

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

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER**  
**AND**  
**SHRI B.M. BIYANI, ACCOUNTANT MEMBER**

**ITA No.832/Ind/2016**  
**(Assessment Year: 2009-10)**

|   |                            |   |
|---|----------------------------|---|
| Shri Abhay Dare<br>R-18, GTB Complex<br>New Market,<br>Bhopal<br>(Appellant / Assessee) | Vs.                        | ITO-1(1)<br>Bhopal<br>(Respondent/ Revenue) |
| <b>PAN: ADQPD5119C</b>  |                            |   |
| Assessee by   | None                       |   |
| Revenue by  | Shri Ashish Porwal, Sr. DR |   |
| Date of Hearing   | 23.07.2024                 |   |
| Date of Pronouncement   | 31.07.2024                 |   |

**O R D E R**

**Per Vijay Pal Rao, JM :**

This appeal by assessee is directed against the order dated 27.05.2016 of the Commissioner of Income Tax (Appeal), for A.Y.2009-10.

2. None has appeared on behalf of the assessee when this appeal was called for hearing. It transpires from the record that there has been no representation on behalf of the assessee since long and thereafter on 22<sup>nd</sup> July 2014 nobody appeared on behalf of the

assessee but an application for adjournment of hearing was filed by the Ld. AR and also requested for withdrawal of his Power. Since none has appeared on behalf of the assessee on 22<sup>nd</sup> July 2024 therefore, to consider the request of the Ld. AR to give permission to withdraw the power of Attorney the case was adjourned to 23<sup>rd</sup> July 2024 but again there was no appearance on behalf of the assessee and specifically the counsel of the assessee. Accordingly the bench proposes to hear and disposed of this appeal ex-parte. The assessee has raised following revised grounds of appeal:

*1) That, the Learned CIT (Appeals) has erred in law and on facts in disallowing the deduction of Rs. 67.30.6127- u/s 801B(10) to the appellant.*

*2) That the Learned CIT (Appeals) failed to appreciate the binding order of Honourable ITAT, Indore. in the case of the appellant, which decided all the issues referred in this appeal in his favour, for the same project, in ITA No. 813/Ind/2014 for the A.Y. 2010-11.*

*3) That the Learned CIT(A) has failed to appreciate that the appellant has complied with all the conditions prescribed u/s 801B (10) for the Phase-1 of the housing project and eligible to claim the deduction u/s 801B (10) as a "standalone" project, even if Phase-II could not be completed due to legal dispute.*

*4) The Learned CIT(A) has failed to appreciate that ownership of land is, no issue, to claim deduction u/s 801B(10).*

*a) That the learned CIT (A) has erred in considering the appellant as a contractor despite the fact that the appellant has initially purchased the land and after taking due approvals from local authority in his name, developed it in complete houses/flats and in every case possession was given for the completed house and not for plot.*

*b) That the learned CIT (A) has erred in law and on fact in confirming the findings of A.O. that the appellant is a contractor, because, the A.O. has not brought any material on record or gave any cogent finding and ignored the agreements. possession letters, building permissions from the Municipal for development and construction of Corporation, completion certificate housing project and other documents in the name of developer, which, clearly show the fact that appellant is a developer.*

*5) The Learned CIT (A) has erred in law and on facts in denying the Deduction 801B (10) of the Income Tax Act. 1961 for the reason that Building Permissions for the construction of houses in the project was taken in piecemeal instead of permission for construction of all the houses together as per the plan of the project approval, ignoring the explanation | of Section 801B (10) Clause A.*

*5) That the appellant reserves the right to add, alter or amend the grounds of appeal before the appeal is decided, with the permission of Honourable Bench.”*

3. The assessee filed his return of income on 23<sup>rd</sup> September 2009 declaring total income of Rs.3,70,010/- and agricultural income at Rs.2,68,749/- after claiming deduction u/s 80IB(10) of the Act to the tune of Rs.67,30,612/-. In the scrutiny assessment the AO found from the audit report that during the year under consideration the assessee has claimed to continue developing a house project namely “Dwarka Garden and Madhuban Residency, Sagar”. The AO further noted that the assessee has sold the plots of land to the buyers and thereafter, agreed to construct the house on the individual plots. Further the AO noted that the assessee obtained plot-wise building permission from the Municipal Corporation, Sagar and the housing project was not approved as

whole by the local authority. The AO issued questionnaire to the assessee to furnish the relevant details including completion certification issued by the local authority. The AO finally held that the assessee has not produced the completion certificate issued by the Municipal authority but only a letter was produced which is not a completion certificate. Accordingly the AO disallowed the claim of deduction u/s 80IB on two grounds viz(i) the assessee is not a developer but only constructed the houses as a work contractor and (ii) the assessee has not furnished the completion certificate as per the provisions of section 80IB(10). The assessee challenged the action of the AO before the CIT(A) and contended that as per the agreement with the buyers the assessee has sold the plots of land along with constructed houses. The assessee contended that the plots of land were sold by executing sale deed before the construction of the houses to facilitate the buyers to availing loan from the banks/financial institutions. Thus, the assessee has given emphasis on the agreement to sell with the buyers wherein the amount of consideration was mentioned as composite for the land as well as houses on it. Further the assessee submitted that the assessee has got approval of two projects and claimed deduction u/s 80IB(10) only in respect of project which was completed and completion certificate was issued by the authority which is wrongly denied by the AO. The CIT(A) was not impressed with the contention of the assessee and upheld the order of the AO disallowing the claim of deduction u/s 80IB on both grounds that the assessee has not developed the project but he has sold the

individual plots to the buyers and then constructed the houses. Before the Tribunal the assessee has filed written submissions which are extracted as under:

*“The appellant is a builder and developer of a housing project and he has developed a housing project for which he has obtained a completion certificate within a specified time and all the other conditions were undisputed except the following-*

- The appellant got the approval from the competent authority i.e. Town and Country Planning Board for development of Dwarika Vihar and the map approved by the authorities have two phases i.e. Phase-I and Phase-II.*
- However, due to dispute in respect to Phase-II portion of land, the case for possession of Land was filed before the court and court has passed a decree on 27/02/2009 where it was directed to handover the portion of relevant portion after due measurement, to appellant.*
- Despite the court orders seller of land case did not co-operated in measurement of land as a result of which correct demarcation of land could not be done and in the mean time one of the land owner in that case also filed a petition before the court.*
- The appellant was again left with no option but to again approach the court for execution of decree and also filed petition on 17/12/2012 for execution of decree and matter is still sub-judice. Consequently, appellant could not commence any activity for Phase- II of approved project.*
- However, Phase- I of the project was duly completed by the appellant and all the conditions including area of land as required u/s 80IB(10) were met, Land comprised in Phase I was 1.95 Acres.*
- The appellant has claimed deduction u/s 80IB(10) for Phase- I as a "stand-alone" project However, Assessing Officer and*

*Commissioner (Appeal) has taken a view that the completion should have been done for whole project (Phase-I & Phase-II) and denied the deduction in respect to the "stand-alone" portion (Phase-I). Simply for the reason that Completion Certificate for Phase- II is not available although completion certificate for Phase-I was available.*

- *Another issue involved in this case is whether appellant is a Contractor or Builder. Assessing Officer has not given any detailed finding and brought any cogent material on record to show that appellant is contractor. As per facts of case, appellant first entered into agreement for sale of house under his project. Thereafter, he got the plot engaged in the house to be transferred, in the name of customer.*

- *The land registry itself, provides that the registration of plot has been done in compliances to agreement between appellant and customer and after completion of such house and its possession is handed over to customers. Copy of possession letters was also filed before Assessing officer to evidence the same.*

- *It is also important to note that the agreement with customers specifically mentions that in case of cancellation of agreement the re- registration of such plot shall be made by customers in favor of appellant. Consequently, all the documents and facts shows that the appellant is a Builders And Developers and not a contractor.*

#### *SSUE-I-STAND ALONE PROJECT*

- *The plain reading of the section 801B(10) makes it very clear that deduction u/s 80IB(10) is available to a housing project complying with various conditions.*

- *The housing Project is defined in sec 80HHBA of Income Tax Act 1961.*

- *As long as the appellant has complied with all the condition of Sec 80IB(10) in respect to one phase of a project by itself, it shall be treated "stand alone" housing project and deduction*

*has to be allowed u/s 80IB(10) in respect to that" Stand Alone Project".*

- *Matter has been decided in favoure of appellant by honourable ITAT in A.Y. 2010-11. Copy of order enclosed herewith vide page no.-*

- *Your kind attention is drawn to following citations where "Stand Alone Projects" even if approved under a single/common, approval, the deduction has to be granted independent of each other. Therefore, Deduction u/s 80IB(10) cannot be denied.*

The assessee has relied upon following decisions:

*"1) Vishwas Promoters Pvt Ltd v/s ACIT(2013)29 Taxmann.com 19 (Madras)*

*2) CIT v/s Sreevasta Real Estate Pvt Ltd (2014) 42 Taxmann .com 329 (Madras)*

*3) CIT v/s Arun Excelo Foundation Pvt Ltd (2013) 29 Taxmann.com149 (Madras)*

*4) GV Corporation v/s ITO Mumbai (2010) 38 SOT 174 (ITAT Mumbai)*

*5) CIT v/s Brahma Associates (2011) 197 Taxmann 459 (Bombay)"*

**ISSUE-11- ASSESSEE IS A BUILDER OR CONTRACTOR.**

*It is also important to note that the section 801B(10) of the Income Tax act 1961, nowhere provides any condition that at what level transfer to the customer should be registered or even it should be registered at all. What is required is the development of a housing project. Therefore, the contention of the A.O. that the appellant is a contractor is without any basis or evidence. Merely a registration of plot comprised in the house, in the name of customer shall not make the "builder" & "developer", a "contractor", when the appellant has developed*

*an approved township and sold and gave possession of completed residential houses to the customers.*

- Thus it is important to note that the appellant in given case has given a specific reference to fact that registry of plot has been done in compliance to agreement and the fact of delivering of residential house is evidenced by letter of possession furnished before both Assessing Officer and Commissioner (Appeal). (Kindly refer page no. 15-34 ---of paper book)*
- It is important to note that A.O. has not given any reasoning or finding to treat the appellant as contractor. Onus is on A.O. to prove that appellant is a contractor.*
- In this case, onus is on Assessing Officer to prove that Appellant is a contractor and not a developer. On plain readings of assessment orders it is apparent that A.O has not discharged his onus to prove that Appellant is a contractor. In fact he has not given any cogent material or any reasoned finding to show that Appellant is a contractor.*
- It seems that only possible objection of A.O is that the registration in the name of customer was not made for the completed constructed house by the Appellant consequently he treats him as contractor.*
- On plain reading of section 80IB(10) it is clear that it does not provide at what stage registration of transfer of property in the name of customer should take place or at all there should be a registration. The section does not provides that to claim a deduction us 80IB (10) the assessee should own land. The issue of ownership of land is settled unanimously by all the courts and it was held that ownership of land is no issue for claiming section 80IB (10).*

*Your attention is also drawn to various cases including*

- 1. CIT v/s Vishal Developers Tax Appeal no. 507/2014 (Ahmeshabad hah Court)*

2. *CIT v/s Vandana Properties (2012) 19 Taxmann.com 316 (Bombay)*

3. *CIT v/s Sanghvee&Doshi Enterprises (2013) 29 Taxmann.com 388 (Madras)*”

4. On the other hand, Ld. DR has submitted that the assessee has not disputed the fact that he has executed sale deed for sale of land to the buyers and thereafter constructed the houses on these plots of land owned by the buyers and not by the assessee. Therefore, the assessee has not developed the project as a residential housing project but he has constructed the houses on the plots of land owned by the individual persons. The agreement to sell was neither attested nor registered and therefore, is not a valid document for transfer of immovable property. He has relied upon the impugned order of the CIT(A) and submitted that the CIT(A) has considered all the facts as well as decisions relied upon by the assessee while deciding the appeal.

5. Having considered the rival submissions and careful perusal of the record we find that the AO denied the claim of deduction u/s 80IB on two grounds that the assessee has not developed a housing project but he has simply constructed houses owned by buyers in whose favour the sale deed was executed by the assessee prior to the construction of the houses. We find that this fact has not been disputed by the assessee that the assessee has first sold the plots of land to the individual buyers and thereafter constructed houses on it as per agreement with the buyers. Once the land was sold by the assessee and transferred in the favour of the buyers through the

registered sale deed then prima facie the assessee was no more having any title over the land or right or interest in the said land. The assessee has taken plea that the sale deeds were executed in favour of the buyers in order to allow the buyers to take loans from the bank and financial institutions however, this is mere a contention on behalf of the assessee which is not substantiated by any corroborating evidence of actual instance of taking loan by the buyers from bank or financial institutions to finance the construction of houses. The CIT(A) has considered and decided the issues as under:

*"I have carefully considered the submission of the appellant and facts of the case. The admitted facts of the case are that the appellant had got the housing project approved from town & Country Planning, Sagar Vide letter F.No. 174/नं०ग्रा०नि०/06 dated 21.12.2006 Subsequently, the appellant had got the approval for the housing colony from Local Authority. Municipal Corporation, Sagar vide permission No. 44 dated 03.4 2007 wherein the project having an are of 1.65 hectares i.e. 4.08 acres at Village Tilimafi in Municipal Corporation. Sagar was approved. Thus the housing project as approved by the Local Authority, was on the total area 4.08 acres. It is noticed that this project was consisting of approximately 117 individual plots on which, the appellant was to construct residential houses. It would be relevant to reproduce the relevant portion of Section 801B(10) of the Act as under :-*

*"(10) The amount of deduction in the case of an undertaking developing and building housing project approved before the 31" day of March 2008 by a local authority B shall be hundred per cent of the profits derive 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 1 day of October 1998 and completes such contraction-*

*(i) In a case where a housing project has been approved by the local authority before the 1<sup>st</sup> day of April 2004 on or before the 31<sup>st</sup> day of March 2008*

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

*Explanation-For the purpose of the this clause-*

*In case where the approved 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 housing project is issued by the local authority:*

*From the above provisions it is evidently clear that deduction S01B(10) of the Act is allowable on the profits derived from developing and building housing project as approved by the Local Authority. As per Clause (a) of Section 801B(10) of the Act, the construction of the project as approved by the Local Authority shall have to be completed within specified time which in this case was 11.03.2013. there is no ambiguity in the provisions of Section 801B(10) of the Act, specially clause (a) that construction of the whole of the project as approved by the Local Authority Shall have to be completed on or before the specified date. It is admitted fact in this case that the appellant had not completed the construction of the project as approved by the Local Authority ie. Municipal Corporation Sagar. The appellant had completed construction of a part of the project only mentioned as Phase-f and it is admitted by the appellee that construction on another part of the project was not completed. The conditions laid down u/s 801B(10) of the Act have to be fulfilled by the project as a whole. Since the appellant had not completed the*

construction of the housing project, as approved by the Local Authority on or before 31.03.2013, the appellant had not fulfilled the conditions laid down in Clause (a) of Section 801B(10) of the Act and therefore the appellant was not eligible for claiming deduction u/s 801B(10) of the Act. A.Y. 2009-10 under consideration. The ratio of cases relied upon by the appellant on this issue is not applicable in the instant case because those cases pertain to assessment years before A.Y. 2005-06. The provisions of Section 801B(10) of the Act were substituted w.e.f. 01.04.2005 from A.Y. 2005-06 and the condition for completion of construction of the project as approved by the local authority within specified time has been provided in clause (a) of Section 801B(10), which was not before AY. 2005-06. Thus, The appellant had not fulfilled the condition laid down under clause (a) of Section 801B(10) of the Act. Hence, the appellant was not eligible for deduction u/s 801B(10) of the Act.

Further, it is also noticed in this case that the appellant has divided the whole project into number of independent plots. The appellant had sold the plots to various customers by registering the sale deed for a consideration. It is very important to note here that the appellant had also handed over the possession of the plots to the respective customers as the same has been specifically mentioned in the sale deed registered. For example perusal of a copy of sale deed furnished by the appellant during appellant proceedings it is noticed that the appellant had sold a plot bearing No. 48 to commander Satya Prakash Shrivastava for a consideration of Rs. 3,00,000 by sale deed registered on 06.10.2008. in the sale deed it has been clearly mentioned that कब्जा मालिकाना व खांस आज से आपका करा है. आज से आप इसक मालिक हो गये। (नामांतरण) Thus the contention of the appellant that he hand not handed over the possession of the plots after selling the same to the customers is not found correct. The appellant had already sold plots of land to the customers and thereafter he had acted only as a contractor for the completion of construction of the residential units. It is also pertinent to note that the agreements claimed to be entered with customers were not registered. These agreement were not even notarized. In view of provisions of Section 17(1A) of the Registration Act 1908, on cognizance can be given to such arguments which not even notarized for transfer of property. Thus the appellant had acted as a work contractor. It also be mentioned here that the ratio of decision of Hon'ble ITAT in the case of SKY Builders & Developers Vs. 1101(1),

*Bhopal (2011) 14 taxmann com 78 (Indore- tribunal) is squarely applicable to the facts of the instant case as the facts involved in that case were similar to the facts involved in the instant Case In the case of M/s Sky Builders & Developers (Supa) also the project was approved in the name of Sky Builders & Developers. The assessee has sold the plots to various customers by registering the sale deed. The assessee had also entered into an agreement with the customers for construction of the houses. Thus there was no difference in the facts involved in the case of Sky Builders & Developers and the facts involved in the instant case. Therefore the ratio of decision in the case of Sky Builders & Developers (Supra) is applicable in the case of the appellant*

*Here it would be relevant to refer the decision of Hon'ble jurisdictional M.P. High Court in the case of Agrawal warehousing 7 Leasing Ltd Vs. CIT (2002) 257 ITR 235 (MP) when it was held as under (head notes)*

*"The orders passed by the Tribunal are binding on all the revenue authorities functioning under the jurisdiction of the Tribunal. The principle of judicial discipline requires that the order of the higher appellate authorities should be followed unreservedly by the subordinate authorities*

*The Tribunal has no right to come to a conclusion contrary to the one reached by another Bench of the same Tribunal on the same facts. If the Tribunal was to take an opinion different from the one taken by an earlier Bench it ought to place the matter before the President of the Tribunal so that he can have the case referred to a bench consisting of three or more Members for which there is provision in the Income Tax Act itself.*

*In view of the above the decision of Hon'ble the case of Sky Builders & Developers V/s ITO 1(1), (Supra) on the identical facts is binding in nature. Therefore considering the facts and circumstances of the case and the legal position on the issue I am of the considered view that the appellant had not completed the construction of the project as approved by the Local Authority on or before the specified date as required under clause (a) of Section 80IB(10) of the Act and further that the appellant had acted as a mere contractor and not as a developer and builder of the housing project as envisaged under 80IB(10) of the Act. Therefore the appellant was not eligible for claiming deduction u/s 80IB(10) of the Act on the profits derived*

*from a portion/ part of the housing project approved by the Local Authority. Hence the disallowance of appellant's claim of deduction u/s 801B(10) of the Act. Of Rs.67,30,612/- made by the A.O. is confirmed.”*

5.1 Mere construction of the Colony Road and other facilities will not change the project of developing residential plots into a housing project. Once the plots of land were sold then the assessee has lost his status of owning the project much less the development of housing project unless some contrary is brought on record. Therefore, this is requires to furnish the evidence to substantiate the claim that the sale deeds were executed only to facilitate the buyer to take loan from banks/financial institutions.

5.2 So far as the issue of completion certificate is concerned this issue is pending adjudication before the Hon'ble Supreme Court in case of Global Reality decided by the Hon'ble jurisdictional High Court against the assessee in 379 ITR 107 and further appeal is pending adjudication before the Hon'ble Supreme Court. It is also brought to the notice of the Bench that operation of the judgment of Hon'ble jurisdictional High Court has been stayed by the Hon'ble Supreme Court. Accordingly in the facts and circumstances of the case where one of the issue is pending adjudication before Hon'ble Supreme Court and other requires fresh adjudication after verification and examination of the supporting evidence to be filed by the assessee the matter is set aside to the record of the AO for afresh adjudication after proper verification and examination of the supporting evidences if any to be filed by the assessee to show that the sale deed of plots were executed only with a view to facilitate the

buyers to take loans from the banks. Further the issue of completion certificate has to be decided as per outcome of the judgment of Hon'ble Supreme Court.

6. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 31.07.2024.

**Sd/-**  
**(B.M. BIYANI)**  
Accountant Member

**Sd/-**  
**(VIJAY PAL RAO)**  
Judicial Member

**Indore, 31.07.2024**

**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*