

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD òBö BENCH**

**Before: Shri Mahavir Prasad, Judicial Member
And Shri Amarjit Singh, Accountant Member**

Sl. No .	ITA	Assessment Year	Appellant	Respondent
1	2000/Ahd/2014	2010-11	ACIT, Cir.2(2), Baroda	M/s. Pratham Developers, Baroda, PAN: AAHFP2699D
2	283/Ahd/2017	2010-11	DCIT, Cir.1(2), Baroda	M/s. Pratham Developers, Baroda
3	2192/Ahd/2015	2011-12	DCIT, Cir.1(2), Baroda	M/s. Pratham Developers, Baroda
4	2769/Ahd/2015	2012-13	DCIT, Cir.1(2), Baroda	M/s. Pratham Developers, Baroda
5	3086/Ahd/2016	2010-11	M/s. Pratham Developers, Baroda	DCIT, Cir.1(2), Vadodara
6	1533/Ahd/2015	2010-11	M/s. Pratham Developers, Baroda	Pr. CIT-1, Vadodara
7	2673/Ahd/2015	2012-13	M/s. Pratham Developers, Baroda	DCIT, Cir.1(2), Vadodara
8	C.O. 158/Ahd/2015 (in IT No. 2192/Ahd/2015)	2011-12	M/s. Pratham Developers, Baroda	ACIT, Cir. 2(2), Vadodara

Revenue by: Shri H.V. Gurjar, CIT-D.R.
Assessee by: Shri Milind Mehta, A.R.

Date of hearing : 12-04-2019
Date of pronouncement : 30-04-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

These seven appeals, four by revenue and three by assessee and one cross objection filed by assessee against the order of CIT(A).

2. The revenue has raised following grounds of appeal:-

ITA No. 2000/Ahd/2014, A.Y. 2010-11

“(i). On the facts and in the circumstances of the case and in law, the ld.CIT (Appeals) erred in allowing the disallowance made u/s 80IB(10) of the Act of Rs. 7,61,58,914/- without appreciating the fact that the assessee had obtained the single approval from Local Authority, which also consisted approval for development and construction of residential unit of more than 1500 sq. ft. in violation of provisions of clause (c) of section 80IB(10) of the Act and therefore, not eligible for deduction u/s 8016(10) of the Act.

“(ii). On the facts and in the circumstances of the case and in law, the ld.CIT (Appeals) erred in allowing deduction u/s 8016(10) of the Act to the assessee without appreciating the fact that no separate approval was taken from Local Authority for the project 'Pratharn Meadows', in which each residential unit has a maximum built-up area of more than 1500 sq. ft.”

“(iii) On the facts and in the circumstances of the case and in law, the ld.CIT (Appeals) erred in allowing deduction u/s 8016(10) of the Act to the assessee on a pro rata basis when there is no such provision under the statute to grant the same?”

3. All the grounds of appeal of the Revenue 1(1) to 1(iii) are inter-connected against the decision of ld. CIT(A) allowing deduction u/s. 80IB(10) of the act, therefore, for the sake of convenience these grounds of appeals are adjudicated together.

ITA No. 2000/Ahd2014, Ground no. 1 of ITA No. 2192/Ahd/2015 assessment year 2010-11, Ground No. 1 of ITA No. 2769/Ahd/2015, assessment year 2012-13

4. As the facts in all the above mentioned grounds of appeals are similar, so, Ground No. 1 of ITA No. 2000/Ahd/2015 is taken as lead case and its finding will be applicable to Ground no. 1 of ITA No. 2192/Ahd/2015 assessment year 2010-11 and Ground No. 1 of ITA No. 2769/Ahd/2015, assessment year 2012-13.

5. The brief fact on this issue is that assessee has filed return of income declaring income of Rs. nil on 30th October, 2010. Subsequently, the case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 27th August, 2011. During the course of assessment the assessee firm is engaged in the business of real estate developer. During the year under consideration, the assessee has taken various projects namely, Pratham Avenue, Pratham Vatika, Pratham Residency, Pratham Citadel Pratham Vatika Ahrnedabad, Pratham Upavan, Pratham Shrusthi, Pratham Vistas. During the course of assessment, the assessing officer noticed that permission for the development of the project was obtained from Vadodara Development Authority in the name of applicant in whose name the project was approved. It is further observed that only 1/3 of land on which the Pratham Vistas project was developed was owned by one of the partners of the firm and 2/3 of the land was owned by Shri Mukund M. Patel and Krupesh N. Patel. Therefore, the assessing officer was of the view that assessee firm was not the sole owner of the land on which the housing project was constructed. In view of the aforesaid fact, the assessing officer stated that the assessee was not eligible for deduction u/s. 80IB(10) of the act. Further, on perusal of the document in respect of Pratham Vistas project, the assessing officer has noticed that as per the lay out plan there were 158 residential units out of

which the 55 residential units were having a built up area of 2199 sq. ft. which exceeded, the prescribed built up area of 1500 sq. ft. as envisaged in section 80IB(10) of the act.

6. Aggrieved assessee has filed appeal before teh Id. CIT(A). The Id. CIT(A) has allowed the appeal of the appeal after following the decision of Honøble Gujarat High Court in the case of CIT vs. Radhe Developers (2012) 341 ITR 403 (Guj).

7. We have heard rival contention on issue and perused the mateira on record carefully. The assessee has claimed deduction u/s. 80IB(10) of the act in respect of (1) Pratham Citadel Project (2) Pratham Vatika Project (3) Pratham Shrusti Project (4) Pratham Residency Project (5) Pratham Vitas Project. On perusal of supporting documents filed in favour of the claim of deduction u/s. 80IB(10) of the Pratham Vitas Project, the assessing officer has stated that permission for development/Rajachithi issued by the Vadodara Urban Authority was not in the name of the assessee, therefore, the assessing officer had held that the assessee was not entitled for deduction under section 80IB(10) of the act. The assessing officer has also stated that the assessee was not the sole owner of the land in question and approval of the layout plan/Rajachithi issued by the local authority was of housing project consisting of 158 residential units out of which the built up area of 55 residential units exceed the prescribed limit of 1500 sq. ft. thereby contravening the provision sedition 80IB(10)(c) of the act. The assessing officer has further stated that the there was no provision in the act to allow partial benefit of section 80IB(10) of the act therefore entire deduction

claimed u/s. 80IB(10) of the case of Rs. 76158914/- was disallowed. The Id. CIT(A) has deleted the disallowance after placing reliance on the decision of the judicial High Court of Gujarat in CIT Vs. Radhe Developer (2012) 341 ITR 403 (Guj). It is also held that 55 residential units in respect of Pratham Meadow was a separate project developed by another assessee named M/s Pratham Properties. The relevant part of the decision is reproduced as under:-

"3.3. DECISION:

3.3.1. I have considered the submissions of the Id. counsel, facts of the case and the decision of Jurisdictional High Court of Gujarat in CIT Vs Radhe Developers [2012] 341 ITR 403 (Guj.). The facts and circumstances of the appellant are identical to the cases decided by Hon'ble High Court. Also all the pleas raised by the Assessing Officer have been effectively dealt with and discussed in the said order and thereafter Hon'ble High Court has allowed the deduction u/s. 80IB(10).

*3.3.2. Hon'ble High Court of Gujarat in **Radhe Developers (Supra) [2012]** has held that neither the provisions of Section 80IB nor any other provisions contained in other related statutes provide that ownership of the land would be a condition precedent for developing the housing project. It has been held by the Hon'ble Court as under:*

"32. Section 80IB(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 Section 80IB(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."

On the question of ownership of the land raised by the Revenue, it has been held by the Hon'ble Court that:

"41. In the present case, we find that the assessee had, in part performance of the agreement to sell the land in question, was given possession thereof and had also carried out the construction work for development of the housing project. Combined reading of Section 2(47)(v) and Section 53A of the Transfer of Property Act would lead to a situation where the land would be for the purpose of Income Tax Act deemed to have been transferred to the assessee. In that view of the matter, for the purpose of income derived from such property, the assessee would be the owner of the land for the purpose of the said Act. It is true that the title in the land had not yet passed on to the assessee. It is equally true that such title would pass only upon execution of a duly registered sale

deed. However, we are, for the limited purpose of these proceedings, not concerned with the question of passing of the title of the property, but are only examining whether for the purpose of benefit under Section 80IB(10) of the Act, the assessee could be considered as the owner of the land in question. As held by the Apex Court in the case of Mysore Minerals Ltd. (supra), and in the case of Podar Cement (P.) Ltd. and others (supra), the ownership has been understood differently in different context. For the limited purpose of deduction under Section 80IB(10) of the Act, the assessee had satisfied the condition of ownership also; even if it was necessary.

42. In the case of Shakti Corporation similarly the assessee had entered into a development agreement with the land owners on similar terms and conditions. It is true that there were certain minor differences, however, in so far as all material aspects are concerned, we see no significant or material difference. Here also assessee was given full rights to develop the land by putting up the housing project at its own risk and cost. Entire profit flowing therefrom was to be received by the assessee. It is true that the agreement provided that the assessee would receive remuneration. However, such one word used in the agreement cannot be interpreted in isolation out of context. When we read the entire document, and also consider that in form of "remuneration" the assessee had to bear the loss or as the case may be take home the profits, it becomes abundantly clear that the project was being developed by him at his own risk and cost and not that of the land owners. Assessee thus was not working as a works contract Introduction of the Explanation to Section 80IB(10) therefore in this group of cases also will have no effect."

3.3.3. I have also considered the arguments taken up in the assessment order and the submissions made before me. In the assessment order, the Assessing Officer has disallowed the Assessee's claim for deduction u/s 80IB (10) in respect of the appellant's housing project 'Pratham Vista' by stating that the Raja Chitti/Layout Plan consisted of 158 residential units of which 55 residential units had buildup area which exceeded the prescribed built up area of 1500 sft. in contravention of the provisions of section 80IB(10)(c) of the Act. From the submissions made by the learned Authorized Representative, it is seen that the appellant firm has developed a residential housing project namely 'Pratham Vista' which consisted of 103 Residential Units and from the details furnished, it is also seen that all the residential units developed by the appellant firm under the scheme 'Pratham Vista' are below the prescribed built up area of 1500 sft.

3.3.4. As regards the 55 Residential units referred to in the assessment order the Appellant has furnished the following documents to show that the scheme 'Pratham Meadows' was developed by the appellant's associate concern M/s Pratham Properties and they do not form part of the housing project developed by the appellant. Appellant filed various documents which consist of Copy of Brochure of 'Pratham Meadows' developed by Pratham Properties and Copy of Development Agreement entered into between the Land Owners and Pratham Properties on which 'Pratham Meadows' scheme is developed by Pratham Properties. The Appellant has also stated that M/s Pratham Properties is assessed to income tax under PAN AAHFP5012C and has furnished copies of the said firm's return of income filed for A.Y. 2010-11, 2011-12 and 2012-13 together with audited accounts for the year ended 31.03.2010, 31.03.2011 and 31.03.2012. A separate profit & loss account has also been furnished in respect of 'Pratham Meadows' scheme of Pratham Properties to show that the entire expenditure for the project is incurred by Pratham Properties and the income on sale of residential units also forms a part of profit & loss account of Pratham Properties. It is also brought to my notice that all these facts are verifiable from the assessment order passed by the Assessing Officer u/s 143(3) of the Act in respect of A.Y. 2008-09. During the course of assessment proceedings in that case, the Assessing Officer noted that the partners of the firm are very reputed builders and developers in the real estate business in the market of Baroda. The project undertaken is located in fully developed area. The Assessing Officer had made addition in case of Pratham Properties by applying profit ratio declared in the case of M/s. Pratham Developers in which the assessee has claimed deduction u/s. 80 IB(10) and has shown profit on around 30%, whereas in the case of Pratham Properties rate of profit was shown 23.47% (in the case of residential projects) and 36.12% (in the case commercial project). Thus, it can be seen that the issue that the appellant is a separate concern fulfilling the conditions

prescribed u/s 80IB(10) of the Act and the profit of the residential units which do not qualify the conditions, is shown in a separate business entity namely M/s Pratham Properties. The addition made by the Assessing Officer in the case of M/s Pratham Properties was confirmed by me vide order dated 16.01.2014 in Appeal No. CAB/11-159/08-09 wherein it was held as under:

I have considered the submissions of the learned Authorized Representative and the order of the Assessing Officer. The contention of the Ld. Authorized Representative that the profit rate of M/s. Pratham Developers in which the assessee has claimed deduction u/s. 80 IB(10) and has shown profit on around 30% cannot be applied, is without any basis. AO has made the estimation of profit on the basis of assessee's own sister concern which is building projects in almost same vicinity. Appellant has not been able to demonstrate in any manner that how the profit rate in his case should be lower than the neighboring projects. The assessee was asked for the explanation why the profit in the case where claim u/s. 80 IB(10) is higher rate of profit as compared to the project undertaken as shown 23.47% in the case of residential projects and 36.12% in the case commercial project. The only argument of the assessee is that it is due to differential rate of land of the project under taken and different projects undertaken in which deduction u/s. 80 IB of the Act. The cost of construction is almost same. The assessee has submitted statement of cost of residential and commercial project from which it was observed that the cost of construction including land in the case of residential project is 671.51 and selling price of per unit per sq.ft is 877.47. Whereas, in the commercial project the total cost is Rs.751.06 sq.ft and selling rate is 1175.69. the Assessing Officer has rightly contended that the assessee has shown cost of construction of residential at Rs.671.51 and cost of construction of commercial unit as 751.06. Normally in the case of Flats, the different type of amenities to be provided whereas in the case of commercial shops no such amenities required to be provided. In the shops, three walls with shutter are to be provided and therefore, the cost of construction of the shop should be less than the cost of construction of flats. In view of above the Assessing Officer held that the assessee has not satisfactorily cost of construction, selling rate comparing with his other projects in which deduction u/s. 80 IB(10) claimed. He therefore, estimate profit of residential unit at 30% as against 23.47% shown by the assessee and in the case of commercial 40% as against 36.11%. the Assessing Officer accordingly made addition of Rs.10,83,700/- i.e. Rs.5,22,000/- in respect of commercial units sold (40-36.12% on sales of Rs.1,34,47,287/-) and addition of Rs.5,61,700 in respect of residential units sold (30-23.47% on sales of Rs.86,04,400). Considering the total facts, it is held that the action of AO does not call for any interference and the addition made by him is confirmed.

3.3.5. From the order of assessment as well as from above observations, it transpires that the issue of separate taxability of profit earned from the residential units of 'Pratham Meadows' was considered by the Assessing Officer in case of assessment of M/s Pratham Properties. Incidentally, the Assessing Officer of both the assesseees is the same. From the examination of the evidence furnished by the Appellant and in view of the submissions that revenues in respect of the scheme Pratham Vistas are accounted for by the appellant and that of 'Pratham Meadows' is accounted for by M/s Pratham Properties, I hold that Pratham Meadows consisting of 55 residential units is a separate project developed by another assessee and further hold that the Appellant firm is entitled to deduction under section 80IB(10) in respect of the 103 residential units in 'Pratham Vista' project which fulfils the criteria prescribed as to the size of the plot, the built up area of each residential unit being of less than 1500 sq.ft.

3.3.6. The Appellant has alternatively submitted that in the event, it is held that the two projects are inseparable, then proportionate deduction under section 80IB(10) be allowed keeping in view of the various decisions brought to my knowledge by the Authorized Representative of the appellant, in particular, ACIT Vs Bengal Ambuja Housing Development Ltd., ITA 1735/KOL-205, Saroj Sales Organization vs. ITO 115 TTJ 485 (Mumbai), Johar Hassan Zozwalla (ITA No 5404/Mum/2008) and other judicial pronouncements.

3.3.7. Hon'ble Madras High Court in case of CIT Vs Sanghvi and Doshi Enterprise [2013] 255 CTR 156 (Mad.) held that:

"36. This leaves us with the last question on proportionality, which was considered by us in T.C.(A)Nos.1348 and 1349 of 2007 dated 18.10.2012. Though the assessee had complied with the extent of built-up area as per clause (c) and the assessee is entitled to have the benefit of deduction under Section 80IB of the Income Tax Act, since the Tribunal had remanded the portion of the built-up area for verification before the Assessing Officer and a factual enquiry has to be made thereon as to whether the built-up area is in fact 1500 sq.ft. or more than that, we do not think that the Revenue could have any serious objection on this aspect. In the circumstances, we confirm the order of the Tribunal on the remand portion."

3.3.8. The Ld. Authorized Representative for the appellant has also relied upon the decision of Madras High Court in case of Viswas Promoters (P.) Ltd. Vs CIT [2013] 255 CTR 149 (Mad.) wherein it has been held that each residential block in a housing project is a 'housing project' in itself for purpose of claiming deduction u/s. 80IB(10) of the Act. It has been held by the High Court that the proportionate deduction has to be allowed to the assessee in respect of the units which fulfill the eligibility conditions. Ratio of these two decisions as well as decisions in cases of Bengal Ambuja Housing Development Ltd., ITA 1735/KOL.-205 and Saroj Sales Organization Vs ITO 115 TTJ 485 (Mumbai), are also in favour of the Appellant. However, in view of my finding that the two projects are distinct projects being developed by two different persons, I find no reason to comment on this argument. As a result, the ground taken by the Appellant is allowed and Assessing Officer is directed to allow deduction u/s 80IB(10) on profits relatable to the residential units of 'Pratham Vista' which are below the prescribed built up area of 1500 sft."

After considering the decision of the Honøble High Court of Gujarat in the case of Radhe Developer as elaborated above in the findings of the Id. CIT(A) and development of 55 residential units by the another assessee M/s. Pratham Properties, we do not find any infirmity in the decision of the Id. CIT(A). Therefore, we do not find any merit in the appeal of the Revenue. Accordingly, all the grounds of appeal filed by the revenue are dismissed.

8. The revenue has raised following grounds of appeal:-

ITA No. 2192/Ahd/2015

"1. On the facts and circumstances of the case and in law, whether the Ld. CIT(A) was correct in allowing relief of Rs.33863776/- u/s. 80IB by holding that the project of the assessee Pratham Vistas complies with the conditions prescribed for built up area of 1500 sq. ft. whereas the actual fact shows is that the assessee has failed to fulfill the essential condition of not constructing residential units exceeding 1500 sq. ft. ?

2. (a) The Ld. GIT (A) has erred in holding that in Pratham Residency, Pratham Vatika and Pratham Vistas, assessee has exploited the project land to the maximum keeping in view the various legal and regulatory impediments and the assessee firm had sufficient reasons for not being able to fully utilize the FSI in project.

(b) While allowing relief on this issue, the Ld. CIT(A) has ignored the fact that the only the profits which are derived from development and construction of housing units are eligible for benefit u/s.

80IB(10) and not the profits which are attributable to the FSI that was sold as such without developing and constructing.”

Ground No. 2(a) & (b) of ITA No. 2192/Ahd/2015, Ground no. 2 of 2769/Ahd/2015, Ground No. 1 of 283/Ahd/2017, Ground No. 1 to 4 of of ITA 2673/Ahd/2015, Ground No. 1 to 6 of ITA No. 3086/Ahd/2016 and Ground No. 4 of ITA No. 2673/Ahd/2015

9. As the facts in all the above mentioned grounds of appeals are similar, so, Ground No. 2(a) & (b) of ITA No. 2192/Ahd/2015 is taken as lead case and its finding will be applicable to Ground no. 2 of 2769/Ahd/2015, Ground No. 1 of ITA 283/Ahd/2017, Ground No. 1 to 6 of ITA No. 3086/Ahd/2016 and Ground No. 4 of ITA No. 2673/Ahd/2015.

10. During the course of assessment, the assessing officer noticed that the assessee has carried out construction activities on the land without fully utilizing the permissible FSI (Floor Space Index). It is further stated that assessee firm has carried out only partial construction of the available FSI/Entire plot of land available for development with the assessee firm and the assessee firm has claimed deduction u/s. 80IB(10) of the act also on the profit earned from sale of unutilized FSI of the housing project. The assessing officer has stated that deduction u/s. 80IB(10) of the act in respect of profit earned on sale of unutilized FSI on which no construction under taken was not available. The assessing officer has referred the decision of Hon~~o~~ble Gujarat High Court of Gujarat in the case of Moon Star developer vide Tax Appeal of 148 of 2008. The assessing officer has restricted the deduction u/s. 80IB(10) of the act claimed by assessee to the extent of profit earned on construction work carried on utilized FSI only and the proportion profit earned on sale of un-utilized FSI to the extent of Rs. 6798955/- was

disallowed. The assessing officer has calculated the FSI of un-utilized FSI as under:-

Particulars	Pratham residency	Pratham Citadel	Pratham Vatika	Pratham Vistas
Cost of land	32904790	229578597	190526528	32240022
Total area (sq. mt.)	48634	17745	21120	23625
Actual utilized FSI (sq. int.)	32280	9139	13588	14070
Un-utilized FSI(sq. mt.)	16354	8606	7532	9555
Project Profit for the year as per Profit & Loss Account				
	105061541	2442916	83266296	33863776
Less: Profit allowed on Civil Construction @15%	15759231	366437	12489944	5079566
Balance profit	89302310	2076479	70776352	28784210
Ratio of unutilized FSI to total FSI	34%	48 %	36%	40%
Profit attributable to utilized FSI	59272907	1069425	45535467	17142596
Profit attributable to unutilized FSI	30029403	1007054	25240884	11641614

Addition: - Rs. 6,79,18,955/-

11. Aggrieved assessee has filed appeal before the ld. CIT(A). The ld. CIT(A) has placed reliance the decision of Hon'ble Gujarat High Court in the case of Shreenath Infrastructure (2014) taxman 461 (Guj) has allowed the appeal of the assessee excluding the project Pratham Citadel. The relevant addition of part of the decision of ld. CIT(A) is reproduced as under:-

“4.3.1 I have considered the submissions made by the Authorized representative and have gone through the orders of CIT (A)-II, Baroda for A.Y. 2006-07, the order of the Hon'ble ITAT, Ahmedabad in ITA No.2183/Ahd/2010 & ITA No. 3300/Ahd/2009 for A.Ys. 2006-07 & 2007-08. From the order of the Hon'ble ITAT, Ahmedabad, I find that they have followed the decision of Hon'ble Co-ordinate Bench in the case of Radhe Developers & Ors. V. ITO & Ors. (2008) 113 TTJ 300 (Ahd.) and dismissed the revenue's appeal. However, subsequent to the decision of ITAT, Ahmedabad in the case of Radhe Developers & Ors. (supra),

Hon'ble High Court of Gujarat in the case of CIT-1 V. Moon Star Developers [2014] 367 ITR 621 (Guj.) have considered the decision of Radhe Developers & Ors. (supra) and have given the following findings:

"..... However, in cases where the utilization of FSI is way short of the permissible area of construction, looking to the scheme of Section 80IB(10) of the Act and the purpose of granting deduction on the income from development of housing projects envisaged there under, bifurcation of such profits arising out of such activity and that arising out of the net sell of FSI must be resorted to...."

Nowhere in the order of the Hon'ble ITAT, Ahmedabad, I find that the issue regarding under utilization of FSI is discussed at length. The Hon'ble ITAT has followed the decision of the Hon'ble Co-ordinate Bench in the case of Radhe Developers & Ors. The decision of Radhe Developers & Ors. is overruled by the decision of Moon Star Developers (supra) and, therefore, I do not find any merit in holding that the issue regarding under utilization of FSI was duly considered in the earlier years and that it is a matter which is covered by the order of the Hon'ble ITAT in appellant's own case.

*4.3.2. On merits of the case, the Authorized Representative has made -further submissions before me regarding the reasons why the full FSI could not utilized in the four projects. This was particularly in light of the Gujarat High Court's pronouncements in the case of **Shreentath Infrastructure (Tax Appeal No. 147 of 2014 with Tax Appeal No. 148 of 2014)** wherein, the Hon'ble High Court while referring to the case of **Moon Star Developers (Supra)** has remarked as under:*

*"Marginal underutilization of FSI certainly cannot be a ground for rejecting the claim under section 80IB(10) of the Act. **Even if there has been considerable underutilization, if the assessee can point out any special grounds why the FSI could not be fully utilized, such as, height restriction because of special zone, passing of high tension electric wires overhead, or any such similar grounds to justify underutilization, the case may stand on a different footing.**"*

In the same judgment, in the conclusion the High Court has stated:

*"In the present case, the facts are somewhat different. The assessee, in the process of developing two housing projects, had utilized 9595.64 sq.m of build-able area against the maximum permissible area of 13004 sq.m and in other cases, put up construction of 5997.28 sq.m against maximum permissible construction on 8127.75 sq.m. Underutilization, if at all was in the marginal range of 25% to 30%. **As held by this Court in case of Moon Star Developers [supra] every case of even marginal underutilization of FSI would not be hit by disallowance of deduction under Section 80IB of the Act.**"*

(Emphasis supplied)

4.3.3. The Id. Authorized Representative has drawn my attention to the various factors which a Developer keeps in mind while demarking, designing and laying out plot of land in a housing project. In his written submission it is stated:

"Your honour will appreciate that when a developer demarcates a plot of land for housing projects, the following issues are always kept in mind:

a. There is a standardized design for the housing unit with almost all the houses having a standard ground floor(built up) area.

b. The developer has to meet the regulations for common plot - generally 10% of the land area with restrictions on dimensions (Minimum size of the common plot shall be 250 sq.mts. with no side less than 10.50 meters.) and road width (7.5metres.). The arrangement of ownership tenement in a plot, shall be as may be approved by the Authority with due regard to internal approach roads, marginal open spaces common plot, water supply, drainage, and internal road lighting.

c. Where the land is evenly shaped, the area of common plot can be restricted to the legal requirement, however in case of land with uneven shapes, higher area may be required for the common plots and roads as it will not be possible to fit the maximum number of standardized houses in the given land.

d. The developer also has to keep the requirement of margins for individual houses from the plot edge. In case of public roads (those which are not a part of the project roads) there are requirements for distance of construction line from the center of the road. For example, where the developer incorporates a naliya road (called a village road basically meant for drainage of rain water) into a road as a part of the housing scheme, the requirement in the GDCR is that no construction can be made up to a distance of six meters from the center of the naliya road. Similarly where an overhead high tension electricity line passes, no construction is permitted up to a distance of 17.5 meters from the center of such line.

e. The developer tries to fit in the maximum number of housing units in the remaining area which is plotted for the individual houses. The ground coverage for the houses is kept to the maximum

permissible in law. However, issues like architectural aesthetics and marketability of the houses, sometimes concessions have to be made.

f. In the various projects undertaken during the year by the appellant the ground coverage is as under:

Project Name	No. of Residential Units	of Available Ground floor coverage	Actual Ground floor coverage	Utilization%
Ahmedabad Pratham Vatika	100	' 7604	7283	96
Pratham Residency	285	19021	14037	74
Pratham Citadel	66	6647	5675	85
Pratham Vistas	103	8859	6716	76

4.3.4. Keeping in view the above facts, Ld. Authorized Representative

-as brought to my notice various reasons for lower utilization of FSI in each project and has explained in detail the reasons for marginal underutilization of FSI in respect of all the projects which are discussed in subsequent para. Ld. Authorized Representative has also made further submissions as under :-

"3.1. During the course of the last hearing, we had brought to your honour's kind notice project wise reasons for under-utilization of FSI in .the various projects undertaken by them.. We had demonstrated before your honour scheme wise details and the various reasons as to why FSI could not be utilized in full. It was brought to your honour's kind notice that there were various Impediments and limiting factors such as passing of high tension electric line, naliya road, odd shape of the plots and various construction restrictions by regulators etc. etc., and we had demonstrated before your honour scheme wise reasons in respect of the utilization of FSI. These have now been tabulated to show the details of the plot wise variation- and their effect on the overall project. Your Honour will appreciate from the charts in respect of the various schemes viz. Pratham Residency, Pratham Citadel, Pratham Vatika Ahmedabad and Pratham Vistas regarding the loss in constructible area on account of the various factors stated. In the said charts, the plot wise details are furnished and from which a deduction on account of the impediments stated is mad. A summary of the variations is given at the end of the charts. Your Honour will kindly observe the following from the enclosed charts:"

The project wise analysis of available FSI vis-a-vis utilized FSI is discussed in below para :-

A. Pratham Residency:

6.1. Authorized Representative has submitted that the project Pratham Residency is constructed on Block Nos. 418, 422, 424 and 425 of Village Kapurai. The project consists of 285 units classified as Manor and Villas. Manors have a built up area of 1043.67 square feet and Villas have a built up area of 1278.87 square feet. The four blocks of land, while they had a squarish srape independently, they were so positioned that the total area for the project esulted in three differently sized squarish shapes joined with each other -esulting in a very odd shape for the project. This odd shape resulted in nooks and crannies and keeping in mind the need to keep the required Common Plot and the 7.5 meter wide roads, the maximum number of residential units which could be fitted in the plot came to 285. After the project drawings was approved a Town Planning Scheme No. 40, demarcating the final plot/s for the project was announced. According to the revised TP Scheme there was substantial delineation which has affected the plot size of a number of plots. Examples are:

1. Straightening of the boundary between Plot No. 261 and 268 which reduces the area of individual plots in the section..
2. Similarly, the size of Plot Nos. 175 to 179 has also reduced by demarcating of fresh Final Plot Line.
3. Similarly, bulge between Plot Nos. 46, 47, 48 & 49 has been straightened with a result that the plot area available to those unit holders is reduced.

4. Similarly, there is a straightening of the line on the east of the project, where, Plot Nos. 80 & 81 have been pruned.

5. It will not be out of place to state here that a portion of the common plot of the society shown as common plot No. 3 in the brochure has been proposed to be taken over for reservation for residential purpose by the Municipal Corporation. This will result in reduction of the area of the entire project.

6. Similarly, the main common plot and the club house to the South of the project has been earmarked as public garden

The effect of items 5 and 6 would be that the total area available for the project would reduce substantially and also the individual plots mentioned would be curtailed in size.

7. Further, a 12 meter road is proposed to join the main society road. This has the effect of reducing the plot size of plot numbers 194A, &195.

8. A part of plots 196 & 197 will be pruned as there is a proposed residential scheme for EWS category of people on the adjacent plot and there is straightening of the boundaries Subsequently, Town Planning Scheme was announced and certain portion of the plot were cut. This has affected many plots in the scheme.

6.2. In addition to this, the Authorized Representative has brought on record detailed explanations as to why full utilization of FSI was not possible on as many as fifty four plots because of their odd shapes, being corner plots, because of disputes with adjacent landowner and the necessary margins on account of the roads. The Authorized Representative has also furnished plot wise and project-wise summary of plot size, special reasons for underutilization of FSI as enunciated in the case of Shreenath infrastructure (supra). This summary is placed as Annexure 'A' of the paper book and from that it transpires that Gross FSI available with the appellant is 48614 Sqm, whereas, total 3427 Sqm is to be reduced considering special reasons forcing underutilization of FSI and this included town planning restriction, irregular shape of particular plots and disputes with others. Considering these special reasons, available FSI remains 43301.89 Sqm, whereas, FSI utilized in this project is 32279 Sqm. This is verifiable from the plot-wise details submitted by the Authorized Representative along with copies of maps and approved plans of the project which were furnished by the Appellant before the Assessing Officer also for verification.

6.3. During the appeal before me Ld. Authorized Representative has made further submission in respect of Pratham Residency project as under :-

"As against the total plot area of 30490.49 square metres, the variation in respect of the plots which are covered by the reasons for under utilization is 3426.81 square metres. This leaves balance plot area of 27063.68 square metres. The FSI available on the same works out to 43301.89 square metres, as against this the actual utilization of FSI in Pratham Residency project is 32279.28 square metres, i.e. **utilization is 75% of the available FSI**. Your honour will kindly appreciate that the under-utilization was in the marginal range of 25% to 30%. The judgment of the Hon. Gujarat High Court in the case of Shreenath Developers would apply to the facts of this project and therefore the marginal under utilization would not be hit by disallowance of deduction U/s 80B(10) of the Act."

6.4. In view of the various reasons cited and the explanations given above, I agree with the AR that the Appellant had exploited the project land to the maximum keeping in mind the various legal and regulatory impediments and that the Appellant had sufficient reasons for not being able to fully utilize the FSI in the project. Hon'ble Gujarat High Court in the case of **Moon Star Developers (Supra)** has considered utilization of FSI up to 65% as reasonable. However, later on Hon'ble Gujarat High Court in the case of **Shreenath infrastructure (supra)** has allowed deduction on account of special reasons for underutilization of FSI and after considering the same, FSI utilization becomes ,75% as mentioned by the Ld. Authorized Representative in above para. Therefore, keeping in mind this decision of **Shreenath infrastructure (supra)**, I hold that the profits from the **Pratham Residency** project are fully eligible for deduction under section 80B(10) of the Income Tax Act, 1961. The AO is accordingly directed to allow the deduction under the said section as claimed by the appellant

B. Pratham Vatika (Ahmedabad):-

7.1. Ld. Authorized Representative has submitted that **Pratham Vatika (Ahmedabad)** project is constructed on land at Block Nos. 801 & 804 of Village Ghuma, Daskroi which was situated within the Ahmedabad Urban Development area. The project consists of 100 units on a total plot area of 18792.99 square meters and according to the AUDA (Ahmedabad Urban Development Authority) provision, a 12 meter by road is required across the entire project as main road. Authorized Representative has further contended that from the enclosed brochure, it can be seen that the project is constructed on 2 plots which are joined by narrow strip of 31.5 meter, therefore, according to the road regulation, after leaving the road across the project, only 19.5 meter was remaining on the eastern plot on the southern side and within the constrains the project was

developed. It is argued by the Authorized Representative that the ground floor (Built up area) utilized is as high as 96%.

7.2. It is further submitted before me that there is a major public road to the west of the Project which necessitated higher margins and, therefore, the common plot and the common facilities (club house, swimming pool etc.) had to be kept on that side. It is also submitted that almost all the building in the project are quadruplicate units i.e. they are conjoined back to back as well as side to side. The only exception are plot Nos. 1, 10 & 11 where because of the common plot odd shape has come across leaving space constructing only 3 units there. The row 42 to 51 and 93 to 100 are twin units i.e. conjoined side to side. This is because of the space constraints. Similarly, plot Nos. 52 to 62 are twin units conjoined from side to side because of the space limitation.

7.3. The Authorized Representative has also furnished plot wise and project-wise summary of plot size, special reasons for underutilization of FSI as enunciated in the case of Shreenath infrastructure (supra). This summary is placed as Annexure 'B' of the paper book and from that it transpires that Gross FSI available with the appellant is 21,120 Sqm and total 1221 Sqm is to be reduced considering special reasons forcing underutilization of FSI and this -eluded town planning restriction, irregular shape of particular plots and layout of the project. Considering these special reasons, available FSI remains 17,843 Sqm whereas FSI Utilised in this project is 13,588.04 Sqm. This is verifiable from the plot-wise details submitted by the Authorized Representative along with copies of maps and approved plans of the project which were furnished by the Appellant before the Assessing Officer also for verification.

7.3. During the appeal before me Ld. Authorized Representative has made further submission as under :-

"As against the total plot area of 11173.27 square metres the variation in respect of the plots which are covered by the reasons for under utilization is 1260.74 square metres which leaves balance plot area of 9912.53 square metres The FSI available on the same works out to 17842.55 square metres as against this the actual utilization of FSI in Pratham Vatika Ahmedabad project is 13588.04 square metres, i.e. **utilization is 76% of the available FSI.** Your honour will kindly appreciate that the under-utilization was in the marginal range of 25% to 30%. The judgment of the Hon. Gujarat High Court in the case of Shreenath Developers would apply to the facts of this project and therefore the marginal under-utilization would not be hit by disallowance of deduction U/s 80B(10) of the Act."

7.4. In view of the various reasons cited and the explanations given above, I agree with the AR that the Appellant had exploited the project land to the maximum keeping in mind the various legal and regulatory impediments and that the Appellant had sufficient reasons for not being able to fully utilize the FSI in the project. Hon'ble Gujarat High Court in the case of **Moon Star Developers (Supra)** has considered utilization of FSI up to 65% as reasonable. However, later on Hon'ble Gujarat High Court in the case of **Shreenath infrastructure (supra)** has allowed deduction due to special reasons for underutilization of FSI and after considering the same FSI utilization becomes "6% as mentioned by the Ld. Authorized Representative in above para. Therefore, keeping in mind this decision of Shreenath infrastructure (supra), I hold that the profits from the Pratham Vatika (Ahmedabad) project are fully eligible for deduction under section 80B(10) of the Income Tax Act, 1961. The Assessing Officer is accordingly directed to allow the deduction under the said section as claimed by the appellant.

C. Pratham Vistas:-

8.1. Ld. Authorized Representative has submitted that Pratham Vistas is a project which has been executed on land bearing Block Nos. 1740, 1746 and 1757 (Part) of Village Bhaili, District Vadodara. The project consists of 103 units of various sizes. The defect in the plot is that towards south west, of the plot there is 220KV high tension electricity power line passing and towards the south of the plot in the middle there is a naliya road which extends almost 8,0 meter inside the project. As per the guidelines, a margin of 17.5 meter from the center of the high tension line is required to be kept before any construction work can be done.

8.2. It is also contended before me that there is a legal requirement that no construction is permitted up to a distance of 6 meters from the center of the naliya (drain) road line. On examination of the site plan furnished which shows that the developer of the project had to realign main road leading into the project with 7.5 meter road so as to avail the best possible constructive area. Eight plots are affected by these margin requirements. While most of the residential units are twin units, there are four plots on the edge of the project which are single units in view of the fact that there was insufficient place to place a twin unit. There is one single unit on the side of the high tension electricity line. There are three other units where extra land was available because of the odd shape of the plot. In spite of these facts, it is seen that in **Pratham Vistas Scheme**, the ground coverage utilization is 76%.

8.3. The Authorized Representative has also submitted that the project is designed with three parallel roads of 7.5 meters width and the entrance road of 7.5 meters incorporating the naliya road and if, in order to use more ground floor coverage, another row of houses was to be inserted, the same would not have been

possible without flouting the margin requirements. Thus, Ld. Authorized Representative has brought on record detailed explanations as to why full utilization of FSI was not possible in this project. The Authorized Representative has also furnished plot wise and project-wise summary of plot size, special reasons for underutilization of FSI as enunciated in the case of **Shreenath infrastructure (supra)**. This summary is placed as Annexure 'C' of the paper book and from that it transpires that Gross FSI available with the appellant is **23,625 Sqm**, whereas, total **2,165 Sqm** is to be reduced considering special reasons forcing underutilization of FSI and this included town planning restriction, irregular shape of particular plots and naliya road. Considering these special reasons, available FSI remains **20,161 Sqm**, whereas, FSI utilized in this project is **14,071 Sqm**. This is tabulated by the appellant as under:

8.4. During the appeal before me Ld. Authorized Representative has made further submission as under:-

"As against the total plot area of 14765.75 square metres the variation in respect of the plots which are covered by the reasons for under utilization is 2164.95 square metres which leaves balance plot area of 12600.80 square metres The FSI available on the same works out to 20161.28 square metres as

against this the actual utilization of FSI in Pratham Vista project is 14070.65 square metres, i.e. **utilization is 70% of the available FSI**. Your honour will kindly appreciate that the under-utilization was in the marginal range of 25% to 30%. The judgment of the Hon. Gujarat High Court in the case of Shreenath Developers would apply to the facts of this project and therefore the marginal under-utilization would not be hit by disallowance of deduction U/s 80B(10) of the Act."

8.5. In view of the various reasons cited and the explanations given above, I agree with the Authorized Representative that the Appellant had exploited the project land to the maximum keeping in mind the various legal and regulatory impediments like the existence of the high tension electricity line passing on the plot and the naliya road necessitating higher margins. I am of the opinion that the Appellant had sufficient reasons for not being able to fully utilize the FSI in the project. Hon'ble Gujarat High Court in the case of **Moon Star Developers (Supra)** has considered utilization of FSI up to 65% as reasonable. However, later on Hon'ble Gujarat High Court in the case of **Shreenath infrastructure (supra)** has allowed deduction due to special reasons for underutilization of FSI and after considering the same FSI utilization becomes 70% as mentioned by the Ld. Authorized Representative in above para. Therefore, keeping in mind this decision of **Shreenath infrastructure (supra)**, I hold that the profits from the **Pratham Residency** project are fully eligible for deduction under section 80B(10) of the Income Tax Act, 1961. The Assessing Officer is accordingly directed to allow the deduction under the said section as claimed by the appellant.

In view of the aforesaid discussion, the Assessing Officer is directed to delete the addition made on account of the profit attributable to unutilized FSI of Rs.3,00,39,403/- for **Pratham Residency** project, Rs.2,52,40,884 for **Pratham Vatika (AKmedabad)** project and Rs.1,16,41,614/- for **Pratham Vistas** project and allow the deduction u/s 80B(10) in respect of the three Projects as claimed by the appellant

D. Pratham Citadel:-

9.1. As regards Pratham Citadel, it was stated before me that as per the building permission granted in respect of the project dated 29.03.2007, there is a condition in clause 4 under special condition which states as under (fair translation) :-

"Clause 4: This land is included in the Town Planning Scheme and accordingly construction of plot numbers C-14, B-32 to 34, C-65 and D-66 are located outside the final plot. The construction of the said building can be commenced only after the receipt of the possession of the final plot and for the purpose necessary renewal/revised permission shall have to be obtained."

It was also explained that there was a dispute as to the ownership of land demarcated for plots 32 to 34 and land adjacent to plot 43 and no construction was possible.

9.2. It was also stated that vide letter dated 29.12.2012, the Town Planning Officer (TPO) has intimated that the original final plot of 14805 square meters has been reduced to 14061 square meters.

9.3. Similarly, during the course of the hearing, it was explained to me that the entire row of houses on the northern side of the project was facing a public road with higher margin requirements. It was also pointed out that the northern and southern sides of the project land were not parallel resulting in an odd shape which necessitated leaving more space for corner plots.

9.4. The regulations regarding laying down of the road has also played a very important role in putting up the number of units. It was explained that If against the regulatory margin an additional margin of 2.5 meter was to be given to the residential units. Had this not been done, unutilized land of 6 to 7 meter width would have been left where no construction could have been done. This would have ultimately resulted in huge waste of land on which no construction would have been permitted.

9.5. It was explained that Plot nos. 14, 32, 33 34, 65 and 66 were included in the town planning scheme and accordingly construction can be commenced only after receipt of possession of Final Plot. In the building construction permission a condition was laid down whereby the revised permission was to be obtained.

9.6. It was explained that Plot Nos 43, 55, 56, 62, 63 and 64, were plots of odd shape and were at the edge of the Project and therefore it was not possible to put up additional units/ additional construction and were, therefore, required to be kept open. From the plot wise summary of the project furnished by the Authorized Representative, it is tabulated as under:-

Scheme	Total Land area of Plots in Sq.mtr	Excess Plot Area in view of limitations	Balance Land area	FSIon Balance land	Actual Utilization ofFSI	Utilization %
Pratham Citadel	11,163	751	10,412	16,658	9,139.00	55%

9.7. I have gone through the details of the Project and also the various explanations given to me during the course of the appeal proceedings. From the representations it is seen that Pratham Citadel Scheme consisted of 66 Residential Units on Plot Area of 11163 Sq Mtrs. According to the Ld. Authorized Representative, as per the Town Planning Scheme, plot numbers 14, 32, 33 34, 65 and 66 were getting affected in so far as the construction of the same was concerned and that a revised/renewal permission was required to commence construction on the said Plots. In case of plot Nos 43, 55, 56, 62, 63 and 64, it is submitted that the same are at the edge of the project and the shape of the plots are odd and in view of the shape of the plot of the entire project, the plot Nos 43, 55, 56, 62, 63 and 64 were different in size as compared to the rest of the plots. I do not find merit in the submissions made before me in respect of the plots listed supra and hold that though, the plots suffered from deficiencies and there were reasons for underutilization of FSI. It is seen that FSI utilization falls short of marginal underutilization as discussed in the case of Gujarat high Court's decision in the case of Shreenath Infrastructure (Supra). In the assessment order the Assessing Officer has computed the profit attributable to unutilized FSI in respect of Pratham Citadel project of the Appellant at Rs.10,07,054/- for the entire project. The Authorized Representative has contended that in view of above mentioned facts, the Profit attributable to unutilized FSI in respect of Pratham Citadel Project has to be restricted to 54 Plots and the disallowance in respect of the Profit attributable to Unutilized FSI for Pratham Citadel Project be calculated as under:-

	No of Units	Land Area Sqm	FSI Sqm
Total Project	66	11163	17745
Less:	12	2545	4073
	54	8618	13672

[As against the FSI available of 13,672 Sqm, the appellant has utilized FSI f 7,479 SQM, therefore, underutilization of FSI is worked out at 6,193 Sqm i.e., 30%]. However, during the appeal before me Ld. Authorized Representative has made further submission as under:-

"As against the total plot area of 11162.54 square metres the variation in respect of the plots which are covered by the reasons for under utilization is 750.98 square metres which leaves balance plot area of 10411.56 square metres The FSI available on the same works out to 16658.50 square metres as against this the actual utilization of FSI in Pratham Citadel project is 9139 square metres i.e. **utilization is 55%% of the available FSI**. Your honour will kindly appreciate that this is a case of under utilization and was in the marginal range keeping in view the various regulatory restrictions. The judgment of the Hon. Gujarat High Court in the case of Shreenath Developers would apply to the facts of this project and therefore the marginal under utilization would not be hit by disallowance of deduction U/s 808(10) of the Act."

Thus, after considering the special circumstances (viz. various regulatory restrictions), the underutilization of FSI is worked out at 6,193 Sqm i.e., 45.30% which is otherwise as high as 55% as admitted by the Ld. Authorized Representative above. This is definitely very high considering the benchmark propounded by the Hon'ble Gujarat High Court in the case of **Moon Star Developers (Supra)**. Even after considering special circumstances (viz. various regulatory restrictions), as propounded by later decision of Hon'ble Gujarat High Court in the case of **Shreenath Infrastructure (Supra)** the underutilization of FSI is

*worked out at 6,193 Sqm i.e., 45.30%, which in my mind, does not entitle the Appellant any relief and, therefore, disallowance on account of underutilization of FSI as calculated by the Assessing Officer at Rs.10,07,054/- in respect of **Pratham Citadel** is upheld and this ground of appeal is dismissed.”*

12. During the course of appellate proceedings before us, the Id. counsel has referred the decision of Hon^{ble} High Court in the case of Shreenath Developer supra and he has also submitted that CIT(A) has incorrectly disallowed the claim of deduction for the project Pratham Citadel without considering the circumstances under which the assessee was not in a position to utilize the non-utilized FSI of the project. On the other hand, Id. departmental representative has supported the order of assessing officer and in respect of Pratham Citadel he has supported the order of Id. CIT(A).

13. We have heard both the sides and perused the material on record carefully. We have gone through the aforesaid mentioned finding of Id. CIT(A). It is noticed that the Id. CIT(A) has considered the different circumstances in respect of different projects mentioned by the assessee i.e. land demarcated for road, deduction in the size of plot, shape of the plot etc. We have further noticed that Id. CIT(A) has considered the decision of Hon^{ble} Jurisdictional High court in the case Shreenath Infrastructure. In this decision, the Hon^{ble} High Court has also referred the para 31 of the earlier decision given in the case of Moon Star Developers which is reproduced as under:-

“31. It is true that section 80IB(10) of the Act does not provide that for deduction, the undertaking must utilize 100% of the FSI available. The question however is, can an undertaking utilize only a small portion of the available area for construction, sell the property leaving ample scope for the purchaser to carry on further construction on his own and claim full deduction under section 80IB(10) of the Act on the profit earned on sale of the property? If this concept is accepted, in a given case, an assessee may put up construction of only 100 sq. ft. on the entire area of one acre of plot and sell the same to a single purchaser and claim full deduction on the profit arising out of such sale under section 80IB(10) of the Act. Surely, this cannot be stated to be development of a housing project qualifying for deduction under section 80IB(10) of the Act. This is not to suggest that for claiming deduction under section 80IB (10) of the Act, invariably in all cases, the assessee must utilize the full FSI and any shortage in such utilization would invite wrath of the claim under section 80IB(10). being rejected. The question is where does one draw the line. In our opinion, the issue has to be seen from case to case basis. Marginal underutilization of FSI certainly cannot be a

ground for rejecting the claim under section 80IB(10) of the Act. "Even if there has been considerable underutilization. if the assessee can point out any special grounds why the FSI could not be fully utilized, such as, height restriction because of special zone, passing of high tension electric wires overhead, or any such similar grounds to justify under utilization, the case may stand on a different footing. However, in cases where the utilization of FSI is way short of the permissible area of construction, looking to the scheme of section 80IB(10) of the Act and the purpose of granting deduction on the income from development of housing projects envisaged thereunder, bifurcation of such profits arising out of such activity and that arising out of the net sell of FSI must be resorted to. In the present case, none of the assessees have made any special ground for non-utilization of the FSI."

In the light of the above fact and findings, we observed that the Id. CIT(A) is justified in allowing the appeal of the assessee for deduction in respect of unutilized FSI except Pratham Citadel after taking into consideration the special grounds and circumstances as elaborated supra in his findings. Therefore, we do not find any merit in the this ground of appeal of the revenue and the same are dismissed. Considering the similar facts and circumstances, ground of appeal vide ITA 3086/Ahd/2016 is partly allowed as per finding of Id. CIT(A) given above except the claim of 80IB(10) in respect of un-utilized FSI from the project claimed Pratham Citadel. In respect of Project 1. Pratham Vatika (Ahmedabad), 2. Pratham Vistas and 3. Pratham Residency in assessment year 2011-12 and all the above projects in assessment year 2012-13 including Pratham Srushti on similar facts and circumstances, Id. CIT(A) has allowed deduction due to special reasons for underutilization of FSI as enunciated in the case of Shreenath Infrastructure. In view of the above facts and circumstances, we do not find any infirmity in the decision of the Ld. CIT(A) pertaining to assessment year 2011-12 and assessment year 2012-13. Considering the similar facts facts and circumstances, the claim of 80IB(10) for assessment year 2010-11 in respect of project Pratham Residency, Pratham Vatika, Pratham Vistas and Pratham Shrusti except Pratham Citedal are also allowed as per the ground of appeal of the assessee vide ITA No. 3086/Ahd/2016 for assessment year 2010-11.

14. In respect of project Pratham Citedal on which the Id. CIT(A) has disallowed the claim of the assessee u/s. 80IB(10) deduction in respect of utilization of FSI, we observe that in this case the assessee has shown very less area of utilization of FSI. It is noticed that total un-utilization of FSI was worked out at 45.30% which was quite high therefore the Id. CIT(A) has disallowed the claim of the assessee. In this connection, the assessee has contended that special circumstances for un-utilization was not considered and no specific findings on the same was given as laid down in the decision of Shreenath Developer of Gujarat High Court. We observe that assessing officer and CIT(A) has not controverted the special circumstances/grounds for less utilization of FSI as mentioned on page 65 to 66 on the order of the Id. CIT(A) as per the findings of the Honøble High Court of Gujarat given in the above cited judgment. In the light of the above facts and finding, we are of the view that it will be appropriate to restore this issue of claim of 80IB(10) deduction of un-utilized FSI in respect of project Pratham Citedal to the file of assessing officer for deciding afresh after examination and verification of the detail to be furnished by the assessee. Therefore, this ground of appeal of assessee is allowed for statistical purposes.

ITA No. 1533/Ahd/2015, A.Y. 2010-11

15. The brief fact of the case is that assessee has filed return of income declaring total income at Rs. nil on 13th October, 2010. The assessment u/s. 143(3) of the act was finalized on 4th April, 2012 determining the total income at Rs. 77568760/- after disallowing of Rs. 76158914/- u/s. 80IB(10) of the act of Pratham Vistas project of the assessee and Rs. 1409847/- on

account of claim of other income as deduction u/s. 80IB(10) of the act. Subsequently, the Id. PCIT-Baroda-1 has found that the assessing officer has not examined the issue of profitability on account of sale of un-utilized FSI while finalizing the assessment u/s. 143(3) of the act. Therefore, the PCIT has issued a notice u/s. 263(1) of the act on 22nd January, 2015 in which the detail issue of non-examination of profitability relating to un-utilized FSI by the assessing officer was brought to the notice of the assessee and reply of the assessee was called. In response to notice u/s. 263(1) by the PCIT, the assessee filed detail and information in respect of un-utilized FSI vide letter dated 16th Feb, 2015. In the reply, the assessee has given the detail of the different projects and cited different reasons for not fully utilizing of FSI in the different projects. After considering the submission of the assessee and material on record, the PCIT has concluded that the assessing officer has not examined this issue while finalizing assessment, therefore, Id. PCIT has set aside the issue to the file of the assessing officer to be framed afresh after giving assessee opportunity of being heard.

16. We have heard the rival contentions and perused the material on record. The assessment u/s. 143(3) of the act was completed on 04-02-2012. The assessing officer has disallowed the claim of deduction u/s. 80IB(10) of the act to the amount of Rs. 77568761/- on account of the following reasons:-

- (i) The assessee was not the sole owner of the land on which the project was constructed.
- (ii) In respect of Prathma Vistas Project, the approval of the Housing Project consisting of 158 residential units of which the built up

area of 55 residential units exceeds the prescribed limit of 1500 sq. fts.

- (iii) Exclusion of other income to the amount of Rs. 17,13,580/- for the claim of 80IB(10) deduction

We have also considered the number of judicial pronouncements referred by the ld. counsel in the index of case law, however he has mainly made reference to the facts of this case to the following two decisions of the Honøble Jurisdictional High of Gujarat on the issue of profitability on sale of un-utilized FSI

- (i) CIT vs. Moon Star Developes (2014) 367 ITR 62 (Guj)

- (ii) CIT vs. Shreenath Infrastructure (2014) Taxmann 461 (Gu)

In the case of the Moon Star Developers wherein held that the marginal under-utilization of FSI certainly cannot be a ground for rejecting the claim under section 80IB(10) of the act. In the subsequent decision of the Honøble Gujarat in the case of CIT vs. Shreenath Infrastructure after referring the aforesaid earlier decision it is mentioned that even if there has been considerable under-utilization if the assessee can point out any special ground why the FSI could not be fully utilized such as height restriction because of special zone, passing of high tension electric wires overhead or any such similar grounds to justify underutilization, the case may stand on different footing. On perusal of the assessment order, it is noticed that the assessing officer has not examined the issue of profitability relating to sale of unutilized FSI in respect of which no construction was undertaken. We have also gone through the paper book furnished by the assessee containing the details of information furnished before the assessing officer and CIT(A). It is observed that the assessing officer has issued notice u/s. 143(2) of the

act on 2-1-2002, reply by the assessee to the notice vide letter dated 18-1-2012, further submission to the assessing officer dated 20-03-2012, notice of the assessing officer dated 13-2-2012, reply to the notice dated 20-03-2012. However we observe that assessing officer has not examined the matter pertaining to the profit derived by the assessee from sale of unutilized FSI. Therefore, the Id. PCIT-1 Vadodara has issued a notice u/s. 263(1) of the act on 22-01-2015 in respect of taxability of profit on sale of un-utilized FSI in respect of taxability of profit on sale of un-utilized FSI in respect of which no construction was undertaken. After considering the submission of the assessee, the Ld. PCIT has held that the assessing officer not re-examined the issue while finalizing the assessment relating to profit in respect of un-utilized FSI. The Id. PCIT has held that the facts of the case of the assessee were identical to the facts of the case of Moon Star Developers, therefore, the assessee was not entitled for deduction u/s. 80IB(10) on un-utilized FSI, therefore, the order u/s. 143(3) was set aside to be framed afresh. We find that assessee has submitted detail in response to notice u/s. 263 placed at page no. 67 to 195 of the paper book furnished during the course of appellate proceedings before us, but we observe that these specific information pertaining to unutilized sale for FSI area was not furnished before the assessing officer during the course of assessment proceedings. Therefore, we are of the view that these specific details were required to be examined by the assessing officer and the Id. PCIT has rightly held in his order u/s. 263 that matter was set aside to the assessing officer to provide opportunity to the assessee to prove its contentions. After considering the aforesaid fact and legal finding, we observe that the assessing officer has not examined the issue of under-utilization of the FSI in the case of the assessee according to

the directions of the Honøble High Court of Gujarat laid down in the above cited judicial pronouncements, therefore, the issue to be examined by the assessing officer according to the directions of Honøble High Court in the referred cases.

In the light of the above facts and circumstances, we observe that the impugned issue was not examined while finalizing the assessment therefore the order of the assessing officer was erroneous as well as prejudicial to the interest of the revenue. We therefore uphold the order of the Id. Pr. CIT. Therefore, all the grounds of appeal from 1 to 10 are dismissed.

C.O. No. 158/Ahd/2015

17. The assessee has filed cross objection against the decision of Id. CIT(A)-5, Baroda in confirming the disallowance made by the assessing officer for deduction u/s. 80IB(10) in respect of profit of Rs. 10,07,054/- of the Pratham Citadel Project.

18. Regarding project named Pratham Citadel, it was noticed that un-utilization of FSI was at very high rate as 55% , therefore, considering the decision of Honøble Gujarat High Court in the case of Moon Star Developer supra and the later decision of Honøble Gujarat High Court in the case of Shreenath Infrastructure supra, the Id. CIT(A) held that assessee was not entitled for relief because of higher rate of un-utilized FSI in this project.

19. We have heard the rival contentions and perused the material on record. The issue regarding disallowance of deduction u/s. 80IB(10) of the act on account of higher percentage of under-utilization of FSI in the case of Pratham Citadel has already been discussed vide ITA No. 2192/Ahd/2015.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलालय आधिकरण,
अहमदाबाद