

**IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, AM AND  
MS. KAVITHA RAJAGOPAL, JM**

ITA Nos. 1755 & 1756/Mum/2022  
(Assessment Years: 2017-18 and 2018-19)

M/s. Himali Vijay Builders & Developers A-5 Ground Floor, Opp. Chatri Bungalow, Mangeshi Sahara, Chikanagar, Kalyan-421 301	Vs.	ACIT, Central Circle-2, Mumbai
PAN/GIR No. AAGFH 1062 B		
<b>(Appellant)</b>	:	<b>(Respondent)</b>

<b>Appellant by</b>	:	Shri Kiran Kapadia
<b>Respondent by</b>	:	Shri Rakesh Ranjan

<b>Date of Hearing</b>	:	19.09.2022
<b>Date of Pronouncement</b>	:	12.12.2022

**ORDER**

**Per Kavitha Rajagopal, J. M.:**

These appeals have been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short), Pune-11, passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2017-18.

2. As the facts are identical in both the appeals, we hereby pass a consolidated order, by taking ITA No. 1755/Mum/2022 as the lead case.

3. The assessee has challenged the grounds of addition, amounting to Rs.40,91,542/- made on disallowance of the assessee's claim u/s. 80IB(10) of the Act and has challenged the assessment order passed u/s. 143(3) r.w.s. 153A.

4. The brief facts are that the assessee claims to be a partnership firm and has developed project by name 'Mangeshi Shruti', for which the assessee has claimed deduction u/s. 80IB(10) of the Income Tax Act, 1961 on the profits earned out of the said project. The assessee filed its return of income dated 31.10.2017, declaring total income of Nil.

5. A search and seizure operation u/s. 132 of the Act was carried out at the business premises as well as residential premises of Shri Mangesh D. Gaikar and Shri Umesh D. Tanna group of cases including the assessee company along with the other individual/business associates dated 25.10.2017 and that certain incriminating documents were found and seized. The case of the assessee company was centralized to Central Circle-2, Thane. Notice u/s. 153A of the Act dated 28.08.2018 was issued. Subsequent to this, the assessee company filed its return u/s.153A dated 24.11.2018, declaring total income at Rs.30,460/-. The A.O. completed the assessment u/s. 143(3) r.w.s. 153A dated 30.12.2019, declaring the total income of Rs.40,91,454/- by making disallowance of deduction, claimed u/s. 80IB(10) of the Act. The A.O. has rejected the claim of the assessee on the ground that the project executed by the assessee was not in the name of the assessee and was inadmissible as per the *Explanation* to section 80IB(10) of the Act.

6. Aggrieved by this, the assessee was in appeal before the Id. CIT(A).

7. The Id. CIT(A) has dismissed the appeal filed by the assessee on the ground that the assessee's claim that it is a partnership firm was not found to be correct and that the assessee is neither a partnership firm nor has developed any housing project and also on

the fact that the risk and reward of the project was not borne by the assessee. The Id. CIT(A) held that the assessee was not eligible for deduction u/s.80IB(10) of the Act on the above said grounds.

8. Further aggrieved, the assessee is in appeal before us.

9. It is observed that M/s. Vijay Builders and Developers has entered into joint venture agreement with Shri Mangesh D. Gaikar and has formed AOP vide agreement dated 05.03.2011 under the name of M/s. Himali Vijay Builders & Developers, i.e., the assessee company. The assessee stated that the commencement certificate and the completion certificate issued by the local authorities was in the name of Shri Dashrath Kanha Shilpi & others and the power of attorney was in the name of Shri Vijay S. Jain. From this fact, the A.O. has presumed that the said project was not an undertaking of the assessee and denied deduction u/s. 80IB(10) of the Act. The assessee further submits that in the earlier years, the assessee was allowed the said deduction u/s. 80IB(10) of the Act subsequent to the scrutiny assessment and relied on the decision of the Hon'ble Apex Court in the case of *Radhasoami Satsang v. CIT* (1992] 193 ITR 321 (SC) which laid the proposition of principle of consistency. The A.O. has stated that the assessee has failed to submit the certificate of commencement and completion inspite of several opportunities given and also the unit-wise break up of construction of the area for commercial and residential components called for by the A.O. Since, the impugned assessment year was an abated assessment year, complete scrutiny was made by the A.O. and, thereby passed the impugned assessment order u/s. 143(3) r.w.s. 153A. The A.O. concluded that the

assessee has executed the said project on contractual terms for which reason the assessee was not entitled to deduction as per *Explanation* to section 80IB(10) of the Act and thereby rejected the claim of the assessee.

10. The Id. CIT(A) observed that the assessee was a partnership firm as a joint venture between M/s. Vijay Builders and Developers and Shri Mangesh D. Gaikar, wherein M/s. Vijay Builders and Developers owned certain lands and Shri Mangesh D. Gaikar was a professional builder and developer having entered into a joint venture for developing a housing project in the name of the assessee company. It is also observed that an agreement dated 05.03.2011 was entered into by both the parties and the construction activity commenced on 23.05.2011. The Id. CIT(A) observed that the commencement certificate dated 23.05.2011 and a completion certificate dated 28.03.2012 was issued in the name of Shri Vilash S. Jain one of the partner of M/s. Vijay Builders and Developers, as the said person was the applicant and in whose name the proposed land stands. The Id. CIT(A) further stated that the terms of the joint venture agreement dated 05.03.2011 specifies the assessee as an association of a person (AOP for short) and are not partners but on a principle to principle basis and that the said association was valid only for this specific project and was entitled to remain as AOP till the completion of the housing project. The Id. CIT(A) pointed out the discrepancy in the written submission filed by the assessee during the first appellate proceeding wherein it has claimed to be a partnership firm, thereby holding that the assessee is not considered to be a partnership firm as per the terms of the agreement. The Id. CIT(A) laid emphasis on the clause which states that all risks and rewards of the said project were to be borne by the joint venture partners and

the funds required for the said project shall be contributed by Developer II - namely Shri Mangesh D. Gaikar only. The Id. CIT(A) elaborated on the other clauses of the agreement pertaining to the supervisory power and the liability of Developer II to make good for the losses suffered by the joint venture for any tax exemption/deduction and specifically deduction u/s. 80IB(10), if not obtained then Developer II was liable to compensate for the same. The Id. CIT(A) held that these clauses of the agreement envisages that the risk and reward of the project was solely to be borne by the partners in their individual capacity and not by the assessee firm. Further to this, the Id. CIT(A) has relied on the clauses for sharing of net profit between Developer I and Developer II in the ratio of 59% and 41%, respectively, wherein in case of any loss, it shall be borne by Developer II and Developer I and the assessee company was not liable in any case. From the various clauses of the agreement, the Id. CIT(A) held that the Developer II was responsible for the said project and not the assessee company or Developer I which is M/s. Vijay Builders and Developers. These clauses also do not specify the rights and obligations of the assessee firm in whatsoever manner may be. The Id. CIT(A) also stated that from Form 10CCB it is evident that the AOP came into existence vide agreement dated 05.03.2011 much after the commencement of the said project dated 30.03.2007. The Id. CIT(A) from the above observation inferred that the assessee – AOP has nothing to do with the said development of the housing project and held that the assessee is not a partnership firm and has not contributed in developing the project which was solely at the risk and reward of the developer, i.e., Shri Mangesh D. Gaikar. The Id. CIT(A) distinguished the facts of the cases relied upon by the assessee which pertain to the

ownership of the land and also held that principle of resjudicata was not applicable to the income tax proceedings for the contention of the assessee that the said deduction u/s. 80IB(10) was allowed in the earlier years. On these observations, the ld. CIT(A) upheld the order of the A.O. in rejecting the claim of the assessee for deduction u/s. 80IB(10) of the Act.

11. The assessee is in appeal before us as against the order of the lower authorities.

12. The ld. AR for the assessee contended that the assessee was an 'AOP', whereas the department has assessed the assessee as 'partnership firm'. The ld. AR also stated that the PAN was obtained as AOP and that the agreement was entered into by M/s. Vijay Builders and Developers and Shri Mangesh D. Gaikar to form an AOP under the name of the assessee. The ld. AR further stated that the commencement certificate and the completion certificate are issued in the name of Shri Vijay S. Jain only for the reason that the said person was the applicant for the certificates. The ld. AR further stated that the entire terms of the agreement should be considered to decide whether the assessee was AOP or a partnership. The ld. AR concluded that the assessee was entitled to the deduction u/s. 80IB(10) like in the earlier years.

13. The ld. Departmental Representative (ld. DR for short), on the other hand, controverted the same and relied on the decision of the lower authorities.

14. Having heard both the rival submissions and perused the material available on record, it is trite to examine the provisions of section 80IB(10) which is extracted hereunder for ease of reference:

***Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.***

***80-IB.***

*(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008 by a local authority shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if,—*

*(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes such construction,—*

*(i) in a case where a housing project has been approved by the local authority before the 1st day of April, 2004, on or before the 31st day of March, 2008;*

*(ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1st day of April, 2004 but not later than the 31st day of March, 2005, within four years from the end of the financial year in which the housing project is approved by the local authority;*

*(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five years from the end of the financial year in which the housing project is approved by the local authority.*

*Explanation.—For the purposes of this clause,—*

*(i) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority;*

*(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority;*

*(b) the project is on the size of a plot of land which has a minimum area of one acre:*

***Provided*** that nothing contained in clause (a) or clause (b) shall apply to a housing project carried out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf;

*(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the city of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place;*

*(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed three per cent of the aggregate built-up area of the housing project or five thousand square feet, whichever is higher;*

*(e) not more than one residential unit in the housing project is allotted to any person not being an individual; and*

*(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.*

*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).*

15. On a perusal of the above said provision, it is evident that the eligibility of a person to claim deduction u/s. 80IB(10) relies on the commencement certificate, the completion certificate, and the development approval for the purpose of construction of the housing project. It is also observed from the explanation to the said provision that the said deduction shall not apply to any undertaking of housing project done as works contract awarded by any person. It is understood that the said deduction is eligible for undertakings pertaining to building housing projects for which the necessary approval by the local authority is warranted. The provision also lays emphasis on the commencement and completion of the said project within the stipulated time. It is clear that to claim deduction u/s.80IB(1), the above said documents are mandatory along with other conditions. On a perusal of the terms of the agreement dated 05.03.2011, the date of joint venture agreement entered into by M/s. Vijay Builders and Developers and Shri Mangesh D. Gaikar, was much after the commencement of the said project and we can also infer that the risk and reward are solely on Developer II, i.e., Shri Mangesh D. Gaikar. The contribution to the said project and supervisory powers are also entitled to the Developer II and not to the assessee. Even upon considering the fact that the commencement certificate, completion certificate and the approval does not stand in the name of the assessee wherein the assessee has relied on the certain decisions, which has supported the fact that the assessee is entitled to the claim even if the above mentioned documents are not in the assessee's name, it is pertinent to point out that the clauses of the agreement also does not support the assessee's claim, as the agreement nowhere gives right to the assessee that the said housing project was exclusively entrusted to the assessee. It is also

to be observed that the assessee has not rebutted the contention of the A.O. and the Id. CIT(A) that the housing project is carried out exclusively by the assessee company and not by Developer II along with Developer I by way of any documentary evidence. The assessee has failed to substantiate its claim by any documentary evidence, except for the fact that its claim of deduction was given in earlier years. The assessee has also not given a convincing reply as to what was its contribution in developing the residential project. The assessee has also failed to negate the fact that the commencement of the housing project was prior to the formation of the AOP. All the statutory dues and claims, including section 80IB(10) deduction was entrusted upon Developer II and not the assessee as per the terms of the agreement.

16. From the above observation, we are of the considered view that there is no infirmity in the order of the Id. CIT(A) in disallowing the claim of the deduction u/s. 80IB(10). Accordingly, Ground no. 1 and 3 raised by the assessee are dismissed.

17. Ground no. 2 pertains to challenging the jurisdiction of the A.O. The said ground challenged the order passed by the A.O. u/s. 153A that it was bad in law on the ground that the approval was granted mechanically without application of mind. It is observed that the assessee has not pressed the said additional ground before the Id. CIT(A) and the same was not adjudicated by the lower authority and for this reason, we find that the said ground cannot be decided by us. Hence, ground no.2 raised by the assessee is dismissed.

18. ITA No. 1756/Mum/2022 is also on identical facts and the above observation in ITA No.1755/Mum/2022 applies *mutatis mutandis* to this appeal.

19. In the result, both these appeals of the assessee are dismissed.

*Order pronounced in the open court on 12.12.2022*

Sd/-

(Om Prakash Kant)  
Accountant Member

Mumbai; Dated : 12.12.2022

Roshani, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

Sd/-

(Kavitha Rajagopal)  
Judicial Member

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai