आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL INDORE BENCH, INDORE

BEFORE MS. MADHUMITA ROY, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.597/Ind/2016 - Assessment Year: 2010-11

M/s. Balajee Sterling Builders, Bhopal	**बनाम/ Vs.**	DCIT-1(1), Bhopal
(Appellant / Assessee)		(Respondent/ Revenue)

ITA No.692/Ind/2018 - Assessment Year: 2011-12

M/s. Balajee Sterling Builders, Bhopal	**बनाम/ Vs.**	ITO-1(1), Bhopal
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAHFB9110B		
Assessee by	Shri Jayesh Doshi, AR	
Revenue by	Shri Harshit Bari, Sr. DR	
Date of Hearing	16.06.2022	
Date of Pronouncement	10.08.2022	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

1. These are the two appeals filed by assessee. ITA No. 597/Ind/2016 is against the order dated 10.02.2016 of learned Commissioner of Income-Tax (Appeals)-31, New Delhi, Camp Bhopal for assessment-year 2010-11 and ITA No. 692/Ind/2018 is against the order dated 06.06.2018 of learned

Commissioner of Income-Tax (Appeals)-1, Bhopal for assessment-year 2011-12, which in turn arise out of the respective orders of assessment passed for those respective assessment-years by respective assessing officers **["Ld. AO"]** u/s 143(3) of the Income-tax Act, 1961 **["the Act"]**.

2. The assessee has raised following grounds:

ITANo.597/Ind/2016:

I.

1. The Learned CIT (A) erred in not allowing deduction u/s 80IB(10) of the Income Tax Act, 1961 claimed at Rs. 21,47,409/-.

2. Further, He failed to appreciate and ought to have held that

a. In view of the facts of the case, the Appellant is Developer and Builder not a works contractor.

b. To claim deduction u/s 80IB(10), it is not necessary for the Builder & Developer to own the land as long as all other condition as prescribed u/s 80IB(10) of the Income Tax Act, 1961 are complied with.

c. In view of the written submission made before Ld. CIT(A), only a single building and layout permission was granted by the Town and Country Planning Department, Bhopal Municipal Corporation vide their letter dated 20/12/2006 and construction was carried out accordingly.

d. In view of the facts that the Appellant has invested substantially and conceived the whole project and has taken entrepreneurial risk and hence the Appellant is a developer not a contractor.

3. In view of the above facts &circumstances of the case, the Appellant prays that he be allowed deduction of Rs. 21,47,409/- claimed u/s 801B(10) of the Income Tax Act, 1961.

II. On the facts and in the circumstances of the case,

the Assessing Officer has erred in charging interest u/s 234A, 234B and 234C.

III. The Appellant craves leave to add, amend, alter or delete any of the grounds as may be required in the nature and circumstance of the case.

IV. The Appellant prays leave to adduce such further evidence to substantiate its case the occasion may demand."

ITA No. 692/Ind/2018:

"I.
1. The Learned CIT(A) erred in not allowing deduction u/s 80IB(10) of the Income Tax Act, 1961 claimed at Rs. 1,38,578/-.

2. Further, He failed to appreciate and ought to have held that

a. ***In view of the facts of the case, the Appellant is Developer and Builder not a works contractor.***

b. ***To claim deduction u/s 80IB(10), it is not necessary for the Builder & Developer to own the land as long as all other condition as prescribed u/s 80IB(10) of the Income Tax Act, 1961 are complied with.***

c. ***In view of the facts that the Appellant has invested substantially and conceived the whole project and has taken entrepreneurial risk and hence the Appellant is a developer not a contractor.***

3. In view of the above facts & circumstances of the case, the Appellant prays that he be allowed deduction of Rs. 1,38,578/- claimed u/s 801B(10) of the Income Tax Act, 1961.

II. On the facts and in the circumstances of the case, the Assessing Officer has erred in charging interest u/s 234A, 234B and 234C.

III. The Appellant craves leave to add, amend, alter or delete any of the grounds as may be required in the nature and circumstance of the case.

IV. The Appellant prays leave to adduce such further evidence to substantiate its case the occasion may demand."

3. Since both of these appeals involve identical issues except the difference of figures, they were heard together and are being disposed of by this common order. For the sake of convenience, ITA No. 597/Ind/2016 for assessment-year 2010-11 is taken as a lead-matter but the findings and conclusions shall apply *mutadis mutandis* to ITA No. 692/Ind/2018 for assessment-year 2011-12.

GROUND No. I:

4. The issue involved in these Grounds is the allowability of deduction u/s 80-IB(10).

5. The assessee is a company claiming to be engaged in developing and building housing projects. It developed a project named 'Sterling Hills View' at Chuna Bhatti, Bhopal and claimed deduction of Rs. 21,47,409/- u/s 80IB(10) in respect of the income from project. But the Ld. AO disallowed deduction by observing as under:

"5. On perusal of details filed on record, it is seen that:

- ***The assessee firm is not the owner of the land on which the impugned housing project was constructed. As per details filed on record, the land belong to Shri Narendra Kumar Jajoria & others.***
- ***Building permission in respect of individual plot was issued by the Municipal Corporation Bhopal.***
- ***On perusal of copy of 'agreement to sell' and 'registered sale deed of plot' in respect of duplex no. 10 of the impugned housing project filed on record, it is seen that the registry of plot was executed on 09/06/2008 in favor of buyer for a sum of Rs. 6,50,000/-. The total sale price of above duplex [including construction consideration] amounted to Rs. 20,43,000/-. Thus, it is apparent that the buyer of the plot has become absolute owner of the plot on 09/06/2008 and the assessee firm has received a***

consideration of Rs. 13,93,000/-for construction work.

From the above facts, it is apparent that:

- ***The assessee is not undertaking development and construction of housing project. The assessee is neither the owner nor the seller of the land on which project is claimed to have been undertaken.***
- ***The assessee is merely acting as a contractor to the customers to whom land has been sold.***
- ***No registry whatsoever is being made for the construction work done by the assessee. No new residential property is being constructed or transferred by the assessee as per books of account of the assessee.***

In view of above, the assessee firm is not found eligible for the claim of deduction u/s 80IB(l0). Accordingly, claim of the assessee firm of deduction u/s 80IB(l0) of the Act amounting to Rs. 21,47,409/- is disallowed and added to the total income of the assessee firm."

6. Being aggrieved by the disallowance made by Ld. AO, the assesse filed appeal to Ld. CIT(A).

7. Before Ld. CIT(A), the assessee made following submissions as reproduced by Ld. CIT(A) in Para No. 4.2 of his order:

"3. The brief facts relevant to the issue at hand are as under. The appellant firm filed return of income on 10.10.2010, showing total income of Rs. 23,11,670/- after claiming deduction u/s 80IB(10) amounting to Rs 21,47,409/-. During the year the appellant carried out work on the project titled as 'Sterling Hill View', in Chunabhatti Bhopal. This project consists of 21 Duplex residential units. The assessing officer disallowed the deduction claimed, on the grounds that the appellant firm had acted as a contractor in this project and not as a developer, which is an essential ingredient for claiming deduction u/s 80IB(10). The assessing officer arrived at this conclusion based on the following three contentions.

a) The appellant firm was not the owner of the land on which the project was constructed.

b) Building permission in respect of individual plots was issued by the Bhopal Municipal Corporation.

c) The agreement to sell and registered sale deed of the plot shows that the registry of plot is separately executed and the balance amount received from the buyer is towards construction of the duplex units.

4. The findings of the assessing officer, and the conclusions drawn by her, may now be considered in the light of the facts as they exist and the law on the subject.

4.1 The first issue raised by the assessing officer is regarding the ownership of land. The land in question, being a plot of land measuring 1.00 acres bearing Khasra No. 4/1/2/2/6/1, had been purchased for Rs. 75,00,000/-, by the appellant firm from Shri Narendra Kumar Jajoriya and others, vide an agreement for sale dated 30.11.2006, along with a general power of attorney. The above agreement was not registered to merely avoid duplication of stamp duty and registration charges, as is the usual practice. However, as per provisions of section 53A of the Transfer of Property Act, the appellant firm was clearly the owner of the land. Hence the assessing officer erred in her belief that the appellant firm was not the owner of the land. (Copy of the agreement dated 30.11.2006 is enclosed as Annexure 1). Be that as it may, it is submitted that the provisions of section 80IB(10) do not require the developer to be the owners of the land on which the project is developed.

4.2 The second contention of the assessing officer was regarding the building permissions received. The assessing officer has erred in forming an opinion that building permissions have been given individual plot wise. A single building and layout permission was given by the Town and Country Planning Deptt, Bhopal Municipal Corporation vide their letter no L.P 228/29/G.K./BMC/2006 dated 20.12.2006 (Copy of the letter is enclosed as Annexure 2). This permission is for the entire project comprising of 21 units and spread over 1 acre of land as can be seen from the permission itself. However, what the assessing officer failed to understand was that the BMC rules stipulate that pending development of the project, 25% of the plots are mortgaged in favour of the BMC. As the project progresses, the plots are released and building permissions for the same also released, This is evident from the building permission no 439 dated 24.01.07 and BMC letter no 134 dated 14.02.07 (Copies enclosed as Annexure 3 and 4), which clearly states that under the M.P. Municipal Corporation (Colonizer Registration and Regulation) Rules 1998, permission is given to develop the entire project on the concerned 1 acre plot of land, but the development activity on plots mortgaged should not be commenced. Subsequently, as the project progressed, permissions were received for the release and commencement of

work on the mortgaged plots vide permission no 4 dated 2.4.08, permission no 439 dated 8.8.08, permission no 1174 dated 31.3.09 and permission no 783 dated 16.8.11. In fact the Completion Certificate dated 31.3.12 (Copy enclosed as Annexure 5), is also for a single project comprising 21 units. Thus the belief formed by the assessing officer was erroneous. Even otherwise, the provisions of section 801B(10) also pre-suppose permissions being received more than once, as is evident from a plain reading of Expl (i) to section 801B(10) (a).

4.3 The third contention of the assessing officer was regarding separate registration of the proportionate portion of land and non-registration of the construction agreement. As mentioned above the appellant firm had purchased the land in question, although the agreement was not registered and hence the original land owners were required to conveyance the proportionate portion of land. There is no requirement for the construction agreement to be registered either under the State Stamp Duty Rules or the Income Tax Act and the objection of the assessing officer appears baseless. What is apparent is that the appellant firm has received necessary building and layout permissions, the plans and drawings for the residential units have been approved and the dwelling units have been constructed as per the approved plans. The buyers of the dwelling units cannot, and have not, got the houses prepared as per their design, but as per a common approved design prepared by the appellant firm and for which approvals were obtained by it from the concerned authorities. In this connection para 31 page 7097 of the 11th edition of Sampath and Iyengars Law of Income-Tax may be reproduced which succinctly clarifies the issues raised by the assessing officer.

> ***"A developer usually has an agreement of sale of plot in his favour, registering the sale, as an agreement holder holding a power of attorney, in respect of undivided interest to prospective flat owners as and when he concludes contracts with them, while entering into a construction contract with them according to approved plan."***

5. The appellant firm has clearly carried out work on this project as a developer. What distinguishes, it from a contractor is the investment and entrepreneurial risk taken by it. It is the appellant who has taken substantial investment and entrepreneurial risks. It has invested in purchasing land, getting all kinds of approvals, payment of fees thereon, payment of charges for change of land use, getting designs and plans prepared, etc. On the other hand there is no guarantee that the

project shall take off. There may be problems with the land title or possession, the project may not be successful. The loss shall be that of the appellant. On the other hand the appellant has the right to determine the sale price, and also to obtain loans by mortgaging the land. This indicates that the reward for the risks undertaken are also to go to the appellant. Hence, the appellant clearly is a developer.

The observations of the Third Member Bench of Tribunal in the case of B.T. Patii & Sons Belgaum Canst Pvt Ltd vs. ACIT Kohlapur in ITA's No 1408 and 1409/PN/2003 dated 26.10.2009, are also relevant in the context of provisions of section 80IB(10). In this order the tribunal expanded on the meaning of the words developer and contractor, wherein they have stated that

> ***"the developer is a person who designs and creates new products. He may execute the entire project himself or assign some parts of it to others. On the contrary the contractor is one who is assigned a particular job to be accomplished on behalf of the developer. When the person acting as a developer, who designs the project, also executes the construction work he works in the capacity of a contractor too. But when he assigns the job of construction to someone else, he remains the developer simpliciter, whereas the person to whom the job of construction has been assigned becomes the contractor. It is no doubt true that in certain circumstances a developer may also do the work of a contractor, but a mere contractor per se can never be called a developer, who undertakes to do work according to a pre decided plan ".***

6. The above discussion clearly shows that the appellant firm developed the project 'Sterling Hill View' and the project meets all the parameters of section 801B(10) and hence the deduction claimed should not have been disallowed. It is respectfully submitted that the ground of appeal number 1 raised by the appellant firm may kindly be allowed and the addition to the returned income made by the assessing officer on account of disallowance of deduction u/s 80IB(10), amounting to Rs 21,47,409/- may kindly be deleted."

8. The Ld. CIT(A) considered the assessment-order and the submissions of assessee. Finally, he confirmed the disallowance by observing as under:

"4.3 I have carefully considered the findings recorded by the Id. AO as per the impugned order, the position of law and the facts of the case on record and the submission filed by the appellant. As per the provisions of section 80IB(10), deduction is available

in respect of development and building of a housing project. Clause (b) of sub-section (10) of section 80IB prescribes the minimum size of the plot of land for the project; whereas the clause(c) specifies the maximum built up area for the residential unit. Thus, a housing project in order to be eligible for deduction under sub-section 10 of section 80IB, must comprise of residential units viz. flats, bungalows or tenements. The explanation below sub-section 10 inserted by Finance Act, 2009 w.e.f, 01.04.2001 clarifies that the deduction under sub-section 10 of section 80IB is not available to any undertaking which executes the housing project as a works contract awarded by any person. Therefore, whatever may be the dictionary meaning of the term builder and developer, a builder and developer within the meaning of provisions of section 80IB of the Act is one who is executing the housing project on its own and not as a contractor of anybody in order to be eligible for deduction under the said section.

4.4 In view of the above provision of the law, it is very clear in that an enterprise which is developing and building a housing project by itself is eligible for deduction made sub-section 10 of section 80IB; whereas an enterprise which is developing and building a housing project as a works contract is not eligible for such deduction.

4.5 From the facts of the case on record, it appears that initially the appellant was planning to develop and build a housing project for which necessary approvals were obtained; however, in the end only fully developed residential plots have been sold by the appellant, executing a registered sale agreement.

4.5.1 After execution of the sale deed for the land, the appellant entered into a separate written construction agreement with the plot purchaser for construction of building on the said plot. A reading of the agreement clearly shows that it is purely in the nature of a contract for construction and certainly not for the sale of a constructed property. The uniformity of the design of the constructed property does not make it an agreement for sale and it does not matter that the construction as per uniform design has been got approved by the appellant from the concerned authorities. By entering into a construction agreement with the plot purchasers, the appellant has made himself a contractor of the plot purchaser. Thus, there is no sale of residential houses by the appellant in a housing project; rather there is a sale of developed residential plots only. There is not a single instance where a fully constructed property as such was sold by the appellant. Thus, it is clear that the appellant had consciously decided to sell developed residential plots only and

complete the rest of the work as a contractor of the plot owners. As discussed earlier, a deduction u/s 80IB(10) is not available in respect of development of a scheme consisting of residential plots only. If we consider the housing project as a whole it is clear that only the land was developed by the appellant on its own; whereas the construction of the properties under works contracts was subsequently awarded by the plot purchasers. The role of the appellant as developer and builder of the project got over as soon as the residential plots were sold to individual purchasers with all the rights in the plot, where after, the role of the appellant got reduced to only that of a contractor. A contractor of the individual plot owners, who is constructing houses, cannot claim that he is still a developer and builder of the housing project and therefore entitled to claim deduction u/s 80IB(10) of the Act.

4.6 At this point, it is pertinent to note the judgment of Hon'ble Supreme Court in the case of Hindustan Aeronautics Ltd. v. State of Orissa [1989] 55 STC 327 in which it has been observed that in a contract for work, the person producing has no property in the thing produced as a whole, even if part or whole of the material used by him may have been his property earlier. Further, in another judgment of Hon'ble Supreme Court in the case of State of Tamil Nadu v. Anandam Viswanathan [1989] 1 SCC 613, it was held that the nature of contract can be found only when the intention of parties are found out. The fact that in the execution of the works contract some materials are used and the property in the goods so used passes to the other party, the contractor undertaking the work will not necessarily be deemed, on that account, to sell the material.

4.6.1 The words 'developer' and 'contractor' have not been defined in the Act for the purposes of section 80-IB(10). The primary question which arises here is that how to find out the meaning of a word or an expression which is not defined in the Act. It is a settled legal position that ordinarily, the meaning or definition of a word used in one statute cannot per se be imported into another as has been held by Hon'ble Supreme Court in the case of Union of India v. R.C. Jain [1981] 2 SCC 308. Therefore, the meaning of the words developer and contractor from other legislations; be they State or Central enactments; cannot be automatically applied in the present context. In order to ascertain the meaning of a word not defined in the Act, a useful reference can be made to the General Clauses Act, 1897. If a particular word is not defined in the relevant statute, but has been defined in the General Clauses Act, such definition throws ample light for guidance and adoption in the former enactment. According to section 3 of the General Clauses Act, the definitions given in the said Act shall have applicability in

all the Central Acts unless a contrary definition is provided to a particular word or expression. On going through section 3 of the General Clauses Act, it is observed that neither the word 'contractor' nor 'developer' has been defined therein. Thus, the General Clauses Act is also of no assistance in this regard. Going ahead, when these words are neither defined in the Income Tax Act, 1961 nor in the General Clauses Act, next question is as to wherefrom to find the meaning of such words. The answer has been aptly given by the Supreme Court in the case of CWT v.Officer-in-charge (Court of Wards) [1976] 105ITR 133 (SC) in which it was held that the ordinary dictionary meaning of a word cannot be disregarded.

4.6.2 Thus, we fall upon Oxford Advanced learner's Dictionary to find out the meanings. According to this dictionary, a "developer" is a person or company that designs and creates new products, whereas a "contractor" is a person or a Company that has a contract to do work or provides services or goods to another. The New Shorter Oxford Dictionary defines the word "contractor" as "A person who enters into a contract or agreement. Now chiefly spec. a person or firm that undertakes work by contract, especially for building to specified plans". In the light of the meaning ascribed to these words by the dictionaries, it is observed that the developer is a person who designs and creates new products. He is the one who conceives the project. He may execute the entire project himself or assign some parts of it to others. On the contrary the contractor is one who is assigned a particular job to be accomplished on behalf of the developer. His duty is to translate such design into reality. There may, in certain circumstances, be developing in the work of a developer and a contractor, but the line of demarcation between the two is thick and unbreachable. The role of a developer is much larger than that of the contractor. In order to be eligible for deduction, the development should be that of housing project as a whole and not a particular part of it, as was the case in the appeal under consideration

4.7 From the reading of the construction agreement, it is becomes amply clear that the appellant is merely acting as a contractor. It is true that the appellant undertook the development work such as planning and development of the properties etc. but it ended with the development of the land and the main revenue earned by the appellant was in the nature of works contractor by virtue of the written agreements entered into with various plot owners. It is relevant to mention here that on similar facts, Hon'ble ITAT, Indore Bench in the case of Sky Builders &Developers v. ITO 48 SOT 51 (URO) held that where the assessee

sold plots to respective customers by registering a sale deed and thereafter the assessee constructed building at an agreed price, it had to be concluded that the assessee merely acted as building contractor and not as a developer and, therefore, the claim for deduction under section 80-IB(10) could not be allowed.

4.8 Under these circumstances, I am of the considered opinion that it cannot be held that the project as a whole was primarily developed and built by the appellant itself within the meaning of the provisions of section 80-IB of the Act. The plots were sold and then construction was done under the terms and conditions of a separate construction agreement which infect is a works contract and no entrepreneurial and investment risk has been undertaken by the appellant in doing so. In fact, no entrepreneurial and investment risk was under taken by the appellant once the sale of plots in the project was over. The appellant sold the plots to the respective customers by registering a sale-deed where after; it constructed the buildings on an agreed price, merely acting as a building contractor and not as a developer. Therefore, in my considered opinion and placing a reliance on the decision in the case of Sky Builders and Developers (supra), it cannot be held that the appellant is a builder and developer of a housing project within the meaning of the provisions of section 80-IB of the Act; and therefore, it is not entitled for deduction u/s 80-IB(10) in respect of profits derived from the project under consideration. Accordingly, in the view of the above discussion, the ground no. 1 is dismissed."

9. Being aggrieved by order of Ld. CIT(A), the assessee has preferred his appeal and now before us.

10. Ld. AR appearing on behalf of assessee submitted that the Ld. AO has formed a view that the assessee is merely acting as a contractor and the assessee is not a builder and developer and therefore not eligible for deduction u/s 80-IB(10). Ld. AR submitted that the Ld. AO has assigned following reasons for forming such a view:

(i) The assessee is not owner of land on which the project was developed.

(ii) Building permission was issued by Municipal Corporation in respect of each individual plot.

(iii) The Sale-Agreement entered into by the assessee with the ultimate buyer indicates that the buyer has paid two separate considerations, one towards plot and other towards construction. Further the registry of plot was executed in favour of buyer but there is no registration of constructed-structure. These points demonstrate that there is a sale of plot and the assessee has acted as a mere contractor for construction activity.

11. Ld. AR drew our attention to various papers placed in the Paper-Book and submitted following facts to dislodge the objections raised by Ld. AO one by one:

(i) Regarding ownership of land, Ld. AR submitted that the land on which the project was situated is identified as Khasra No. 4/1/2/2/6/1 and consists of an area of 1 acre. The assessee purchased this land for Rs. 75,00,000/- from the original owners Shri Narendra Kumar Jajoriya and Others through a Purchase-Agreement dated 30.11.2006. A copy of the Purchase-Agreement is placed in the Paper-Book. Ld. AR submitted that the Purchase-Agreement was not registered for the sole reason to avoid duplication of stamp-duty, which is a normal practice prevalent in this business. But, however, all conditions of ownership are satisfied, namely (i) the Purchase-Agreement was executed in writing and the same is duly signed by the original owners; (ii) the assessee has paid consideration as agreed; and (iii) the assessee has taken possession. In support, the Ld. AR carried us through the following covenants of the Purchase-Agreement:

> ***"1. That in consideration of a total sum of Rs. 75,00,000.00 (Rupees Seventy Five Lacs Only) to be paid by the purchaser to the sellers, in the manner mentioned hereinafter, most certainly within 21months from the date of this agreement i.e. on or before 01.09.2008, but the said sellers shall transfer their said land mentioned in the schedule hereto to the purchaser free form all encumbrances, charges & demands absolutely and forever immediately after receiving amount of R~.***

15,OO,000.00 (Rupees Fifteen Lacs Only). However it shall be the sole discretion of the purchaser, in case the purchaser wants to delay the date of registry / transfer of title in his name or take an registered power of attorney from the original land owner vide an amendment deed.

2. That the purchaser has satisfied themselves with the title, status, location and condition of the said land under sale and accordingly in terms of the oral agreement reached between the parties, the purchaser in consideration of this agreement has already paid a sum of Rs.15,OO,OOO.OO (Rupees Fifteen Lacs Only) as advance in cheques drawn in favour of the aforesaid sellers.

The sellers mentioned above hereby expressly acknowledge receipt of the aforesaid cheques totaling to Rs. 15,00,000.00 (Rupees Fifteen Lacs Only) as advance against the said total sale consideration mentioned above payable by the purchaser to the sellers,

3. That the sellers hereby declare and undertake that they have a good right, title and interest including full power and absolute authority to enter into this agreement and the purchaser is also expressly assured that the said sellers have not sold or agreed to sell the said land to any other person, The sellers are executing this agreement with their own free will and they hereby confirm that to tile best of their knowledge, there is no court case pending in respect of the said land with the sellers,

4. That in part performance of the contract the sellers have handed over the actual, physical and legal possession of the said land to the purchaser, with an understanding that the purchaser shall now be entitled to develop the said land according to their own choice as permissible, and the said , actual and legal possession is being transferred by the sellers with an express understanding that the purchaser shall be no" entitled to transfer the said land in the form of developed plots, constructed houses / flats to the independent buyers.

5. That the purchaser shall also be entitled to gel land diverted from agriculture to residential, take Nazool NOC, get layout approved from TCP, obtain necessary building permission and development permission from colony cell of Municipal Corporation, Bhopal or any other concerned authorities at their own cost and expenses.

6. That on receipt of all such permissions from the concerned authorities / departments, the purchaser shall be entitled to develop the entire said land mentioned in the schedule hereto as per such plans which may be sanctioned and approved by the concerned authorities, including to divide the said land into plots, construct houses / buildings etc. thereon, at their own cost.

7. That the purchaser as developers shall alone be responsible and liable for completing the said entire project on their own and the sellers shall in no way be responsible or liable for payment of any costs or expenses required for tile said construction project of any other cost relating thereto. The purchaser as developers shall alone be responsible for all kinds of damages and claims pertaining to the said project including the liability for payment of any compensation during the course of construction of the complex which may arise due to any accident or otherwise and the sellers shall in no way be liable or responsible for such claims / damages of any kind

8. Since purchaser is undertaking the construction of complex at their own cost and risk, therefore the said purchaser alone shall also be responsible and liable for payment of all taxes, cess and outgoings including sales tax if any payable to the concerned department for purchasing the building materials etc. and also for payment of Income Tax or any other kind of taxes payable to the departments concerned. The sellers shall not have any responsibility or liability for payment of taxes of any kind in respect thereto and the purchaser hereby expressly indemnifies the sellers in this regard.

9. That it has also been mutually agreed between the parties that the purchaser as developers shall I also be entitled to invite bookings and allot such houses / buildings to be constructed on the said i land of the sellers and they as developers shall also be entitled to receive advances / considerations from their prospective buyers and to issue valid receipts for the same.

10 That however, it is further expressly agreed between the parties that the said purchaser as developers shall develop and construct the houses / buildings / dwellings on the said land of the sellers through their own appointed agencies at their own risk and cost and they shall also invite bookings and receive advances /

considerations at their own risk and cost and the sellers shall in no way be responsible or liable for any such transactions including that of payment of any damages, losses, dues or refunds if any, arises in future at any stage relating to such transaction entered into by the purchaser independently with the prospective buyers or any such agency. In nutshell, the sellers shall not have any liability whatsoever pertaining to the transaction of the purchaser and the purchaser hereby expressly indemnifies the sellers in the regard."

Reading these covenants one by one, the Ld. AR asserted that there cannot be any doubt *qua* the ownership of assessee.

Ld. AR further pointed out that the assessee also obtained a General Power of Attorney dated 27.04.2007 from the original owners, a copy of which is also placed in the Paper-Book. This Power of Attorney gives all powers to the assessee including, *inter alia,* the power to obtain construction-permissions from Government departments, deposit fee and other charges, make developmental and building work over the land, obtain loans from financiers, effect sales to ultimate buyers, etc.

Ld. AR submitted that the Ld. AO is, therefore, wrong in concluding that the assessee was not owner of the land.

Alternatively, Ld. AR also submitted that section 80-IB(10) does not require that the assessee, in order be treated as builder and developer, must be owner of the land and this proposition is already settled by numerous judgements.

(ii) Regarding permissions from Municipal Corporation, Ld. AR submitted that the Ld. AO has made an incorrect observation that the Municipal Corporation has given permission to individual plot. Ld. AR invited our attention to the copies of permission-letters placed in the Paper-Book. Referring to Page No. 11 to 14 of the Paper-Book, Ld. AR demonstrated that the letter No. L.P 228/29/G.K./BMC/2006 dated 20.12.2006 issued by the Municipal Corporation alongwith the attached layout of the project clearly demonstrate that the permission was granted for

construction of the whole project consisting of 21 units, spread over 1 acre of land. Ld. AR submitted that although the project was approved in this single permission but under the Rules of Bhopal Municipal Corporation, 25% of the Units are reserved over which construction is released in phases as the work progresses. In terms of those Rules, the Bhopal Municipal Corporation has, though granted one single permission for the entire project, released sanction to construct the reserved units through subsequent letters dated 24.01.2007, 14.02.2007, 02.04.2008, 08.08.2008, 31.03.2009 and 16.08.2011. Ld. AR drew our attention to the final completion-certificate issued by Bhopal Municipal Corporation through their letter dated 31.03.2012, placed at Page No. 17 of the Paper-Book. According to Ld. AR, this completion-certificate also certifies the completion of construction of entire project consisting of 21 units. Ld. AR submitted that the Ld. AO has mis-understood that the permissions were given for construction of individual plots which is not so. According to Ld. AR, the whole project was approved in one single permission-letter dated 20.12.2006 and the completion of entire project is also certified in one single certificate dated 31.03.2012. Ld. AR submitted that after seeing these evidences there remains no doubt in the matter.

(iii) Regarding third objection by Ld. AO, the Ld. AR drew our attention to certain documents, placed in the Paper-Book, to clarify the whole picture. Ld. AR submitted that the assessee purchased land from the original-owners through Purchase-Agreement dated 30.11.2006. The details of this Purchase-Agreement dated 30.11.2006 have already been explained at length in preceding paragraph. As observed earlier, this Purchase-Agreement was not registered to avoid duplication of stamp-duty. As the agreement was not registered, the land stood registered in the name of the original owners, Shri Narendra Jajoria and Others, in the records of registration-department, although the assessee was actual owner. Therefore, the assessee had also taken a General Power of Attorney dated 27.04.2007 from the original-owners,

the details of which have already been explained earlier. Thereafter, as and when the assessee sold Units to ultimate buyers, the assessee entered into Sale-Agreements with the buyers, a sample copy of the Unit No. 18 is placed in the Paper-Book. Referring to the same, the Ld. AR firstly submitted that the name of assessee is reflected in this Sale-Agreement on seller side as attorney of the original-owners. Thereafter, the preliminary paragraphs in the Sale-Agreement clearly mention that the assessee was developing a project called "Sterling Hill Views" in which Units would be developed and the necessary permissions/approvals from the authorities for development of Units had already been taken. Going further, Ld. AR explained various covenants in the Sale-Agreement one by one to demonstrate that the assessee has sold the entire Unit for an agreed consideration. Ld. AR submitted that the possession of Unit was with the assessee till the final instalment is received and the ultimate buyer do not have any right till such event is reached. Ld. AR also submitted that the various covenants impose several restrictions on the assessee as well as ultimate buyer with clearly spell out that there was a sale of Unit and not a sale of plot. Then the Ld. AR carried us to a sample-registry of the plot executed in favour of buyer. Ld. AR submitted that although the registry was in respect of plot only but the name of assessee is clearly mentioned on the seller side as attorney of the original-owners. Having shown these, Ld. AR submitted that this kind of documentation is done for two reasons, viz. (i) to avoid duplication / multiplication of stamp duty, and (ii) to enable the ultimate buyer to take loan from bank for purchase of Unit from assessee. But the factual position that the assessee has purchased the land, constructed residential Units and sold those Units to the ultimate buyers, is clearly borne out of these documents. Ld. AR further submitted that even otherwise, there is no legal requirement either under the State Stamp Duty Rules or the Income Tax Act to effect registration or documentation in a particular manner and the assessee has followed the policy as prevalent in this

business.

12. Then the Ld. AR briefly summed up the entire chain of critical activities undertaken by assessee to materialize this project:

(a) It is the assessee who conceived the idea of building and developing a housing project of 21 uniform duplex units and named it as "Sterling Hill View".

(b) The assessee purchased land from the original owners as per earlier discussed Purchase-Agreement dated 30.11.2006 and General Power of Attorney dated 27.04.2007. The assessee took possession of land.

(c) Then the assessee got the drawings, designs and layouts of the project prepared.

(d) It is the assessee who obtained permissions from the Municipal Corporations. Ld. AR drew our attention to the copies of permissions-letter issued by the Municipal Corporation and demonstrated that the permissions have been granted in the name of assessee or assessee as attorney holder of original-owners. The assessee spent moneys on fee, charges, etc.

(e) Ld. AR also drew our attention to the audited Balance-Sheet of the assessee placed in the Paper-Book to demonstrate that the assessee has undertaken financial risk involved in the project by making investment in plant, machinery, manpower, all assets and expenses of the project.

(f) The assessee has undertaken entrepreneurial risks involved in the project such as problems in the title of land, completion of project within time, damages, injuries, disputes, unforeseen circumstances, etc.

(g) The assessee has done all marketing efforts, negotiations with the buyers.

(h) The assessee has executed all documents relating to sale of units in favour of buyers.

13. During the course of hearing, the Ld. AR also relied upon following decisions:

(a) CIT Vs. Radhe Developers 341 ITR 402 (Gujrat HC)

(b) Gayatri Builders, Bhopal – ITA No. 330/Ind/2013 dated 20.11.2013, ITAT Indore

(c) M/s Vardhman Builders Vs. ITO – ITA No. 559/Ind/2020 dated 09.5.2012 – ITAT Indore

14. With above submissions, Ld. AR contested that the assessee has built and developed the impugned housing project as an integrated project consisting of as many as 21 Units and sold the housing units to intending buyers. Therefore the assessee is a developer and not mere work-contractor. Accordingly, Ld. AR prayed to allow the deduction.

15. Ld. DR strongly supported the orders of lower authorities. Ld. DR emphasized that the lower authorities have given proper reasons for disallowing the deduction. Ld. DR submitted that on account of the concrete observations made by lower authorities, the assessee cannot be said to a developer and builder, the assessee is only a work contractor who has sold plots to the buyers and undertaken construction-contract. Therefore, according to Ld. DR the assessee is not eligible for deduction u/s 80-IB(10). Ld. DR requested to uphold the action of lower authorities.

16. We have considered rival submissions of both sides, the relevant material held on record and the judicial precedents cited before us. We observe that the assessee has purchased land in terms of the Purchase-Agreement entered into with the original owners for a sum of Rs. 75,00,000/- and acquired ownership rights as well as possession which is clearly evident from the terms of Purchase-Agreement. Even otherwise, it has been held in

the judicial rulings discussed below, that the ownership of land is not a pre-condition for eligibility of section 80-IB. On perusal of permissions-letters issued by the Municipal Corporation, we observe that the construction-permissions as well as completion-certificate have been issued by Municipal Corporation for the entire project consisting of 21 Units. Regarding sale to ultimate buyers, we have perused the covenants mentioned in the sample Sale-Agreement and observed that the assessee has sold constructed Units to the buyers and not undertaken construction-work on contract. We further observe that by explaining various activities undertaken by the assessee for materializing this project, the Ld. AR has successfully demonstrated that the assessee has developed the project as an integrated housing project and undertaken all kinds of financial, enterperneurial and technical risks. We have also perused the legal precedents cited before us by the assessee and found the same as directly resolving the issues in favour of assessee:

(a) **CIT Vs. Radhe Developers – 341 ITR 402 (Gujrat HC):**

> ***"38. In the present case, as already held the assessee had undertaken the development of housing project at its own risk and cost. The land owner had accepted only the full price of the land and nothing further. The entire risk of investment and expenditure was that of the assessee. Resultantly, profit and loss also would accrue to the assessee alone. In that view of the matter, the addition of the Explanation to Section 80IB with retrospective effect of 1.4.2001 would have no material bearing in the cases on hand. We may recall that the said Explanation introduced by Finance (No.2)Act, 2009 provided as under:-***
>
> > ***[Explanation- For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State Government)].***
>
> ***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. vs. Commissioner of Income Tax (supra), and in the case of Commissioner of Income-Tax vs. Podar Cement Pvt. 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.

45. Under the circumstances, we are of the opinion that the Tribunal committed no error in holding that the assessees were entitled to the benefit under Section 80IB(10) of the Act even where the title of the lands had not passed on to the assessees and in some cases, the development permissions may also have been obtained in the name of the original land owners."

(b) **Gayatri Builders, Bhopal – ITA No. 330/Ind/2013 dated 20.11.2013, ITAT Indore:**

"5. We have considered the rival submissions and found from record that the assessee is a partnership firm engaged in the business of development of residential housing projects. During the relevant assessment year, the assessee has continued development of a residential project at Kolar Road, Bhopal, named as "Vijay Vilas". The residential project was approved by Gram Panchayat Nayapura vide approval no. 1793 dated 18.10.2005. The project basically consists of construction of 31 Duplex Houses. The approval order and approved project map was submitted on record. The assessee claimed deduction of Section 80IB(10) of Rs. 6,47,250/- on this project. At the time of assessment, it was explained to the Assessing Officer that the assessee had complied with all the conditions of Section 80IB(10) viz.(i) the project has been sanctioned by the Local Authority (ii) the project consists of residential units having built up area not exceeding 1500 sq.ft. and (iii) no commercial units have been built up.

6. The Assessing Officer has declined the claim of deduction on the plea that the assessee is a contractor and not a builder. We found that as per approval letter dated 18.10.2005, issued by Gram Panchayat, Nayapura vide approval no.1793, the assessee was to undertake residential project for construction of 31 Duplex Houses. We also found that as per certificate issued by office of Sub Divisional Officer, Tahsil Huzur, District Bhopal, dated 31st October, 2009, the assessee as a colonizer have undertaken and completed work of drinking water, sewerage line, septic tank, park, cement road and other connected work in the colony. It has also been certified that the joint inspection of the spot alongwith the President of the Samiti was undertaken on 17.12.2001 according to which all the infrastructure facilities have duly been developed at the Scheme Vijay Villas.

7. Merely because the assessee had entered into agreement for sale of plot so as to enable the customer to have a loan facility from bank and other financial institutions will not go to prove that the assessee has not undertaken any construction. As per the agreement entered into by the assessee with the customers, the assessee was required to undertake construction of the residential unit as a whole. It appears that the Assessing Officer has mis-interpreted various agreements entered by the assessee with its customers. Not only as per project approval letter but also as per the certificate dated 31st October, 2009, issued by the Office of Sub Divisional Officer, the assessee has not only conceived the entire housing scheme but also executed the work as per approved plan. The assessee had entered into comprehensive sale agreement with the customers for the purpose of sale of complete residential units. It is a normal trade practice to receive payment in instalments as per the progress of the project, as most of the customers got houses financed from the bank and the Bank release the funds as per progress of the work. Facility of registration of structure was made available to the customers only with a view to provide them mortgageable securities to avail bank finance. As per the agreement, the possession of residential unit remained with the assessee till final instalment is paid. The customer has no authority to get construction work done by any other person other than the assessee. In view of these facts, we do not find any merit on the part of Assessing Officer's action for treating the assessee merely as a contractor rather than a Developer. Thus, the assessee is not hit adversely by the Explanation to Section 80IB(10), which was made effective from 1st April, 2001."

(c) **M/s Vardhman Builders Vs. ITO – ITA No. 559/Ind/2020 dated 09.5.2012 – ITAT Indore**:

"2. Rival contentions have been heard and records perused. The Assessing Officer has disallowed assessee's claim of deduction u/s 80IB(10) on the plea that the assessee is a contractor and not developer and built up area is more than 1500 sq.ft. and that completion certificate did not mention the date of completion. From the record, we found that during the year, the assessee has undertaken a housing project under the name of Vardhman Green City Extension. The project was approved by the competent authority i.e. Municipal Corporation, Bhopal, on 11.8.2003. The project comprised of 35 Duplex Houses. During the year five houses were sold which resulted into profit of Rs. 6,18,350/- on which deduction was claimed u/s 80IB(10). For being called "developer", the assessee was not only required to build the house but also required to undertake construction of road, water and electricity. Merely because the assessee has entered into agreement for sale of land and separate agreement for construction of houses on the land, the claim of deduction u/s 80IB(10) cannot be declined if the other conditions are being satisfied. We found that at the time of constitution of firm, the partners of the assessee firm had contributed their land as capital contribution to the firm. The assessee firm became beneficial owner of the land, which is clear from the sale deed of the land so executed which shows that land is sold by Puneet Boda, partner of Vardhman Builders & Developers. Just to facilitate the buyers of the houses to have a bank loan, the assessee entered into agreement for sale of land, the possession of which was retained with the firm and construction of houses was carried thereon. Even if the land is not in the name of assesee or the approvals were not given to the assessee, the assessee would still be entitled to deduction u/s 80IB(10) in view of the following decisions :-

i. Man Developers 18 ITJ 485 (Trib - Indore)
ii. ACIT v. Smt. C. Rajni 140 TTJ 218 (Chennai)
iii. Fortune Builders 14 ITJ 667 (Trib Indore)
iv. CIT v. Radhey Developers 204 Taxman 543(Guj)
v. Sreevatsa Real Estate 49 SOT 5 (Chennai)

We found that the development expenditure of road, electricity and water and the land has been incurred by the assessee as per audited balance sheets placed on record. Even in terms of the completion certificate dated 31.3.2008 which was dispatched on 21st April, 2008, it has been certified by the Municipal Corporation that the assessee had carried out its development work as per project approval letter No. 3692 dated 8.10.2001. In view of these facts, the AO was not justified in holding that assessee was not a developer and merely a contractor."

17. In view of above discussion, we do not find any merit in the objections raised by Ld. AO on the basis of which deduction has been denied. We observe that the assessee is a developer and builder of the impugned housing project and therefore eligible for deduction u/s 80-IB(10). Accordingly, we direct the Ld. AO to allow deduction. This Ground is, thus, allowed.

GROUND No. II to IV:

18. During the course of appeal, no specific submission was made by either side on those grounds. Hence they do not require any adjudication by us.

19. In the result, both of the appeals of assessee are allowed.

Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 10/08/2022.

Sd/- Sd/-

(MADHUMITA ROY) (B.M. BIYANI)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Indore
दिनांक /Dated :10.08.2022
Patel/Sr. PS

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore

1.	Date of taking dictation	
2.	Date of typing & draft order placed before the Dictating Member	
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	
4.	Date on which the fair order is placed before the Dictating Member for pronouncement	
5.	Date on which the file goes to the Bench Clerk	
6.	Date on which the file goes to the Head Clerk	
7.	Date on which the file goes to the Assistant Registrar for signature on the order	
8.	Date of dispatch of the Order	