

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
BEFORE SHRI B.M. BIYANI, ACCOUNTANT MEMBER
AND
SHRI UDAYAN DAS GUPTA, JUDICIAL MEMBER

ITA No. 26/Ind/2024 (AY: 2007-08)

ITA No. 27/Ind/2024 (AY: 2009-10)

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| Vaishali Developers And Builders, 240 MP Nagar Zone-I, Bhopal (PAN:AACFV7638P) | <u>बनाम/</u> Vs. | Income Tax Officer-1(2), Bhopal |
| (Assessee/Appellant) | | (Revenue/Respondent) |

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|-------------|----------------------------|
| Assessee by | Shri S.S. Deshpande, AR |
| Revenue by | Shri Ashish Porwal, Sr. DR |

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| Date of Hearing | 27.01.2025 |
| Date of Pronouncement | 24.02.2025 |

आदेश / O R D E R

Per B.M. Biyani, AM:

The captioned two appeals are filed by assessee against a consolidated order of first-appeal dated 30.03.2017 passed by learned Commissioner of Income-tax (Appeals)-1, Bhopal ["CIT(A)"] which in turn arises out of assessment-orders dated 18.03.2016 & 25.02.2016 for Assessment-Years ["AY"] 2007-08 & 2009-10 passed by ITO-1(2), Bhopal ["AO"] u/s 143(3) of the Income-tax Act, 1961 ["the Act"].

2. Since these appeals arise from a single order and the issue for adjudication is identical; they were heard together at the request of parties

and are being disposed of by this consolidated order for the sake of convenience, brevity and clarity.

3. At the outset we would like to mention that the impugned order was passed on 30.03.2017 and the present appeal was filed on 12.01.2024. The assessee has mentioned "date of service or communication of order" as 29.12.2023 in Form No. 36 (Appeal Memo) and accordingly claims that the present appeal has been filed within the prescribed period of 60 days. Shri Harsh Malhotra, partner of assessee-firm, has filed an affidavit on Page 146 of Paper-Book of AY 2007-08 / Page 165 of Paper-Book of AY 2009-10, making a solemnised averment that the impugned order was served upon assessee on 29.12.2023 only after making an application. Ld. DR appearing for revenue was directed, vide order-sheet dated 27.05.2024, to verify assessee's averment. Pursuant to this, Ld. DR submitted a report of AO dated 12.07.2024. Ld. DR narrated that the AO has sent despatch register but it does not indicate about service of impugned order. Ld. DR accepts that nothing can be made out from despatch register regarding service of order upon assessee. Further, the AO has stated in his report "*As per available records, the CA for Vaishali Developers and Builders has received the order on 29.12.2023*". Therefore, the date of service claimed by assessee as 29.12.2023 is not disputed and the present appeal is found to have been filed in time. The limitation issue is dissolved and the appeal is treated as valid, proceeded for hearing.

4. This is 2nd round of litigation before ITAT. The background facts are such that the assessee is a partnership-firm engaged in the business of builders and developers. For AY 2007-08 & 2009-10 involved in these appeals, the assessee filed original returns declaring total income of Rs. Nil after claiming deduction u/s 80-IB(10) of Rs. 38,81,630/- & Rs. 62,10,754/- respectively. The cases were selected for scrutiny and the assessment-orders dated 21.12.2009 & 09.12.2011 respectively were passed after denying assessee's claim of deduction u/s 80-IB(10). The assessee carried matters upto ITAT, Indore in *ITA No. 497/Ind/2012 & 19/Ind/2013*. The ITAT, Indore passed order dated 25.11.2014 whereby the matters were restored to AO for *de novo* consideration with certain directions. *This way, the 1st rounded ended.* Pursuant to ITAT's order, the AO passed fresh assessment-orders dated 18.03.2016 & 25.02.2016 respectively again denying the deduction u/s 80-IB(10) to assessee. Aggrieved, the assessee went in first-appeals before CIT(A) but did not get any success. Now, the assessee has come in next appeals before ITAT. *Accordingly, this is 2nd round before ITAT.*

5. The grounds raised in these appeals are as under:

ITA 26/Ind/2024 for AY 2007-08:

"1. That on the facts and in the circumstances of the case and in law, the decision of the learned CIT(A) is materially incorrect and bad on facts and unsustainable in law and his findings are materially incorrect.

2. That on the facts and in the circumstances of the case and in law, the appellant submits that its housing project fulfills all the conditions laid down in section 80-IB(10) of the I.T. Act and, therefore, the income from such project is deductible under the said provisions. The learned CIT(A) erred and not justified in his

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findings that the appellant is not eligible for the deductible u/s 80-IB(10) of the I.T. Act and, therefore, the findings of the learned CIT(A) be quashed and the exemption as claimed u/s 80-IB(10) be kindly allowed.

3. That on the facts and in the circumstances of the case, the assessee submits that the learned CIT(A) erred in holding the view that the appellant had not maintained the separate accounts for its projects namely "Vaishali Nagar" and "Vijay Nagar" because Tax Auditors of the appellant had given one single audit report for the appellant firm and they had not certified the project wise profit and therefore the deduction for the project "Vijay Nagar" could not be allowed to the appellant in spite of the fact that the project "Vijay Nagar" is fulfilling all the conditions mentioned in the section 80-IB(10).

4. That on the facts and in the circumstances of the case and in law the learned CIT(A) erred in affirming the view of the AO that the project approval certificate, in respect of the project "Vaishali Nagar", was not in the name of the appellant firm and it was in the name of land owners i.e. Shri Hemant Kumar Malaviya. Similarly the completion certificate, in respect of the project "Vaishali Nagar", was also not in the name of the appellant firm but in the name of Shri Hemant Kumar Malaviya, and hence, disallowed the deduction claimed u/s 80-IB(10) of the I.T. Act by the appellant.

5. That on the facts and in the circumstances of the case and in law the learned CIT(A) erred in affirming the view of the AO that the appellant is not selling any constructed property, in respect of the project "Vaishali Nagar", to its customers and that registration of land is only made. It is also stated that the assessee has mainly acted as a contractor and not a builder and hence, disallowed the deduction claimed u/s 80-IB(10) of the I.T. Act by the appellant.

6. That on the facts and in the circumstances of the case and in law the learned CIT(A) erred in affirming the view of the AO that the appellant is neither the owner of the land nor the seller of the land, in respect of the project "Vaishali Nagar", and hence, disallowed the deduction claimed u/s 80-IB(10) of the I.T. Act by the appellant.

7. That on the facts and in the circumstances of the case and in law the learned CIT(A) erred in rejecting the claim u/s 80-IB(10) of the I.T. Act, of the appellant mentioning that the appellant had acted as a contractor and not as a Developer and Builder, in respect of the project "Vaishali Nagar".

8. That on the facts and in the circumstances of the case and in law the learned CIT(A) erred in holding the view that "It cannot be said that the appellant firm has derived profit from the business of developing and building housing project as per section 80-IB(10) of the I.T. Act," therefore disallowed the deduction claimed u/s 80-IB(10) of the I.T. Act by the appellant, in respect of the project "Vaishali Nagar".

9. That on the facts and in the circumstances of the case and in law, the levy of interest u/s 234B is unlawful and hence, be cancelled.

10. That the assessee craves leave to add, amend, delete and or modify any of the grounds at the time of this appeal is heard."

ITA 27/Ind/2024 for AY 2009-10:

"1. That on the facts and in the circumstances of the case and in law, the decision of the learned CIT(A) is materially incorrect and bad on facts and unsustainable in law and his findings are materially incorrect.

2. That on the facts and in the circumstances of the case and in law, the appellant submits that its housing project fulfills all the conditions laid down in section 80-IB(10) of the I.T. Act and, therefore, the income from such project is deductible under the said provisions. The learned CIT(A) erred and not justified in his findings that the appellant is not eligible for the deductible u/s 80IB(10) of the I.T. Act and, therefore, the findings of the learned CIT(A) be quashed and the exemption as claimed u/s 80-IB(10) be kindly allowed.

3. That on the facts and in the circumstances of the case, and in law the learned CIT(A) erred in affirming the view of the AO that "the appellant had acted merely as a contractor after selling the plot and not as a developer. Therefore the appellant was not eligible for claiming deduction u/s 80-IB(10) on the profits claimed from this project".

4. That on the facts and in the circumstances of the case and in law the learned CIT(A) erred in rejecting the claim u/s 80-IB(10) of the I.T. Act, of the appellant mentioning that the appellant had acted as a contractor and not as a Developer and Builder, for the only reason that the appellant had not registered the sale deeds in favor of the customers for the full value of the units as agreed amongst them.

5. That on the facts and in the circumstances of the case and in law the learned CIT(A) erred in holding the view that "It cannot be said that the appellant firm has derived profit from the business of developing and building housing project as per section 80-IB(10) of the I.T. Act", therefore disallowed the deduction claimed u/s 80-IB(10) of the I.T. Act by the appellant.

6. That on the facts and in the circumstances of the case and in law, the levy of interest u/s. 234B is unlawful and hence, be cancelled.

7. That the assessee craves leave to add, amend, delete and or modify any of the grounds at the time of this appeal is heard."

6. By means of various grounds, the main grievance of assessee is such that the lower-authorities are not justified in denying deduction u/s 80-IB(10) claimed by assessee.

7. Ld. AR carried us to assessment-order of AY 2007-08 (identical assessment-order for AY 2009-10 also, except change in details of properties

sold) where the AO has denied deduction to assessee; the same is re-produced below:

*"4.....The appellant has not sold the residential units, having built-up area less than 1500 sq. ft. after completion of construction. It is noticed that the appellant had sold plots of land and not the residential units after construction. The customers have purchased plots for a consideration. **The vacant possession was also given to the customers** and, hence, they became absolute owners. Thus, after selling plots, the appellant had acted as a contractor for the construction of the flats and not as a developer of the project. It is noticed that all the sale-deeds are identical and all the plots were sold and not as a complete residential unit. **The relevant portion of the sale-deed for the sale of plot to Shri Ashok Kumar Jain and his wife Sm. Prabha Jain for a consideration of Rs. 1,12,000/- on 30.03.2006 is re-produced as under:***

"B. Consents from seller in favour of purchaser:

1. That seller (M/s Vaishali Developers and Builders) having received the total sale consideration of the above plot now transferred all his rights title together to the purchaser and now the purchaser has become the absolute owner thereof said plot and shall be free to enjoy the ownership right over the said plot subject to the conditions mentioned in this deed. If, at the same time the seller also made the agreement with the purchaser to construct a house thereon this plot under the terms conditions mentioned in the said agreement, then the plot will remain in possession of the seller for construction of the house till the full and final settlement of the construction amount. Then after the possession of the plot will be automatically transferred to the purchaser without any demur.

2. That the seller firm to the best of their knowledge has already paid all taxes, assessments cesses and other taxes to the dept. concerned and no payment of any kind of such taxes are payable on the date of this deed. In future plot owner shall pay all taxes and dues which is liable to different department. However, if any such dues are found prior to the date of execution of this deed, the seller firm shall be responsible to make such payments thereof to the department concerned. In case the purchaser makes such payments, he/she will have the right to recover the same from the seller firm.

3. That the seller further declare that due to any defect in the title over the plot under reference and it goes away from the title of the purchaser, the seller shall be responsible to repay the total consideration which they receive from the purchaser.

C. Consents from Purchaser in favour of seller:

1. That the purchaser will construct building as per standard design approved by any appropriate authority authorised or scheduled by the government for such purpose. In case if the seller firm also doing construction work in the plot under sale on behalf of the purchaser under

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the agreement executed between them, seller firm will also construct the house as per approved plan, designs and specifications of which has already got approved from such authority. This is the essence of this sales-deed, for further addition/alteration purchaser will have to take written permission from the seller, and thereafter any appropriate authority authorised or scheduled by the government for such purpose.

2. That in case purchaser wants any structural changes and/or any addition in its plot building then it is mandatory for the purchaser to submit the plans with the seller after its proper scrutiny issue No Objection Certificate in writing to the purchaser then only, purchaser can submit the plans, if necessary, with the civic authorities. Any addition/alteration done by the purchaser without obtaining NOC from seller be termed as illegal and consequence will follow accordingly.

6. That the purchaser will separately pay the development charges, service tax, system strengthening charges of M.P.S.E.B., property tax and other charges as per government norms and the liability of such taxes on purchaser starts after the execution of the sale-deed."

From the above, it is clear that the appellant had sold land first and thereafter constructed the building. Hence, the profits earned by the appellant were not from developing and building housing project. **It may be relevant to give the details of amount of sale consideration for the sale of land by the appellant to its customers, the amount received on account of construction as a contractor and the total consideration booked in the books of accounts in few cases in A.Y. 2007-08 as under:**

XXX (table not reproduced for brevity)

From the above, it can be noticed that the appellant had earned profit on account of construction activities undertaken as a contractor after selling the plots and thus, had not sold residential units after completion as envisaged in section 80IB(10). Therefore, the appellant was not eligible for deduction u/s 80-IB(10).

The submission of the appellant that the appellant had entered into an agreement for construction and sale of residential units with the customers and after completing the construction had handed over the complete residential unit to the customers, which amounts to sale of residential unit is also not tenable. It may be pertinent to note that the agreement entered with the customers by the appellant was not registered under the Registration Act, 1908. As per the Transfer of Property Act, 1882, the immovable properties can be sold only by a registered instrument as, per section 54 of this Act or as per section 53A known as part performance. However Section 17(1A) of the Registration Act, 1908, makes it clear that w.e.f. 24.09.2001, if an agreement for transfer of an immovable property for consideration is not registered under the Registration Act, it shall have no effect for the purpose of section 53A of the Transfer of Property Act, 1882. The relevant section 17(1A) of the Registration Act reads as under:-

"(1A) The documents containing contracts to transfer for consideration any immovable property for the purpose of section 53A of the Transfer of

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Property Act 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act 2001 and if such documents are not registered on or after such commencement, then they shall have no effect for the purposes of the said section 53A."

Therefore, the, agreement to sale in question cannot be relied upon for the transfer u/s 53A of the Transfer of Property Act for the simple reason that the said document, having being executed after 24.09.2001 was not registered under the Registration Act, 1908. The appellant had already transferred the immovable property i.e. plot and **had also given vacant possession of the same to the customer as mentioned in sale-deed registered**. Thereafter, the appellant had acted only as a contractor for the work of construction of the residential units. Thus, the appellant was not eligible for deduction u/s 80-IB(10).

In this regard, reference can be made to the decision of Hon'ble ITAT, Indore Bench in the case of **Sky Builders & Developers Vs. ITO-1(1), Bhopal [2011] 14 taxmann.com 78 (Indore)** wherein it was decided that where the assessee sold plots to respective customers by registering sale-deed and thereafter constructed building at an agreed price, it had to be concluded that the assessee merely acted as a contractor and not a developer and, therefore, not eligible for deduction u/s 80-IB(10). **The head note of this decision are reproduced as under :-**

"Section 80-IB of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings - Assessment year 2006-07- Whether where assessee sold plots to respective customers by registering a sale-deed and thereafter assessee constructed building at an agreed price, it had to be concluded that assessee merely acted as building contractor and not as a developer and, therefore, assessee's claim for deduction under section 80-IB(10) could not be allowed - Held, yes - Whether even otherwise, in view of fact that no completion certificate had been issued to assessee by local authority, in view of sub-clause (2) of Explanation to section 80-IB(10), assessee's claim for deduction was to be rejected. Held, yes"

In view of the facts and circumstances of the case and the discussions made hereinabove, it is clear that the assessee has merely acted as a contractor, and therefore, it is not eligible for claiming deduction u/s 80-IB(10) on the profits claimed from this project. Hence, I hereby disallow the claim of the appellant of deduction u/s 80-IB(10) of Rs. 38,81,630/- in A.Y. 2007-08."

8. Then, the Ld. AR carried us to the order of CIT(A) upholding AO's order; the same is also re-produced below:

"7. It may be noted that the identical issue was involved in immediate preceding assessment years in the case of the appellant. The Ld. CIT (A) had confirmed the disallowance u/s 80-IB of the Act for the A.Y. 2008-09, 2010-11, 2011-12 holding that the appellant was not entitled for deduction u/s 80-IB(10) of the Act on this

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project relying on the decision of the Hon'ble ITAT, Indore Bench in the case of Sky Builders & Developers Vs. ITO-1(1), Bhopal [2011] 14 taxmann.com 78 (Indore).

8. The facts involved in the years under consideration are identical to the facts involved in immediate preceding A.Y. 2008-09, A.Y. 2010-11 and A.Y. 2011-12. The appellant during the assessment and appellate proceedings has not been able to bring out any new facts which could dispute the findings of the A.O. that the appellant does not fulfil the conditions as required under the provisions of section 80-IB(10) of the Act. It is evidently clear that the appellant had acted merely as a contractor after selling the plots and not as a developer. Therefore, respectfully following the order of the Ld. CIT(A) in the appeal orders for A.Y. 2008-09, A.Y. 2010-11 and A.Y. 2011-12, the appellant is not eligible for deduction u/s 80-IB(10) of the Act on the profits derived from this project. Hence, the disallowance of the claim of the appellant of deduction u/s 80-IB(10) of the Act for Rs. 38,81,630/- for A.Y. 2007-08 and for Rs. 62,10,754/- for A.Y. 2009-10 made by the A.O. is hereby confirmed. Grounds No. 1 to 4 are dismissed."

Ld. AR informed the present status of assessee's cases for AY 2008-09, 2010-11 & 2011-12 upon which the CIT(A) has relied in above order. He narrated that the assessee has already filed appeals before ITAT challenging the orders of CIT(A) for AY 2008-09, 2010-11 and 2011-12. The appeal of AY 2008-09 is yet to come up for hearing. Further, the ITAT has already decided appeals of AY 2010-11 & 2011-12, being *ITA No. 156/Ind/2015 & 77/Ind/2016*, long back vide orders dated 30.07.2015 & 12.01.2017 respectively wherein the matters have been remanded to CIT(A) for a fresh adjudication but those matters are still pending at the level of CIT(A).

9. Ld. AR next submitted that the deduction u/s 80-IB(10) is allowed to a person undertaking the "developing and building housing projects". He submitted that the assessee in present case has developed two housing projects known as "Vaishali Nagar" and "Vijay Nagar" [*Ld. AR pointed out that the CIT(A) has mentioned these projects as Vijay Nagar-I and Vijay Nagar-II in Para 5 of impugned order*] and claimed deduction in relation to

income from these projects. However, the AO has rejected assessee's claim of deduction on the footing that the assessee did mere 'construction work as contractor' and assessee was not a 'developer and builder'. Referring to assessment-order (re-produced above), Ld. AR explained that the AO has gained such an understanding by observing that (i) the customers had purchased plots for a consideration under sale-deeds, (ii) the vacant possession of plots was given to customers, (iii) the agreements made by assessee with the customers for sale of constructed units were unregistered and hence not recognisable in the eyes of law, and (iv) the decision of ITAT, Indore in ***Sky Builders (supra)*** is relied. But, Ld. AR submitted, these conclusions taken by AO are not valid. Ld. AR prayed us to first look into the correct facts/evidences of the projects undertaken by assessee as under:

(i) Vaishali Nagar project:

- (a) This project was developed over a land having area of 8.390 acres at Khasra No. 49/4, 49/7 & 49/8, Village-Chopra Kurd, District-Damoh.
- (b) The land was owned by "Malviya family" but the project was developed by assessee. An idea was conceived to develop a housing project and to materialise this idea, a "Development Agreement" was executed between (i) land-owners alongwith one technical person (all these persons then became partners in assessee-firm), and (ii) assessee-firm. Copy of "Development Agreement" is filed at Pages 139-145 of Paper-

Book of AY 2007-08. The important covenants agreed in "Development Agreement" are re-produced below:

"This Development Agreement is entered by and amongst:

(1) XX

(2) XX

(3) XX

(4) XX

Hereinafter referred to as "THE LAND OWNERS"

AND

Vaishali Developers and Builders, a partnership firm,Hereinafter referred as "THE DEVELOPERS"

AND WHEREAS the land owners owns a piece of Land admeasuring 8.55 acres at Khasra No. 49/4, 49/7 & 49/8 at Village Chopra Kurd, District Damon. In this piece of Land they wish to develop a residential colony and as they do not have sufficient experience in the field of development of residential colony, they joined hand with Mr. Harsh Malhotra of Bhopal, who is having requisite experience in the field of development of residential colony and thus formed a partnership firm namely "Vaishali Developers and Builders" having shares as following:

1. 50% share of Mr. Harsh Malhotra
2. 20% share of Mr. Hemant Kumar Malaiya
3. 15% share of Mr. Siddharth Malaiya
4. 15% share of Mr. Nishant Malaiya

AND WHEREAS the developers are desirous of developing the said land after obtaining necessary Permission and after getting the plans sanctioned from the competent authority at their own risk, cost and expenses. But as the ownership of the said land vests with the land owners all the permissions necessary for the project shall be taken in the name of land owners. Both the parties had agreed to the said proposal on the terms and conditions which are agreed, mutually upon by and between the parties and which are enumerated hereunder.

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AND WHEREAS the parties to the agreement are desirous of recording the said terms and conditions as under:

1. ***A housing project shall be developed by the party of the second part and name of the colony shall be kept as "Vaishali Nagar".***

- 2. Execution of this housing project shall be sole responsibility of the party of the second part and the party of the first part shall have no role in this Entire planning and execution of the project, including the design and plan of the houses shall be done by the party of the second part. No alteration, other than minor i.e. color scheme or fixtures, shall be done according to the customers. All the specifications planed by the party of the second part shall be strictly adhered to.**
- 3. The cost of the land shall be directly payable by the customers to the party of the first part, which shall be payable at the time of transfer of the land by the party of first part to the customers of the party of the second part. Sale Deed of the Land alone shall be executed by the party of the first part in favor of the customers to facilitate them to mortgage the property in favor of the bank and get the finance.**
- 4. The developer shall obtain the residential use permission from the competent authority within a reasonable time. That immediately after the Execution of this agreement, the developer shall start the Procedure obtaining of residential Use Permission for the said land.**
- 5. That after obtaining of Residential Use Permission, the developers shall get the plans sanctioned from the T&CP Office, Sagar for the development of the said land. The development of land shall mean construction of Houses with all the requisite infrastructure and amenities like road, drainage, water supply, electricity, etc.**
- 6. The development of all the infrastructure facilities on the said land shall be the responsibility of the party of the second part and the party of the second part shall execute all such things on their own cost. Although the permissions/ approvals shall be in the name of the party of the first part, all the costs shall be borne by the party of the second part.**

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- 12. That the marketing of the project shall be totally be the responsibility of the party of the second part and party of the first part shall not interfere in this and upon identifying the customers for the proposed project the party of the first part shall execute the sale deed in the favour of the customers after getting the cost of the land and then the party of the second part shall hand over the possession of the ready house to the customers."**

- (c) The statutory permissions and certificates of project are in the name of assessee-firm or its partner which is evident from the documents filed in Paper-Book of AY 2007-08 at Pages 31-42/107, viz. Permission Letter dated 15.09.1999/30.10.2004 issued by Town & Country

Planning, Sagar and Project Completion Certificate dated 15.02.2008 issued by Gram Panchayat, Chopra Khurd.

- (d) That the assessee sold residential units to customers and for this purpose, "Tri-parti Agreements" were executed by (i) Partners of assessee-firm (who were also land-owners), (ii) Assessee-firm as 'developer' and (iii) Buyers. One sample Agreement is placed at Page 23-30 of Paper-Book of AY 2007-08. Ld. AR referred following covenants mentioned in this Agreement:

"TRIPARTITE AGREEMENT
BETWEEN LANDOWNER, BUILDER AND PURCHASER
FOR SALE OF LAND AND CONSTRUCTION THEREON

XXX

WHEREAS SECOND PARTY

M/s. Vaishali Developers and Builders is carrying out the development and construction in the vicinity of the Vaishali Nagar as per design and specifications approved by T&CP, Sagar or any authorized approval authority, and accepted the request of the third party to construct the house and the said plot of land of the Vaishali Nagar on the consideration mentioned hereinafter.

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WHEREAS the second party after completing the construction and receiving the full payment of consideration will hand over the possession of the land and the house to the third party.

WHEREAS the third party will not claim the title and the possession on the said land and the house till the full and final payment of construction cost to the second party.

XXX

NOW THEREFORE THIS INDENTURE BETWEEN PARTIES AFOREMENTIONED WITNESSETH:

XXX

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3. *That the second party has been agreed to construct the building as per plan and the specification attached to this agreement (Map Annex. I and Specification ann. II) for a total of Rs. 6,65,000/- (Rupees Six lacs and sixty five thousand only).*

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5. *That the third party hereby expressly agreed, that in case if the third party fails to pay the land cost and construction amount within time hereby mentioned above, the second party will have full right and authority to cancel the allotment of the said plot, to change the plot No., to change the plot size, to change the land cost and to change the construction cost. Third party, irrevocably give his/her/their consent to the second party to take such any decision at that moment. Third party also agree that he/she/they will have no right to lodge any complaint or claim for getting the above said plot, at above said land and construction cost, if he/she/they fails to pay the abovesaid amounts within time mentioned above.*

XXX

7. *That, third party will not claim and shall not be entitled for claiming the possession of the House or the aforesaid land, until and unless the instalments of the construction cost are paid regularly upto the last.*
8. *That the second party will be entitled to hold the title deeds and possession of the land and constructed structure thereon, till the full and final payment of the construction by the third party, and after receiving the full consideration and completing the construction, second party will handover the possession of the house and also handover the title deeds and will not hold any claim regarding the said land house thereon.*
9. *That however second party have no objection whatsoever to the third party mortgaging the plot/house to _____ by equitable mortgage on full and final settlement of the consideration.*

(ii) Vijay Nagar project:

- (a) This project was developed over a land having area of 6.024 acres at Khasra No. 330/1, 331/1, 330/2, 331/2, 330/3, 331/3, 351/1/Kh, 351/2/Kh, 351/1/Kh/1, 351/2Kh/1, 351/1/Kh/3, 351/2Kh/3, 351/1Kh/4, 351/2Kh/4, 351/5, Village-Hirdepur, District-Damoh.

- (b) The land belonged to assessee-firm and the project was developed by assessee-firm. The permissions and certificates of project are in the name of assessee-firm which is evident from documents filed at Pages 45-59 of Paper-Book of AY 2009-10, viz. Permission Letter dated 22.08.2005 issued by Town & Country Planning, Sagar; Project Map approved by Town & Country Planning, Sagar; House Designs approved by Gram Panchayat, Hirdepur; Mortgage Removal Certificate dated 20.05.2008 issued by Gram Panchayat, Hirdepur; and Project Completion Certificate dated 30.03.2011 issued by Gram Panchayat, Hirdepur.
- (c) That the assessee sold residential units to customers and for this purpose "Bi-parti Agreements" were executed between (i) Assessee-firm, and (ii) Buyers. One sample Agreement is filed at Pages 60-70 of Paper-Book of AY 2008-09. Ld. AR referred following covenants mentioned in this Agreement:

"AGREEMENT

*BETWEEN LAND OWNER, BUILDER AND PURCHASER
FOR SALE OF LAND AND CONSTRUCTION THEREON*

This indenture is made at (XXXX).

WHEREAS FIRST PARTY:

- 1. M/s. Vaishali Developers has registered his name as colonizer under Madhya Pradesh Gram Panchayat (Coloniser's registration and M.P. Panchayat Raj) Act, 1998 by from Sub-Divisional Officer, Damoh vide their order No. 1/2005 dated 01-07-2005.***

2. **The builder firm also received No Objection for colony development by Sub-Divisional Officer, Tehsil Damoh vide their letter No. 124 dated 16-07-2005 and the permission of Development.**

WHEREAS

The Second Party is agree to **purchase the house** at the cost of Rs. 7,95,000/- (Rupees seven lacs and ninety five thousand only). In the total cost of the house, plot cost is Rs 1,37,000/- (Rupees One lac and thirty seven thousand only) and construction cost is Rs. 6,58,000/- (Rupees six lacs and fifty eight thousand only). The plot cost of Rs. 1,37,000/- is payable before 30th June 2007 and construction cost is payable as per schedule given herewith in clause No. 4.

XXX

WHEREAS

The second party after completing the construction and receiving the full amount of consideration will hand over the possession of the land and the house to the second party.

WHEREAS

The second party will not claim the title and the possession rights on the said land and the house the full and final payment of construction cost to the first party.

NOW THEREFORE THIS INDENTURE BETWEEN PARTIES AFOREMENTIONED WITNESSETH:

XXX

3. **That the first party has been agreed to construct the building as per plan and the specification attached to this agreement (Map Annexure I and Specification annexure II) and the second party is agree to pay the construction cost of Rs. 6,58,000/- (Rupees six lacs and fifty eight thousand only) as per following schedule:**

XXX

4. **That the second party hereby expressly agreed, that in case if the second party fails to pay the land cost and construction amount within time hereby mentioned above, the first party will have full right and authority to cancel the allotment of the said plot, to change the plot No., to change the plot size, to change the land cost and to change the construction cost. Second party, irrevocably give his/her/their consent to the first party to take such any decision at that moment. Second party also agree that he/she/they will have no right to lodge any complaint or claim for getting the abovesaid plot, at above said land and construction cost, if he/she/they fails to pay the abovesaid amounts within time mentioned above.**

5. *That second party will not claim and shall not be entitled for claiming the possession of the House or the aforesaid land, until and unless the instalments of the construction cost are paid regularly upto the last.*
6. *That the first party will be entitled to hold the possession of the land and constructed structure thereon, till the full and final payment of the construction by the second party, and after receiving the full consideration and completing the construction first party will handover the possession of the house and also handover the title deeds, and will not hold any claim regarding the said land house thereon.*
7. *That however first party have no objection whatsoever to the second party mortgaging the plot/house to ___ by equitable mortgage for full and final settlement of the consideration."*

10. Ld. AR submitted that from the documents discussed above, following facts clearly emerge:

- (a) Both projects were developed by assessee-firm. The "Vaishali Nagar" project was developed on a land belonging to partners of assessee-firm and therefore a "Development Agreement" was executed between landowners (i.e. partners of firm) and assessee-firm. The covenants of "Development Agreement" clearly reveal (i) that the assessee would develop housing project, (ii) that the assessee would obtain necessary permissions and sanctions at its own risk, cost and expenses, (iii) that the execution of project shall be the sole responsibility of assessee and the landowners will have no role, (iv) that the cost of land shall be directly payable by customers to landowners, (v) that the landowners shall execute sale-deeds in favour of customers to facilitate bank finance, (vi) that the assessee shall develop project with all requisite infrastructure and amenities like road, drainage, water supply,

electricity, etc. at its own responsibility and cost, (vii) that the marketing shall be done by assessee, (viii) that the assessee shall handover possession of ready house to customers. However, in the case of "Vijay Nagar" project, there was no need of executing any Development Agreement since the land belonged to assessee itself.

- (b) That the assessee sold residential units to customers and for this purpose, "Tri-parti Agreements" were executed in case of "Vaishali Nagar" project and "Bi-Parte Agreements" were executed in case of "Vijay Nagar" project. The covenants of these agreements clearly reveal (i) that the assessee was a developer of project, (ii) that the assessee shall, after completing the construction and receiving full payment of consideration, hand over possession of land and house to buyer, (iii) that the buyer will not claim the title and the possession on the land and house till full and final payment of construction cost, (iv) that the house shall be constructed as per plan and specification, (v) that if the buyer fails to pay the land cost and construction amount within time agreed, the assessee shall have full right and authority to cancel the allotment of plot, to change the plot No., to change the plot size, to change the land cost and to change the construction cost and the buyer will have no right in the plot or construction, (vi) that the buyer will not claim and shall not be entitled to claim the possession of house or land until and unless the instalments of the construction

cost are paid regularly upto the last, (vii) that the assessee will be entitled to hold the title deeds and possession of the land and constructed structure thereon till the full and final payment of construction by buyer and after receiving full consideration and completing construction, the assessee will handover possession of house and also handover the title deeds, and (viii) that the assessee shall have no objection to the buyer mortgaging the plot/house for taking finance for payment. Ld. AR submitted that the AO has not given recognition to these Agreements with the reasoning that they were not registered but these Agreements were the primary contracts between assessee and its buyers and the sale was made to buyers on the bedrock of these Agreements only. Ld. AR submitted that the AO has given importance to the Sale-Deeds of plots executed in favour of buyers and the covenants mentioned in those Sale-Deeds but the execution of those Sale-Deeds was in furtherance of these Agreements only and moreover the execution of Sale-Deeds of plots was necessitated for facilitating bank finance to buyers. The covenants mentioned in Sale-Deeds were necessary not only for execution of those deeds but also to enable the buyers obtain bank finance. Ld. AR submitted that if the assessee had not helped its buyers in obtaining bank finance, no person would have made any purchase in assessee's projects.

(c) That the AO has made a wrong finding in assessment-order stating “*The vacant possession was also given to customers*”. The correct fact is that the assessee has given possession of constructed units after payment of all instalments of constructed units (plot and construction) and this point is repeatedly mentioned in aforesaid Agreements.

11. Having submitted thus, Ld. AR narrated that the AO has treated assessee as “Contractor for work” which is grossly incorrect. He submitted that there is a significant difference in contractorship and assessee’s case as is clearly discernible from assessee’s facts and this difference was also pointed out to AO during assessment-proceedings, refer Page No. 4 of assessment-order:

| Sr. | Essentials of Contractor | Case of Assessee |
|-----|---|---|
| A | A Contractor is being appointed by the person who wants to get the work done. | Assessee identifies the customers by advertisement, publicity or otherwise. |
| B | A Contractor is the person who works for any person and according to the instructions and to the satisfaction of the person appointing him. | The assessee does not work as per instructions of the customers, rather the customers agree to buy the house built as per the specification of the assessee, which is being evident |

| | | |
|---|---|---|
| | | from the Agreement entered by the customers which clearly mentions the specification of the house being built up by the assessee. |
| C | A Contractor starts the work after his appointment and virtually makes no investment of his own. | Assessee had made his own investment in establishing the infrastructure much before he identified the customers and even after executing the sale-deed of plot. The construction work is started by the assessee on his own and the money is paid by the customer later on. |
| D | If a person engages a Contractor, he can construct the house as per his specification and drawings. | Assessee constructs the house totally according to his specification and customers are not allowed to alter the specification except the minor one like the colour of the internal walls, colour of floor, etc. |

| | | |
|---|---|--|
| E | The person who engages the Contractor has to take the necessary permissions and approvals from the concerned departments in his own name, the Contractor never does the said job. | The assessee had planned the whole colony and taken the approval from the TNCP and Gram Panchayat in its own name (or in the name of its partner) much before the prospective buyer approached the assessee. |
|---|---|--|

12. Lastly, Ld. AR relied upon several decisions of appellate forums as mentioned in a Case Law Paper-Book separately filed. Ld. AR submitted that the Hon'ble Gujrat High Court has, in **CIT Vs. Radhe Developers 341 ITR 403**, categorically held that the ownership of the land is not a sine-qua-non for claiming deduction [u/s 80IB\(10\)](#) of the Act and this decision has also been followed in the decisions relied by him. Ld. AR also pointed out that the Co-ordinate Bench of ITAT, Indore has, in Para No. 14 & 15 of **ACIT, 2(1), Bhopal Vs. M/s D.K. Construction, ITA No. 59, 159 & 436/Ind/2015 order dated 17.10.2024** which is a case argued by Ld. AR himself, vehemently considered all case-laws relied by him and also analysed the decision of **Sky Builders (supra)** being relied by revenue, hence the same may be considered.

13. Per contra, Ld. DR submitted that the AO, in his findings, has noted that the assessee sold plots to buyers through registered Sale-Deeds and

entered into separate Agreements for construction of houses and that no registry/transfer of houses was made. Therefore, the assessee was a mere 'contractor' and not a 'builder/developer'. He submitted that as per provisions of section 80-IB(10), the entirety of project including development of infrastructure must be undertaken by assessee. According to Ld. DR, 'entire project' would mean development as a cohesive unit which includes the construction of houses with development of essential amenities. In the case of assessee, the buyers have first acquired ownership of plots from assessee through registered Sale-Deeds and entered into separate Agreements for construction, which indicates that the assessee functioned as a 'contractor' rather than 'builder/developer'. Ld. DR submitted that this situation disentitles the assessee from claiming deduction as held by ITAT, Indore in ***Sky Builders (supra)*** relied by AO.

14. We have considered rival contentions of both sides and perused the orders of lower-authorities as well as the material held on record to which our attention has been drawn. The controversy in present case is very narrow and specific. The assessee has claimed deduction u/s 80-IB(10) treating itself as engaged in the activity of developing and building housing project which the AO has rejected by concluding that the assessee is a mere work-contractor and not a developer/builder. The fundamental facts of the case are such that the assessee developed township projects called "Vaishali Nagar" and "Vijay Nagar" projects. The assessee then obtained necessary

permissions from govt. authorities for development of townships which were granted. Thereafter, the assessee approached customers for sale of residential units in the township and the buyers made bookings. The assessee entered into Agreements with buyers for sale of residential units as per terms and conditions set out in Agreements. The Agreements clearly provide that the buyers would be given possession of constructed units and on payment of all installments towards land and construction. Although there were registered Sale-Deeds of plots executed with buyers but according to assessee, the execution of Sale-Deeds of plots was to facilitate bank financing only and moreover it was a step in furtherance of initial Agreements entered with buyers. Further, the execution of Sale-Deeds of plots was a necessity step for assessee because if it is not done, the buyers would not be getting loans from banks and consequently not interested to buy units in assessee's projects. The assessee, however, received payments from buyers as per initial Agreements and delivered possession of residential units to buyers after complete construction of units. Thus, the initial Agreements were not obliterated in any manner due to execution of Sale-Deeds of plots. It is further discernible from documents that there is a complete specification of the units to be constructed and provided by assessee in 'Schedule' to the Agreements. The assessee has developed the impugned projects with all amenities and facilities like road, drainage, lights, etc. The assessee made investments for developing the projects. The assessee has taken all kinds of risks and responsibilities of projects. These

clinging facts shown by Ld. AR with reference to the documents held in Paper-Book could not be rebutted by revenue. Therefore, in these set of facts, the decisions relied by Ld. AR are clearly applicable according to which the assessee is a developer/builder of project and not mere work-contractor.

15. The revenue is placing a high reliance on the decision of ***Sky Builders (supra)*** which is extracted by AO in assessment-order (reproduced above). On perusal, we find that the AO has cited the head note of ***Sky Builders (supra)*** but not exact paras of ITAT's order. For an immediate reference, we re-produce the relevant paras of ITAT order in ***Sky Builders (supra)*** reading as under:

*"4. If sub-clause (2) to Explanation is analysed with the facts of the present appeal, it clearly provides that the date of issue of completion certificate, by the local authority, shall be the date of completion of the project. However, as admitted by the Ld. Counsel for assessee and also in view of the letter dated 15.12.2008, issued to the Id. Assessing Officer, no certificate was issued to the assessee, therefore, it can be clearly inferred that the assessee is not eligible for deduction u/s 80IB(10) of the Act. So far as the reliance of the Ld. Counsel for assessee in the case of M/s. ***D.K. Construction vs. ITO (ITA No.243/Ind/2010, order dated 6.12.2010)*** passed by the Indore Bench, is concerned, firstly, we find that in this case, the completion-certificate was issued to the assessee clearly mentioning the date of the project but in the present appeal, even till date, no such certificate was issued and secondly, the assessee sold the plots to the respective customers by registering a sale- deed and thereafter the assessee constructed the building on agreed price, therefore, the assessee acted as building contractor and not as a developer, consequently, this decision may not help the assessee. Sometimes, the process of issuance of certificate may take time, therefore, for claiming eligibility of deduction as per Explanation (2) of ***sec. 80IB(10)(a)*** of the Act, the crucial aspect is the date mentioned in the letter certifying completion of project. For claiming deduction ***u/s 80IB(10)***, on the profits derived from a housing project, the assessee has to fulfil all the four conditions ***laid down in*** the clauses (a), (b), (c) and (d) of sub-sec. (10). In the case of the assessee, the housing project was approved by the local authority on 24.11.2003 (i.e. before 1.4.2004), consequently, the assessee was to complete the construction on or before 31.3.2008. In sub-clause (ii) to Explanation, the word used is "shall" and not "may" before completion certificate is issued by the local authority, therefore, it can be said that the assessee has not fulfilled the required conditions ***laid down in*** clause (a)(i) of ***sec. 80IB(10)***. Even otherwise, it is well settled principle in law that the court cannot*

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read anything into a statutory provision where the language is clean and unambiguous because a statute is an addict of legislature. The language employed in statute is the determinative factor of legislative intent. Our view is fortified by the decision from Hon'ble Apex Court in the case of [Prakash Nath Khanna vs. CIT \(266 ITR 1\) \(SC\)](#).

5. Substitution was further made by the [Finance \(No.2\) Act 2009](#) with retrospective effect from 1.4.2009 and insertion by the [Finance Act 2010](#) w.e.f. 1.4.2010 as per which the assessee is supposed to complete the project within the specified time form the end of the FY in which the housing project is approved by the local authority and the date of completion of construction shall be taken to be the date on which completion certificate is issued by the local authority in respect of such housing project. However, in the case of the assessee, even till today, no completion certificate was issued to the assessee, therefore, we find no infirmity in the stand of the Id. CIT(A). It is affirmed."

16. Now, we re-produce Para Nos. 14 & 15 of **M/s D.K. Construction (supra)** quoted by Ld. AR, wherein the Co-ordinate Bench of ITAT, Indore has analysed various decisions relied by Ld. AR in favour of assessee as well as **Sky Builders (supra)** relied by AO in favour of revenue:

"14. Ld. AR then placed a heavy reliance on following decisions as filed in "Case Laws Compilation" submitted by him:

Paras Housing (P) Ltd. Vs. ACIT (2013) 22 ITJ 273 (Trib. Indore):

"6. The only objection of the Assessing Officer was that total construction of the plot was much higher than the amount mentioned in the registered sale-deed. The Assessing Officer also observed that the registered sale deed mentions that the plots have been sold at structure level. Thus, the difference of agreed sale price and the sale-deed price is the contract receipts. Accordingly, he held that the assessee is a contractor and not a developer. We have carefully gone through the agreement executed by the assessee with the buyers wherein structure was sold just to enable the buyers to take loan against it. However, possession was to remain with the assessee who alleged to carry out the complete construction of the building thereon as per the approved plan. The relevant clause 17 of the agreement reads as under:

"But in that case for all practical purposes the actual and physical possession of the said apartment shall continue to remain with the builders only and the builders shall have a lien over the said apartment until the entire balance payment is made to the builders either by the purchaser or by his/her financier. Therefore, it is clearly understood and agreed by the purchaser that such sale-deed will be executed by the builders only to facilitate the purchaser to get the housing loan or as the case may be, but

the same shall certainly not affect the terms of sale entered into between the parties under this agreement."

Such agreements were entered into so that the purchasers could obtain loan from the banks.

7. As per the prevailing practice in the market normally all the prospective buyers purchase flat/bungalow, are interested to avail housing loan facility from different financial institutions/banks. The financial institutions/banks insist for the execution of the sale deed before completion of the units to safeguard their interest. These agreements have been executed by the assessee before execution of sale deed and in the agreement for sale, the total cost of flat is mentioned and nowhere the bifurcation of amount of plot and amount of finished work has been mentioned. We also found that builders are asking the buyers to pay the total amount of flat at different stages based on the progress of the project. It is evident from the agreements submitted before the Assessing Officer that entire cost of flat and other charges were demanded from the buyers within a period of two months which further indicate that the flats were already completed and the possession was handed over to the buyers immediately after receiving the entire amount. The contention of the Assessing Officer that the assessee is acting as a contractor is merely on the basis of execution of sale deed at a lower price than the agreed price. There is no merit in Assessing Officer's contention in so far as the buyers having incurred any expenditure on construction of said flats during the year under consideration and the assessee is a developer and builder since inception, which has not only been accepted by the Department but also by the Tribunal in its order dated 19/12/2006.

8. In view of the above, the orders passed by lower authorities are de void of any merits. Accordingly, the Assessing Officer is directed to allow the claim of deduction u/s 80IB(10) of the Act.

Agarwal Builders Vs. DCIT (2015) 26 ITJ 709 (Trib. Indore):

*"8. Similarly in respect of semi-finished, finished units where the revenue has treated the assessee as a contractor rather than a developer, we hold that even after registry, the purchasers were not given possession of the house till it is completed. As regards the reliance of the revenue in the case of **Sky Builders (supra)**, we find that in that case only the plots were sold to the purchasers and not the constructed area. Various documents submitted before us including sanction from the Municipal Corporation and the completion certificate and other documents establish that the registries of the structure were made only to facilitate the housing loan to the purchasers. The initial agreement clearly provided that after receiving the sale consideration, the registration for structure/semi-finished/finished flats/bungalows may be done whenever the purchaser desires. Even after execution of the registration of sale-deed of structure/semi-finished/finished flats/bungalows, the possession shall remain with the seller till full payment is made. All these facts suggest that the assessee was a developer and it has never worked as a contractor on behalf of the*

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*purchasers. We also get support from the decision of the ITAT in the case of **Paras Housing (supra)** and **Vardhman Builders & Developers (supra)**. Our this view is also supported by the decision of the Hon'ble Gujarat High Court in the case of **CIT vs. Radhe Developers (supra)** wherein the Hon'ble High Court has held as under:-*

"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 s. 2(47)(v) and s. 53A of the Transfer of Property Act would lead to a situation where the land would be for the purpose of IT Act deemed to have been transferred to the assessee. In that view of the mater, 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 equally true that such title would pass only upon execution of a duly registered sale deed. However, for the limited purpose of these proceedings, one is not concerned with the question of passing of the title of the property but only examining whether for the purpose of benefit under s. 80IB(10), the assessee could be considered as the owner of the land in question. For the limited purpose of deduction u/s 80IB(10), the assessee had satisfied the condition of ownership also, even if it was necessary. The Tribunal committed no error in holding that the assesses were entitled to the benefit u/s 80IB(10) even where the title of the lands had not passed on to the assessee and in some case, the development permissions may also have been obtained in the name of the original land owners. It is not even the case of the Revenue that other conditions of s.80IB were not fulfilled."

*The decisions in the cases of **Radhe Developers and Paras Housing Pvt. Ltd. (supra)** were of a later date than the decision of ITAT in the case of **Sky Developers (supra)**."*

AG8 Ventures Ltd. Vs. ACIT, Bhopal IT(SS)A No.83, 84, 86, 87, 90, 91, 109, 110 & ITA, No. 922 & 923/Ind/2019 order dated 16.02.2021 (ITAT, Indore):

"32. We have considered the rival submissions and gone through the orders of the lower authorities and the facts and evidences on record. Revenue has challenged the finding of Ld. CIT(A) allowing the claim of assessee of deduction u/s. 80IB(10) of the Act at Rs. 1,60,73,981; Rs. 3,56,08,183; and Rs. 2,68,13,834 raising Ground No. 3 of A.Y. 2008-09, Ground No. 3 of A.Y. 2009-10 and Ground No. 10 of A.Y. 2011-12 respectively.

At the first instance, we observe that learned Assessing office has not referred to any incriminating material found during the course of search u/s.132 of the Act to establish disallowance of deduction u/s. 80IB(10). Further, we find that the claim of deduction u/s. 80IB(10) was already a subject matter of regular assessments in preceding years. In the A.Y. 2004-05 to 2007-08 the deduction was impugned before this Tribunal and the same was decided in favor of assessee and copy of order is placed at PB 438-447. Further, in A.Y. 2007-08, the issue of deduction was disallowed

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again in proceedings u/s. 147. The matter again travelled before this Tribunal and in ITA No. 472 & 473/Ind/2015, vide order dated 08.01.2019 deduction u/s.80IB(10) of the Act was allowed. The order has been placed in the assessee's paper book at PB 125-145. Further in A.Y. 2008-09, which is impugned before us, the assessment was completed u/s. 143(3) and the claim of deduction u/s. 80IB(10) was allowed by the Ld. AO (The Assessment order is placed at PB 45-46). Also, in A.Y. 2009-10, the claim was allowed in the assessment u/s. 143(3) by the Ld. AO. The Assessment order is placed at PB 69-70. In A.Y. 2010-11, the issue of developer and contractor travelled to ITAT. The claim was allowed by the ITAT, Indore Bench, Indore and the order is placed at PB 125-145. Thus, the issue as regards the deduction u/s. 80IB(10), so far as the assessee is concerned, has already been settled in various proceedings. The department in the proceedings u/s. 153A is trying to re-agitate this issue, which is not permissible. The relevant finding of this Tribunal in ITA 472 & 473/IND/2015, order dated 08.01.2019 squarely applicable on the instant issue is reproduced below:

"5. We have heard rival submissions, perused the materials available on record and gone through the orders of the authorities below. Objection of the A.O. is that the assessee is not undertaking development and construction of housing projects. The assessee is not owner of the land of which project is claimed to have been undertaken. The similar issue was before the Hon'ble Gujarat High Court in the case of CIT Vs. Radhe Developers 341 ITR 403, wherein the Hon'ble High Court was of the view that the ownership of the land is not sine-qua-non for claiming deduction u/s 80IB(10) of the Act. Therefore, in our considered view, this objection of the A.O. is contrary to the judicial pronouncements cannot be sustained. Further, the A.O's objection that the assessee is merely acting as a contractor to the customer to whom land is independently sold and thereafter construction is being done as per agreement. This issue was examined by the Tribunal in original proceedings, wherein it has been decided in favour of the assessee. There is no change into facts and circumstances. Hence, this objection is also not sustained"

Swadesh Developers and Builders Vs. ACIT, ITA No. 304 to 309/Ind/2017 order dated 10.08.2021 (ITAT, Indore):

"25. It was also contended that for the sake of convenience the buyers and in order to facilitate them to take housing loan the assessee agreed to sale the plots without giving the possession and after the construction of house used to hand over the possession. This submission by the Ld. counsel for the assessee has sufficient weightage as this condition is already provided in clause 13 of the agreement entered into between assessee and buyers placed at page 102 of paper book. We also observe that in the allotment cum acceptance letter consideration is towards the complete bungalow and there is no bifurcation of the cost towards land and cost of construction. Thus there remains no dispute to the fact that after the completion of construction possession of the residential house is given to the buyers/colonizers.

26. However, the Coordinate Bench Ahmedabad in the case of Green Associates (supra) dealing with the similar issue and identical set of acts and placing reliance on the decision of Tribunal in the case of **Narayan Reality Ltd. ITANo.2293/Ahd/2012 and others dated 02.05.2014** held that the assessee is a developer eligible for deduction u/s 80IB(10) of the Act observing as follows:

"We have heard the rival submission and perused the material on record. We find that in the present case the assessee was denied deduction u/s 80IB(10) by Ld. CIT(A) for the reason that assessee had not sold residential houses in the house project but had sold developed residential plots with construction up to the plinth only and thus the assessee could not be considered as developer of housing project but was a contractor and therefore assessee was not eligible for deduction u/s 80IB(10) of the Act. we find that on similar facts, in the case of Narayan Reality Ltd. (supra) the issue was decided in favor of the assessee by holding as under:

"8. We have heard the rival submissions and perused the material on record. On perusing the order of CIT(A), it is seen that CIT(A) has held that the issue relating to disallowance of deduction u/s 80IB(10) of the Act on the ground that Assessee is not the owner of the land and the approval of the project not being in the name of the Assessee is covered in favour of Assessee by the decision of his predecessor in assessee's own case for AY 2008-09. We further find that CIT(A) had disallowed the claim of the Assessee on the ground that Assessee had entered into two agreements namely "sale-deed" for the sale of land and "construction agreement" for the construction the unit and therefore according to him, the Assessee was a contractor and therefore not eligible for deduction u/s 80IB(10). We also find that on identical facts, the co-ordinate Bench of the tribunal in the case of **Satsang Developers (ITA No 1011, 2498 and 1221 of 2012 order dated 12.11.2013** has allowed the deduction to assessee by holding as under:-

"4.2. In addition to above two objections, the Ld.CIT(A) has raised one more objection that the assessee has sold the land to the Unit holders separately and has done the construction of units under separate agreement/contract and, therefore, the assessee is not eligible for deduction u/s.80-IB(10) of the Act because as per Ld.CIT(A), profit earned by the assessee in respect of sale of land is not eligible for deduction u/s.80-IB(10) of the Act and similarly, the profit earned by the assessee for construction activities is not eligible for deduction u/s.80-IB(10) because the assessee is doing the construction as a contractor for a work and not as a builder or developer and, therefore, the assessee is not eligible for deduction u/s.80-IB(10) of the Act. Against these objections of Ld.CIT(A), the assessee is in appeal before us.

5.2 Regarding the 3rd objection that the assessee has sold land to the unit holders separately and has done the construction units under a project agreement/contract, it was submitted that it is a joint activity although the agreement and land sale-deed are executed separately, but for this reason

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alone, it cannot be said that the assessee is not a builder or a developer. He placed reliance on the following Tribunal decisions:-

Sl. Decision in the case of. ... Reported in.... No(s)

1. DCIT vs. SMR Builders (P.)Ltd. (2012)24 Taxman.com 194 (Hyd.)
2. Sky Builders & Developers vs. (2011)14 Taxman.com 78 ITO (Indore)
3. M/s.Vardhman Builders ITA No.559/Ind/2010 dated and [Developers vs. ITO 09/05/2012](#)
4. Raghava Estates Vs. Dy.CIT ITA Nos.248 & 49/Vizag/2009 dated 04/08/2011.

5.2. He submitted that in the case of Vardhman Builders & Developers (supra) also, the assessee had entered into a separate agreement for sale of land and separate agreement for construction of housing on such land and under these facts, it was held by the Tribunal in that case that merely because of two separate agreements, the claim of the assessee for deduction [u/s.80-IB \(10\)](#) of the Act cannot be declined if other conditions are being satisfied.

5.3. He further submitted that in the case of DCIT vs. SMR Builders (P) Ltd. (supra) also, the facts were that the assessee had sold flats in a semi-finished stage. In that case, the AO had noted that as per the sale- deed, the assessee-company has sold undivided share of land with super-structure of semi-finished built-up area for a certain consideration. The AO held that thesemi-finished structure has never been considered as a residential unit. It was also noted by the AO in that case that on the same date when the sale deed was executed, a construction agreement was also entered into with the transferee for further construction of the same flats by the builder company itself. He submitted that the facts in the present case are similar. He also pointed out that in that case, it was held by the Tribunal that the stand of the Revenue with regard to the semifinished condition of the flats is devoid of any merit in as much as what is sought to be constructed and sold by the assessee is a residential units and what is sought to be purchased by the buyer is the ownership of the specified unit and registration of flat in semi-finished condition is only to facilitate the convenience of the parties and agreement for development and completion of balance work in relation to the flats is only an incidental formality and this cannot be viewed as fatal to the claim of the assessee for deduction [u/s.80-IB\(10\)](#) of the Act. It was also held by the Tribunal that the entire work from the stage of the commencement to the stage of making the residential unit habitable have been carried out by the assessee only and, therefore, assessee is eligible for deduction [u/s.80-IB\(10\)](#) of the Act.

9.2. Now we take up the third and last objection of Ld.CIT(A) that the assessee had sold the land separately and undertook the construction work as per a separate agreement and, therefore the assessee is not a builder or a developer but a land dealer and contractor. In this regard, in our

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considered opinion, the issue involved is squarely covered in favour of assessee by the decision of ITAT Indore Bench rendered in the case of M/s. Vardhman Builders and Developers vs. ITO (supra). It is noted by the Tribunal in that case that the assessee had entered into an agreement for a sale of land and a separate agreement for construction of the house on the land and, therefore, the facts are similar. Under these facts, it was held by the Tribunal in that case that the claim of the assessee for deduction u/s.80-IB (10) of the Act cannot be declined if other conditions are being satisfied. Similarly, in the case of DCIT vs. SMR Builders (P.) Ltd. (supra) also, the assessee sold the land along with semi-finished structure to the buyers and as per separate agreement, agreed for construction for completion of balance work. Hence, the facts of this case are also similar because in that case also, the land was sold separately along with partial and unfinished construction of flats and, thereafter, construction agreement was entered into to carry out the balance construction work and under these facts, it was held by the Tribunal in that case that such agreement for construction to complete the balance work is only an incidental facilitation to protect interest of the parties and therefore, the assessee is eligible for deduction u/s.80-IB(10) of the Act. Similarly, in the case of Raghava Estates vs. Dy.CIT (supra) on which reliance was placed by the Id.AR of the assessee, the facts are similar. In that case also, the assessee had sold the plots separately and thereafter, constructed the houses and under these facts, the Revenue held that the assessee has to be considered as a mere contractor and, therefore, the assessee is not eligible for deduction u/s.80-IB (10) of the Act. This goes to show that the facts in that case were identical. In that case, it was noted by the Tribunal that the assessee had chosen to register the plot in the name of the buyer on payment of specified amount in order to achieve cost saving and to ensure reliability and thereafter, the assessee had proceeded to construct the house as per building plan obtained in the name of the plot-owners on payment of subsequent installments. It is also noted that the assessee had also developed various public amenities within the project. Thereafter, it was held by the Tribunal that on a totality of a fact, the Tribunal is of the view that the assessee has undertaken developing and building housing projects as per the scheme provided in section 80-IB (10) of the Act.

9.3. Since the facts in the present case are similar to the facts in above noted three Tribunal decisions, we do not find any defect in the construction in the present case and hence respectfully following these decisions, we decide the issue in favour of the assessee. There is no other objection of the Id. CIT(A) regarding allowability of deduction to the assessee u/s. 80IB(10) of the Act. Hence, we direct the A.O to grant the deduction to the assessee u/s. 80IB(10) of the Act.

9. Before us, the Revenue could did not place any contrary decision on record nor could distinguish the facts of the case which was relied ITA Nos. 1028 & 1781/Ahd/2012 ITO vs. M/s. Parashar Developers AY : 2008-09 & 2009-10 by the Assessee. In view of the aforesaid facts, we respectfully following the aforesaid decision of the co-ordinate Bench of the Tribunal, in the case of Satsang Developers (supra) hold that Assessee is eligible for deduction u/s 80IB(10). Thus this ground of Assessee is allowed.

10. This the appeal of Assessee is allowed."

15. Ld. AR distinguished **Sky Builders (supra)** relied by revenue. He submitted that a careful reading of Para 5 of the order of ITAT shows that the ITAT has rejected assessee's claim of deduction for want of completion-certificate. The sale of plots to buyers in Para 4 was mentioned only for the sake of comparison with another case. Further, the decision in **Sky Builders** was given before decision of Hon'ble Gujrat High Court in **Radhe Developers 341 ITR 403**. The decision of **Radhe Developers** has been followed by various benches of ITAT in subsequent cases including ITAT, Indore in **Agarwal Builders (supra)** and **AG8 Ventures Ltd. (supra)** relied by assessee. Ld. AR referred Para No. 8 of **Agarwal Builders (supra)** to demonstrate that there were exactly same facts and same controversy as in present assessee and that the ITAT allowed claim of deduction by following decisions of ITAT, Indore in **Paras Housing** and **Vardhman Builders & Developers** as well as the decision of Hon'ble Gujarat High Court in **Radhe Developers**."

17. Thus, considering the facts of the projects done by assessee in the light of various decisions, we are inclined to hold that the assessee was engaged in the activity of developing and building housing projects and entitled to deduction u/s 80-IB(10). Accordingly, we direct the AO to allow the deduction as claimed by assessee. The assessee succeeds in these appeals.

18. The Ground No. 6 in AY 2007-08 and Ground No. 9 in AY 2008-09 challenge the interest levied by AO u/s 234B. During hearing, these grounds are not pleaded. Accordingly, they do not require any adjudication from us.

19. Resultantly, these appeals are allowed.

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| Order pronounced by putting on notice board as per Rule 34 of ITAT Rules, 1963 on 24/02/2025 |
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Sd/-
(UDAYAN DAS GUPTA)
JUDICIAL MEMBER

Sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक/ Dated : 24/02/2025

Dev/Sr. PS

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

By order
Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore