did not carry out the development of the property so as to be eligible to claim deduction u/s 80IB (10) of the Act is *prima facie* not correct. The Assessing Officer appears to have only considered the second part of the development of the property wherein the appellant entered into the JV agreement with Bramha Builders without taking into consideration the fact that the execution of the second part of the property was not possible without the construction of 2,40,000 sq.ft area at the cost of the appellant firm and handing over the residential flats to the members of the Kausar baug housing society.

3.4.2 Further on perusal of the clauses of the JV agreement dated 21-03-2006 entered into between the appellant and Bramha Builders, it becomes apparent that the appellant entered into a JV for jointly developing the property on the terms and conditions set out in the agreement. The appellant has pointed out the various events and also filed the related documents to demonstrate that the parties to the JV were acting on principle to principle basis with clearly defined roles and following a revenue sharing model. For instance, the bank account No. 000505008737 with the ICICI bank, bund garden, Pune in the name of Bramha Skyline Developers there was a clear instruction that the receipts needed to be apportioned in the respective developers account in the ratio of 68% of Bramha Builders and 32% to the appellant firm. Further, in the agreement entered into with the parties to whom the flat has been sold the appellant along with Bramha Builders both are referred to as promoters and this has been signed by the respective representatives of both the developers. The supplementary agreement dated 02-02-2007 between the appellant and Bramha Builders specifies that in case of any cancellation of booking, the refund shall be granted in the same ratio of 68:32 by the respective parties. Moreover, the copy of the commencement certificate, completion / occupancy certificate for the project has been obtained by the appellant firm which is in the name of one of the partners. The copies of some of the court orders filed by the appellant indicates the appellant firm to be an independent party represented by its partner and has been equally held responsible for any action to be taken against the complainant. Moreover, the Maharashtra Ownership of Flats Act, 1963 is also seen to have recognized the concept of joint ownership and dual promoters relating to ownership of flats as is evident as per sec 2(c) which defines the term promoter as " a person who constructs or causes to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons or to a company, cooperative society or other Association of Persons, and includes his assignees; and where the person who builds and the person who sells are different, the term includes both." Thus the aforesaid fact clearly reveal that the appellant firm has been working on the project with equal risk and incurring the necessary expenses on account of its obligation which enabled them to develop the plot jointly with Bramha Builders. Thus the claim made by the appellant should not be seen in isolation i.e. only with respect to the JV agreement without taking into consideration the obligation of the appellant of constructing and handing over residential flats to the owners of the plot. Thus the Assessing Officer's observation and reasoning in denying the claim of deduction u/s. 80IB(10), that the appellant merely introduced land and not performed the role of builders and developer of the housing project is not correct."

8. We concur with the findings of Commissioner of Income Tax (Appeals) in holding that the assessee was not merely contributor of the land but was engaged in the development of housing project. That apart, it is a well settled law that owner of the land as well as developer of the land both are eligible for claiming deduction u/s. 80IB(10) in respect of housing project where the owner contributes the land and the other party develops the housing project.

9. The Hon'ble Karnataka High Court in the case of Commissioner of Income Tax Vs. Shravane Constructions (supra) has held that it is not merely building housing project, which attracts provisions of section 80IB(10), it is developing and building housing project, which attracts said provisions. The Hon'ble High Court in the facts of the case held as under :

*"8. In terms of the agreement, which are not in dispute, the assessee not only undertook the aforesaid development activities on the land in question, but in fact, he entered into an agreement of sale with the owners of the land, paid the entire consideration but he did not take a registered sale deed in his name. On the contrary, the procedure adopted is he in turn entered into a joint development agreement with the builder and the owner of the land was made a party to the said proceedings. Thus, the assessee contributed the land, undertook the aforesaid developmental activities in the said land and thus, complied with all other conditions, which have to be fulfilled before claiming benefit under Section 80IB(10) of the Act. The builder has invested the money in the construction. It is after completion of the building in terms of the agreement, the assessee was given 22% share of the building area. It is after sale of the built area, in terms of Section 80IB (10), the assessee is claiming deduction. As is clear from the joint development agreement, the undertaking of developing and building housing project was jointly undertaken by the assessee and the builder. Therefore, in respect of the residential units numbering 211 in all, the persons who undertook this undertaking are entitled to the benefit of Section 80IB(10) of the Act in proportion to the share to which they are entitled to in the built up area.*

*9. In that view of the matter, the contention of the revenue that the assessee did not undertake any developmental or building activity and therefore, he cannot individually claim the benefit has no substance. That is not the requirement of law. Keeping in mind, the object with which this provision is introduced when all persons who have made investments in this housing project which is for the benefit of middle and lower class people and, when*

*they have complied with all the conditions prescribed under the aforesaid provision, both of them are entitled to hundred percent benefit of tax deduction as provided under the said provision. In that view of the matter, we do not see any merit in these appeals. The substantial question of law is answered in favour of the assessee and against the revenue. Accordingly, the appeals are dismissed.”*

Following the ratio laid down in the case of Commissioner of Income Tax Vs. Shravanee Constructions (supra), the Chennai Bench of the Tribunal in the case of Assistant Commissioner of Income Tax Vs. M/s. Lakshmi Brick Industries (supra) and Deputy Commissioner of Income Tax Vs. M/s. AKS Housing Development Co. P. Ltd. (supra) granted benefit of deduction u/s. 80IB(10) to the owner of the land.

10. In the present case, as is emanating from records the assessee has also contributed towards the development of housing project. Apart from contributing land, the assessee was purportedly instrumental in removing of encumbrances from land and marketing of flats. Thus, the assessee is also eligible for claiming deduction u/s. 80IB(10) of the Act.

11. The second contention of the Revenue is that benefit of section 80IB(10) can only be granted to an AOP and not to the assessee. We do not find any merit in this contention of the Revenue. The assessee and M/s. Brahma Builders, the two constituents of Brahma Skyline JV had agreed to share gross receipts of the joint venture in the ratio of 32% and 68% and not the net profits. The joint venture was merely used as conduit to facilitate execution of housing project work, the actual work was done by the two members of JV. It is further relevant to note that all the expenditure for the execution of project was incurred by the individual

members and not the joint venture. Therefore, the deduction was rightly claimed by the members. The Commissioner of Income Tax (Appeals) dealt with this issue in para 3.6 of its order. For the sake of completeness the same is reproduced as under :

*“3.6 So far as the contention-of the Assessing Officer that the claim of deduction u/s. 80IB(10) can only be considered in the hands of the AOP and as no return of income has been filed' the same cannot be considered, it has already been seen that the appellant and M/s. Bramha Builders are the two members of the JV which was formed for the development of the property and both the parties agreed to share the gross receipts and not profits of the JV in the ratio of 32:68. Thus the material on record point out that the JV was a conduit and the actual work was done by the individual members and no expenditure was incurred by the JV, but by the individual members. Moreover the share in gross revenue and the relevant related expenditure incurred have been recorded in the books of account of individual members of the AOP and the resultant profit/loss offered to tax by the members of the AOP by individual members. Thus the contention of the appellant that there has been no loss to the revenue as a result of the above method of sharing gross revenue prima facie appears to be acceptable. The aforesaid fact also becomes apparent if the joint development agreement (JV agreement) is perused, it reveals that the two members were working together on principle to principle basis and were jointly and severally liable for the project. It is also noticed that in the clause of the terms, it has been pointed out that no party is agent of each other and there is no intention of constituting a partnership firm and the reference of AOP is in the context of Indian Contract Act, 1872 and the term AOP needs to be understood with reference to the section of the Contract Act, 1872. The roles of the two persons has been clearly defined in the agreement. In such a situation the contention raised by the appellant that taxing the same income again in the hands of the JV will lead to double taxation of the same income appears to be reasonable. In this regard the decision of the Karnataka High Court in the case of CIT Vs Manjunatha Motor Service & Canara Public Conveyances (Supra) also relied upon by the appellant has held that:*

*“.....Assessment having been made on each member of AOP in individual status, assessment in respect of the same income cannot once again be made on the AOP as such a course would amount to double taxation, more so in view of CBDT Circular F. No. 75/191/62-IT (J) dt. 24<sup>th</sup> August, 1966 which is binding on the Revenue.....”*

*In view of the above facts, the contention raised by the Assessing Officer in this regard is not supported by the facts of the case and the view of the Courts and, therefore, cannot be upheld.”*

We are in consonance with the findings of Commissioner of Income Tax (Appeals) on this issue. Accordingly, we uphold the same. We find no merit in the grounds raised by the Revenue in appeal. The findings of

Commissioner of Income Tax (Appeals) on eligibility of deduction u/s. 80IB(10) to the assessee are confirmed and the appeal of Revenue is dismissed.

12. In the result, the appeal of the Revenue is dismissed.

Order pronounced on Wednesday, the 10<sup>th</sup> day of January, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 10<sup>th</sup> January, 2018

RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-II, Pune
4. आयकर आयुक्त / The CIT-II, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,  
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune