

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM**

**आयकरअपीलसं./ITA Nos.2102 to 2104/AHD/2016**

**(निर्धारणवर्ष / Assessment Years: (2010-11 to 2012-13)**

**(Physical Court Hearing)**

M/s. Jay Kesar Bhavani Developers Pvt. Ltd., A-48, Kesar Kunj, Shri Bhulabhai Desai Marg, Laxmikant Ashram Road, Katargam, Surat.	<b>Vs.</b>	The ITO, Ward-1(1)(3), Surat.
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AABCJ6278P</b>		
<b>(Assessee)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	Shri Sapnesh Seth, CA
<b>Respondent by</b>	Shri J. K. Chandani, SR. DR
<b>Date of Hearing</b>	05/05/2022
<b>Date of Pronouncement</b>	13/07/2022

**आदेश / ORDER**

**PER DR. A. L. SAINI, AM:**

Captioned three appeals filed by assessee, pertaining to Assessment Years (AY) 2010-11 to 2012-13, are directed against the separate orders passed by the Learned Commissioner of Income Tax (Appeals)-4, Surat (in short “ld. CIT(A)”) in Appeal No.CAS/4/TFR/160/13-14, 194 & 486/14-15, all dated 18.05.2016 which in turn arise out of separate assessment orders passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”).

2. Since the issue involved in these three appeals, are common and identical, therefore these appeals are clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity. The facts as well as grounds narrated in ITA No.2102/AHD/2016 for AY.2010-11, are considered for deciding these appeals *en masse*.

3. Grounds of appeal raised by the assessee in lead case in ITA No. 2102/AHD/2016 for AY.2010-11 are as follows:

*“1. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income Tax (Appeals) has erred in confirming the action of assessing officer of passing order u/s 143(3) of the Act served on 03.04.2013 upon the assessee beyond the statutory time limit prescribed u/s 153(1)(a) of the Act which is thus bad in law, illegal, void ab initio and without jurisdiction and hence, the assessment is liable to be annulled.*

*2. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income Tax (Appeals) has erred in confirming the action of assessing officer in disallowing deduction claimed u/s 80IB(10) of the IT. Act amounting to Rs. 44,85,887/-.*

*3. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income Tax (Appeals) has erred in confirming the action of assessing officer of making addition of entire development and/ or construction receipts of Rs. 69,06,611/- as alleged unrecorded receipts.*

*4. It is therefore prayed that above addition made by assessing officer and confirmed by Commissioner of Income-tax (Appeals) may please be deleted.*

*5. Assessee craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”*

4. So far ground no.1 is concerned, Learned Counsel for the assessee submits that order passed by the Assessing officer under section 143(3) of the Act, dated 31.03.2013, is beyond the statutory time limit prescribed under section 153 of the Act, as the assessment order was served on the assessee on 03.04.2013, therefore assessment proceedings initiated under section 143(3) of the Act should be annulled.

5. On the other hand, Learned Departmental Representative (Ld.DR) for the Revenue pleads that assessee has not proved that assessment order passed under section 143(3) of the Act dated 31.03.2013, was served on the assessee on 03.04.2013. The assessing officer passed order on 31.03.2013, which is within the statutory time limit prescribed under section 153 of the Act. Just to say that the assessment order was passed beyond the statutory time limit is not sufficient, the assessee has to prove with documentary evidences that assessment order passed under section 143(3) of the Act dated 31.03.2013 is beyond statutory time limit

prescribed under section 153 of the Act. Since the assessee has failed to prove the fact that order passed by the Assessing Officer under section 143(3) of the Act is beyond the statutory time limit, therefore contention of the Id Counsel should not be accepted.

6. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with assessment order. We note that Ld. Counsel for the assessee did not prove with cogent evidence that assessment order passed under section 143(3), dated 31.03.2013, is beyond the statutory time limit prescribed under the Act. We note that in assessee's case the assessment year under consideration is A.Y. 2010-11. For assessment year (AY) 2010-11, the Assessing Officer is supposed to frame assessment order within two years from the end of the assessment year, which ends on 31.03.2013. We note that Assessing Officer passed the order u/s 143(3) on 31.03.2013, which is within the statutory time limit prescribed under section 153 of the Act. The Ld. Counsel did not furnish any evidence to demonstrate that the order under section 143(3) was passed beyond the statutory limit. The assessment order passed under section 143(3) of the Act dated 31.03.2013, was served on the assessee, on 03.04.2013, that does not mean that order was passed on 03.04.2013. The service of assessment order on the assessee is a different thing altogether. Therefore, we dismiss the ground no.1 raised by the assessee.

7. Ground No.2 raised by the assessee relates to disallowance of deduction claimed by the assessee under section 80IB(10) of the Act, amounting to Rs.44,85,887/-. This is a common ground in all three appeals of the assessee (that is, in ITA Nos.2102 to 2104/Ahd/2016), which is related to rejection of assessee's claim under section 80IB(10) of the Act. Therefore, we adjudicate said common ground No.2 by taking lead case in ITA No.2102/Ahd/2016.

8. Succinct facts qua common ground No.2 are that during the year under consideration, the assessee is engaged in the business of construction of residential houses. The assessee company has shown gross receipts of Rs.11,33,57,647/- and

gross profit at Rs.2,48,65,246/- which is @ 21.94%. The assessee company has claimed deduction of Rs.44,85,887/- u/s 80IB(10) of the Act. In assessee's case, survey u/s133A of the Act was conducted on 30.12.2009 by DDIT Wing, Surat. During the course of assessment proceedings, the books of account have been produced by assessee and assessing officer had verified them. On verification of the details furnished by the assessee company, it was noticed by AO that assessee has sold out more than one units to persons as specified under clause (f) to the section 80IB(10) of the Act. Unit No. A-115, A-116 and A-117 were sold out to Shri Arvindbhai Hirabhai Patel, Smt. Manjulaben Hirabhai Patel and Smt. Manjulaben Arvindbhai Patel and Unit No. A-110 and A-111 were sold out to Hasmukhbhai S. Patel during the F.Y.2009-10. As per the said clause, deduction u/s 80IB(10) of the Act is allowable only if not more than one unit is allotted "in the project" to a person and his/her spouse and minor child. Therefore, assessing officer asked the assessee to furnish the explanation. In response, the assessee submitted its reply on 26.03.2012 which is reproduced by the assessing officer in para no.4 of the assessment order.

9. The assessing officer having gone through the submission of the assessee observed that assessee company is not eligible to claim deduction under section 80IB(10) of the Act for the following reasons:

(1) In the instant clause of section 80IB(10) of the Act, it has been mentioned that "in the project" not more than one units can be allotted to a person. The clause (f) to section 80IB(10) of the Act is very clear, it implies that:

*"Section 80IB(10)(f): in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons namely:-*

- (i) the individual or the spouse or the minor children of such individual*
- (ii) the Hindu undivided family in which such individual is the karta,*

*(iii) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta."*

The Id AO then cited the judgment of Hon`ble Supreme Court, in the case of B. M. Bhattacharjee v/s. Russel Estate Corp. AIR 1993 SC 1621, 1634, wherein it was held that the meaning of allotment has to be sale registration of the property. So, the plea of the assessee company that the units were allotted prior to 01.04.2009 but sale deeds were executed in the current year is of no use. Since the assessee has treated the sale, only on the registration, then it has to be taken as allotted in the current year only.

(II) Apart from that, during the appellate proceedings for A.Y. 2009-10, the assessee company has submitted supplementary agreement dated 22.10.2008, to establish that it is an undertaking engaged in developing and building housing projects. The Id.CIT(A)-1, Surat, while deciding the appeal for A.Y. 2009-10 has opined in paras 6.2 to 6.4 of the order dated 01.02.2013 as under:

*"The assessee further stated that built up area of each unit is not more than 1500 Sq. feet. The supplementary Development Agreement dated 22.10.2008 (clause-12) is relied upon by the assessee company to establish that it is an undertaking engaged in developing & building, housing projects. The relevant para reproduced by the assessee on page-4 of its submission dated 27.11.2011 addressed to the Assessing Officer is reproduced herein under:-*

*"This supplementary Deed is one of the part of registered Development Deed Regi. On 20.04.2007 at Sub-Registrar Office, Bardoli Book No.1, Regi. No. 1046.*

*Mr. Nitin Gopal Rana, owner of the said land has given Development rights to M/s. Jay Kesar Bhavani Development (p) Ltd. Mr. Nitin Gopal Rana shall sell open plots of land to any intending purchaser with a condition that the purchaser shall make the construction of row houses through M/s Jay Kesar Bhavani Developers (P) Ltd only and purchaser shall abide by the same condition. The developer shall be required to deal with the intending purchaser of the units till the stage of physical possession:....."*

*The assessee's contention has been examined. The first undisputed fact is that the Housing Project was approved the Local Authority on 09.07.2008 i.e. F.Y. 2008-09 and not F.Y. 2007-08 as claimed by the assessee. Therefore, the assessee's claim fails to meet the basic condition of section 80IB(10) i.e. project should have approved before 31<sup>st</sup> March 2008. Moreover, the agreement dated 22.10.2008*

*made with the landlord also pertains to F.Y. 2008-09. The original agreement dated 20.04.2007 is basically an agreement for purchase of land.*

*As per the Supplementary Agreement, dated 22.10.2008 plots shall be sold to the purchaser/s and the purchaser/s will get the construction work done by the assessee. Therefore, the Assessing Officer's observation that the assessee-company is a "Construction Contractor" is correct and deduction u/s. 80IB(10) of the Act is not allowable. Moreover, the return of income in this case has been filed on 08.10.2009. The assessee has not furnished any evidence regarding extension of due date of filing of return. In view of the above facts, the first ground of appeal is decided against the assessee and addition made by the Assessing Officer is confirmed. "*

10. Assessing officer thus also relied upon the order of the Id.CIT(A)-1, Surat. Therefore, assessing officer, based on the above facts disallowed the deduction of Rs.44,85,887/- claimed by assessee u/s.80IB(10) of the Act.

11. On appeal, Id CIT(A) confirmed the action of the assessing officer. The Id CIT(A) held that assessee's claim fails to meet the basic condition of section 80IB(10) i.e. the project should have approved before 31<sup>st</sup> March 2008. Moreover, the agreement dated 22.10.2008 made with the landlord also pertains to F.Y. 2008-09. The original agreement dated 20.04.2007 is basically an agreement for purchase of land. The Id CIT(A) also observed that assessee company is a 'Construction Contractor' therefore not eligible for deduction u/s 80IB(10) of the Act. Aggrieved, by the order of Id CIT(A), the assessee is in further appeal before us.

12. Shri Sapnesh Seth, Learned Counsel for the assessee submitted that assessee is bearing the risk and rewards of the project and submitted supplementary Agreement, dated 22.10.2008, stating that plots shall be sold to the purchasers and the purchasers will get the construction work done by the assessee. Therefore, Id Counsel contended that assessee's claim is genuine and assessee is entitled to claim deduction under section 80IB(10) of the Act, therefore deduction should be allowed to the assessee.

13. On the other hand, Ld DR for the Revenue pleads that assessee has failed to satisfy the conditions laid down under section 80IB(10) of the Act. The assessee is not bearing the risk/right of profits/losses. The original owner of land would have

the right to sell the developed plots, therefore assessee- company is a 'Construction Contractor' and therefore not entitled to claim deduction u/s 80IB(10) of the Act.

14. The Id DR also pointed out that letter dated 09.07.2008 of Nagar Niyojan (town planner), Surat Branch has not been examined by the Assessing Officer. It is also not clear whether Bardoli Nagarpalika is competent authority to give the permission or whether Nagar Niyojan, town planner, Surat Branch is competent authority to sanction the development plan. Therefore, he submits that the issue should be remitted back to the file of the Assessing officer to examine whether Bardoli Nagarpalika is competent authority or Nagar Niyojan (town planner), Surat Branch, is a competent authority to sanction the assessee's project to be eligible under section 80IB(10) of the Act.

15. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. CIT(A) and other material brought on record. Before us, Id Counsel submitted a letter dated 03.05.2007 of Bardoli Nagarpalika, which is paced at paper book page no.1. The Id Counsel also submitted letter dated 09.07.2008 of Nagar Niyojan (town planner), Surat Branch, which is placed at paper book page nos. 2 to 3. The Id. DR for the Revenue submitted that letter dated 09.07.2008 of Nagar Niyojan (town planer- Surat Branch) has not been examined by the Assessing Officer. It is also not clear whether Bardoli Nagarpalika is competent authority to give the permission or whether Nagar Niyojan, (town planner), Surat Branch is competent authority to sanction the development plan. Therefore, We are of the view that the issue should be remitted back to the file of the Assessing officer to examine whether Bardoli Nagarpalika is competent authority or Nagar Niyojan (town planner), Surat Branch is a competent authority to sanction the assessee's project to be eligible under section 80IB(10) of the Act.

16. It is no doubt true that in all cases in which a receipt is sought to be taxed as income, the burden lies on the Department to prove that it is within the taxing provision and if a receipt is in the nature of income, the burden of proving that it is

not taxable because it falls within exemption provided by the Act lies upon the assessee. The assessee is claiming deduction under section 80IB(10) of the Act therefore, he has to satisfy conditions mentioned in section 80IB(10) of the Act. At this juncture, it is appropriate to cite the landmark judgment of Hon`ble Supreme Court in the case of Commissioner of Customs (Import), vs M/S. Dilip Kumar And Company, Civil appeal No.3327 of 2007, dated 30 July, 2018, wherein it was held that:

*“52. To sum up, we answer the reference holding as under*

*(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*

*(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject, assessee and it must be interpreted in favour of the revenue.*

*(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export Case (supra) stand overruled.”*

17. In the light of the above facts and circumstances, we note that assessee company has violated the basic conditions as laid down under sec. 80IB(10) of the Act. At the cost of repetition, we reproduce the brief objections of assessing officer:

*“a) The assessee cannot be considered an undertaking, developing and / building housing projects. The plots have been purchased by buyers and after that it has entered into Construction Contracts with the buyers of plots.*

*b) The built - up area of the construction work has not been mentioned in the Construction Agreement and the size/s of open plots is/are as under:-*

<i>Plot Number</i>	<i>Area in ( Sq. Feet)</i>
<i>1</i>	<i>2170</i>
<i>2</i>	<i>2170</i>
<i>3</i>	<i>2170</i>
<i>4</i>	<i>2170</i>
<i>6</i>	<i>1997.50</i>
<i>7</i>	<i>3215.90</i>
<i>10</i>	<i>1925</i>
<i>11</i>	<i>1925</i>
<i>12</i>	<i>1890</i>

*Also unit No. A-136 has plot area of 1620 Sq Ft.”*

18. Thus, we note that assessee company has not fulfilled the conditions of section 80IB(10) of the Act. However, we note that assessee has submitted before us a letter dated 03.05.2007 of Bardoli Nagarpalika, which is placed at paper book page no.1 and also submitted letter dated 09.07.2008 of Nagar Niyojan (town planner), Surat Branch, which is placed at paper book page nos. 2 to 3, these papers were not examined by the assessing officer. Therefore, we remit this issue back to the file of the assessing officer to adjudicate the issue afresh. The assessee is also directed to submit relevant evidences and documents to prove its claim of deduction under section 80IB(10) of the Act. Therefore, statistical purposes, ground no.2 raised by the assessee is allowed.

19. In the result, Ground No.2 raised by the assessee in ITA No. 2102/AHD/2016 for AY.2010-11 and Ground No.1 raised by the assessee in ITA Nos. 2103 to 2104/AHD/2016 for AYs.2011-12 to 2012-13 are allowed for statistical purposes.

20. Ground No.3 raised by the assessee relates to addition of development/construction receipts of Rs.69,06,611/- as alleged unrecorded receipts.

21. At the outset, Ld. Counsel submitted that ground no.3 raised by the assessee is covered by the judgment of the Co-ordinate Bench in assessee's own case in ITA No. 1196/Ahd/2013 dated 13.02.2020 wherein the Co-ordinate Bench held as follows:

*“13. In the light of above discussion, and respectfully following the judgments of Hon`ble Jurisdictional High Court as discussed above and also of Tribunal, we of the considered opinion that Ld. CIT (A) was not justified in confirming the addition of entire on-money receipts amounting to Rs.4,72,02,368. Therefore, only estimated net profit is required to be taxed. We find that the assessee has shown net profit at 4.55.% for the assessment year under consideration and 4.59% for A.Y. 2010-11. Further, the Hon`ble High Court in the case of CIT V. Abhishek Corporation (supra) has upheld the net profit at 1.31% as declared by the assessee in that case. The net profit rate disclosed at 4.55% during the assessment year under consideration by the assessee in books of accounts and considering the facts that the project undertaken by the assessee comes under deduction of section 80IB(10) of the Act, hence, there may not be any intention to*

*disclose the lower rate of profit. Considering these facts, and taking in to account net profit in construction business, it would be reasonable to estimate 6% of net profit on total on-money receipts of Rs.4,72,02,368. Accordingly, the AO is directed to tax net profit @6% on total on-money receipts of Rs.4,72,02,368. In view of these facts and circumstances, the Ground No. 4 to 6 of appeal are partly allowed.”*

22. We note that as the issue is squarely covered in assessee’s own case wherein the Co-ordinate Bench held that it would be reasonable to estimate 6% on net profit on total on-money receipts. We note that addition of development/construction receipts of Rs.69,06,611/- was made by the assessing officer, treating it alleged unrecorded receipts/on-money. Accordingly, Assessing officer is directed to estimate 6% of net profit on total on-money/unrecorded receipts of Rs.69,06,611/-. Therefore, ground no.3 raised by the assessee is partly allowed.

Registry is directed to place one copy of this order in all appeals folder / case file(s).

Order is pronounced in the open court on 13/07/2022 by placing the result on the Notice Board as per Rule 34(5) of the Income Tax (Appellate Tribunal) Rule 1963.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

Surat

दिनांक/ Date: 13/07/2022

**SAMANTA**

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS  
ITAT, Surat