IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH – AHMEDABAD

(BEFORE S/SHRI BHAVNESH SAINI, JM AND D. C. AGRAWAL, AM)

ITA No. 2700, 2701, 2702 and 2703/Ahd/2009
A. Y.: 2004-05, 2005-06, 2006-07 and 2007-08

The A. C. I.T., Cent. Cir- 1 (3), Room No.304, 3rd floor, Aayakar Bhavan, Ashram Road, Ahmedabad	Vs	M/s. Yug Corporation, F/1, Trimurty Complex, T. B. Nagar, Bapunagar, Ahmedabad
PA No. AAAFY 4756 D		
(Appellant)		(Respondent)

Appellant by	Shri S. K. Gupta, DR
Respondent by	Shri P. M. Mehta, AR

O R D E R

PER BHAVNESH SAINI: All the above appeals filed by the revenue are directed against the common order of the learned CIT(A)-I, Ahmedabad dated 17th June, 2009, for assessment years 2004-05 to 2007-08. The revenue in all the appeals challenged the order of the learned CIT(A) in directing the AO to allow deductions of Rs.11,23,120/-, Rs.28,88,965/-, Rs.49,38,710/- and Rs.67,78,990/- u/s 80 IB (10) of the IT Act for all the assessment years respectively.

2. The facts of the case are that the AO disallowed the claim of the assessee for deduction u/s 80 IB (10) of the IT Act. The claim which was disallowed is as under:

Assessment Year	Disallowance
2004-05	Rs.11,23,120/-
2005-06	Rs.28,88,965/-
2006-07	Rs.49,38,710/-
2007-08	Rs.67,78,990/-

The AO noticed that the assessee had two housing projects; the first one is that of New Naklank Co-operative Housing Society Ltd. and the second one is Rajshila. Co-operative Housing Society Ltd. The *A.O.* has stated that the AUDA authorities had approved the project by giving permission to Babubhai Popatbhai Vasani being power of attorney holder of different persons in both the cases. The AO noticed that the land was registered in the name of respective societies and permission for development was also given in the name of societies. He has noticed that in respect of Rajshila Co-operative Housing Society Ltd. 60 units were to be developed and in the case New Naklank Co-operative Housing Society Ltd. 50 units were to be developed. The assessee had shown the work in progress in the profit *& l*oss accounts as also direct and indirect expenses along with the profit in the profit & loss account of the respective years. The AO has rejected the claim of assessee for deduction u/s. 80 1B (10) of the IT Act on the following grounds:

(a) The project has been developed on an area 8094 Sq. Mtrs. and 9410 Sq. Mtrs. The piece of land is owned by societies i.e. New Naklank Co-operative Housing Society Ltd. and Rajshila Co Operative Housing Society Ltd. The lay out plan has been approved by AUDA on 30/10/2002 and

23/07/2003 for construction of 60 and 50 units of residence. Thus it is clear that the assessee is not owner of the project.

(b) The construction work is done as per the development/ construction agreement and hence the assessee is merely a contractor for the purpose of construction of the projects.

(c) Assessee's claim that it has paid money for purchase of land and taken the possession for development and construction of project and hence it is real owner of project, in view of section 53A of Transfer of Property Act, is also not acceptable because ownership of land transfers only when registered sale deed is executed.

(d) All the expenses are being done on behalf of the co-operative society and the society has the ultimate liability towards such expenses.

(e) As per the terms of the agreement, till the completion of the housing project, the work in progress is to be computed on the basis of work contract. This clause clearly evidences the status of the assessee, as being that of a works contractor and not a developer of project.

(f) In the books of accounts, the assessee firm has never shown any income from sale of flats/bungalows/row houses but has merely shown work done which has been subsequently transferred to the society.

(g) The deduction is not available to assessee, who is engaged in the business of developing a land and doing a labour work for construction for other entity. The deduction shall be available only if the undertaking is developing and constructing the housing project.

The assessee submitted that the project was developed by them for both the societies on the land which was purchased from land owners as special purpose vehicle by the societies and was for development transferred with development rights to the assessee and development agreement was entered into separately with each of the societies. It was submitted that the development was to be carried out as per the layout plan at the cost of the assessee which was approved by AUDA authorities. The assessee submitted that the conditions of 80 IB (10) of the IT Act are fulfilled as per the details given hereunder:

Sr. No.	Conditions specifics for deduction u/s. 80IB	Fulfillment of conditions of deduction u/s. 80IB
A	Rajshila *Co* Operative Housing Society limited	
1	Housing project should be approved before 31/03/2007	23/07/2003 Approved by AUDA
2	Undertaking commence or commences development and construction of housing	BU permission is *received* on 21/08/2007

	project on or after 1/10/1998 and approved by local authority before 1/4/2004 and completes such construction on or before 31/3/2008	
3	Size of the plot of land having a minimum one acre	8094 square meters
4	Maximum built up area of 1500 Sq feet for each residential unit	Each residential unit is having built up area of less than 1500 Sq. Ft.
5	Location of the project should be .within Municipal Corporation Limits	Project is within such limits.
B	New Naklank Co Operative Housing Society limited	
1	Housing project should be approved before 31/03/2007	30/10/2002 Approved by AUDA
2	Undertaking commence or commences development and construction of housing project on or after 1/10/1998 and approved by local authority before 1/4/2004 and completes such construction on or before 31/3/2008	BU permission is received on 16/02/2008
3	Size of the plot of land having a minimum one acre	9410 square meters
4	Maximum built up area of 1500 Sq feet for each residential unit	Each residential unit is having built up area of less than 1500 Sq. Ft.
5	Location of the project should be within Municipal Corporation Limits	Project is within such limits.

In support of aforesaid claim of deduction u/s 80IB (10) of the IT Act, the assessee had submitted following details to AO:-

(i) Annual accounts for the year ended on 31/03/2004

(ii) Audit report in Form No. 10CCB for claiming deduction u/sec. 80-IB(10) of the Act

(iii) Approval of housing project approved from AUDA

(iv) B.U. Permission received from AUDA

(v) Copy of Agreement to sale/Banakhat entered between society and developer for purchase of land.

It was claimed that there was no other conditions left out to be complied by the assessee for the purpose of allowing the deduction, keeping in view the ratio laid down by the ITAT, Ahmedabad in the case of M/s. Radhe Developers. The assessee's further submissions regarding satisfaction of Sec. 80 IB of the IT Act are summarized as under:

i) It was submitted that though the permission for development was issued by AUDA in the name of the society, the said permission was obtained/attended by the assessee. Even the cost i.e. fees etc. relating to such permission was also borne by the assessee. It was further submitted that it is not necessary that permission should be in the name of the developer as per the provisions of section 80 IB (10) of the IT

Act. It was submitted that the assessee being developer, was involved in all these activities from the very beginning.

ii) It was submitted that the development was carried out by the assessee at its responsibility and risk. There was no fixed income by way of percentage of collection etc. earned by the assessee, but it was profit on development work which was earned. The functions which as developer to be carried out are described as under:

(A) The developer for the purpose of planning and executing the housing project has sanctioned necessary plans, drawings, specifications and maps, etc., and has done the work of planning, construction and development of the said project.

(B) The developer has appointed the Architects, Engineers, Legal Advisors and such other professionals necessary for the purpose of implementation of such project and has born the necessary expenditure. The developer has made all necessary arrangements with the aforesaid professionals for successful planning, construction and development of the said project.

(C) The approval from local authority was obtained with the efforts of the assessee developer as stated in earlier Para.

(D) The developer has accepted money from the persons enrolled in the project. The price to be charged to customers is solely determined by the assessee and thereby, collects the consideration. Entire sales value of a units collected by

developer has been shown as income in the books of account of the assessee.

(E) For the purpose of completing the project, as planned and within stipulated period, developer has made all necessary applications, replies, statements, which are needed, in the Government Offices or Municipal Corporation Offices, etc.

(F) The complete responsibility of the planning, and the total construction is rested upon the developer and during the time when the project was going on, the complete responsibility for whatever agreements executed under the project and whatever transactions taken place with third parties, the same was rested upon the developer and the Society was not responsible.

(G) The assessee-developer has created common amenities and other infrastructure like roads, electricity, water, drainage, etc., for aforesaid project at their own cost thus, assessee has created a new product on the plot of land by performing aforesaid development work.

(H) All expenditure related to development recorded in the books of assessee and legal, AUDA charges, development etc. are paid by the assessee.

It was submitted that thus the assessee has worked as a developer. It was further submitted that the assessee had entered into agreement for sale (banakhat) for acquiring the land with the society in respect of Rajshila Co-operative Housing Society for Rs.9 lakh and in respect of

New Naklank Society for Rs.16 lakh and the consideration for the same was to be paid by the assessee, irrespective of the fact as to whether the assessee was able to sell out the units and possession of land was given to assessee. Thus all the risks of the project were to be borne by the assessee. In this connection the assessee also referred to various clauses of development agreement. In so far as the observation of the A.O. that the assessee should be the owner of the land, the assessee referred to the above Banakhat agreement and further stated that as can be seen from the speech of Finance Minister when the provisions of section 80 IB (10) of the IT Act were introduced it can be seen that there was no intention that the developer should be owner of the land. In this connection the assessee also referred to the ITAT, Mumbai decision in the case of Patel Engineering Ltd. 84 TTJ 646 and stated that the ownership of land is not precondition for the purpose of claiming deduction u/s. 80 IB (10) of the IT Act. It was submitted that the assessee was in full possession of land for development of the project. With *reference* to the AO's observation that the land had not been sold, it was again submitted that the price to be charged from the respective members was to be determined and collected by the assessee and the society was bound to enter such persons as members. As such the decision for sale of units was that of the assessee firm and not of the society. It was further submitted that even collection of funds from the members was by the assessee as a developer. It was also stated that no separate amount is collected for land and construction but the amount is received for sale of each unit. With *reference* to the AO's observation that the assessee had not shown income from sale of

flats, It was further submitted by the assessee that as it follows percentage completion method of accounting, the profit is shown with reference to work in progress i. e. project work carried out during the year though the project is not completed/still pending and the units are not sold. It was pointed out by the assessee that if he had not shown income from sale of flats, there would not have been any profit/loss from housing project in year under consideration. The assessee further submitted that the assessee was not working on fixed remuneration from the land owners but was working itself as a developer in order to exploit the potential of its business in its own interest and, therefore, opted for all business risks associated with the business of development of real estate including development and building of housing projects. Thus entire risk i. e. profit/loss was to be born by developer and not the society. This can be appreciated from clause 15 *&* 16 of development agreement and clause 6 of Banakhat Agreement.

With the above explanation the assessee claimed that the deduction was rightly admissible u/s 80IB (10) of the IT Act. The assessee relied upon the decision of ITAT, Ahmedabad in the case of M/s. Radhe Developers 113 TTJ 300 and also the decision of ITAT, Ahmedabad in the case of Shakti Corporation dated 7-11-2008.

3. The learned CIT(A) considering the submissions of the assessee, materials on record in the light of the decisions of ITAT Ahmedabad Bench in the cases of M/s. Radhe Developers and Shakti Corporation (supra) decided the issues in favour of the

assessee and directed the AO to allow deduction u/s 80 IB (10) of the IT Act. The findings of the learned CIT(A) in Para 3.2 of the impugned order are reproduced as under:

> *"3.2 I have carefully considered the above assessment order and the submissions on the issue. It is noticed that the appellant has entered into agreement for development of the housing project of two societies namely Rajshila Co-op. Hsg. Society and New Naklank Co-op. Hsg. The appellant has as per development agreement carried out the work of development of the two societies. The A.O's arguments are mainly based on two grounds i.e. the land was registered in the name of Society and that the permission for development was in the name of Society and secondly, in the accounts the sale was not shown but the profit was shown. As against this, the appellant has clarified and proved that the development was carried out by them. Even the cost for obtaining permission was borne by the appellant. The appellant had entered into both the agreements for development as also banakhat for purchase of land with the two societies and as per the agreement they have carried out the development work. Thus, appellant in present case has acquired dominant control over the land and as per banakhat agreement entered with societies; developer was bound to pay amount for acquiring the land irrespective of the fact whether it is able to sell the units. Possession of the land was also given to appellant developer and risks associated with housing project were on it. The appellant is not earning remuneration at fixed rate.*
>
> *The appellant submitted that they are following percentage completion method of accounting and thus the profit/loss in respect of the project was shown on year to year basis and it was not correct to say that the appellant had not shown any income on sale of units. It is also seen from the agreement for development as well as the banakhat agreement that the risk for development including cost is to be borne by the appellant. It is noticed*

that appellant is following percentage completion method of accounting and profit is shown with reference to work in i. e. project work carried out during the year. Other conditions of section 80 IB (10) are not disputed by the AO and assessee has furnished all information thereto.

Accordingly the appellant was entitled to deduction u/s.80 IB(10). On consideration of all these aspects and the ratio of the decision of ITAT, Ahmedabad in the case of Radhe Developers and subsequent decision in the case of Shakti Developers the A.O. is directed to allow deduction u/s. 80 IB(10) to the appellant."

4. The learned DR relied upon the order of the AO and submitted that the assessee is not owner of the project in question and was merely engaged as contractor and has not shown the sale consideration in the profit & loss account. Therefore, the assessee has no dominant control over the project. Therefore, the learned CIT(A) should not have allowed the claim of the assessee. He has submitted that earlier decisions of the Tribunal in the case of M/s. Radhe Developers and Shakti Corporation are in favour of the revenue. The learned DR also referred to certain paragraphs from the development agreements as well as agreements to sell in order to support his contention.

5. On the other hand, the learned Counsel for the assessee reiterated the submissions made before the authorities below and submitted that the issues are squarely covered in favour of the assessee by earlier decisions of the Tribunal which have also been considered in detail by ITAT Ahmedabad Benches in the case of M/s. Amaltas Associates Vs ITO in ITA No.2401/Ahd/2010 dated

21-01-2011 and in the case of M/s. Safal Associates Vs ITO in ITA No.520/Ahd/2011 dated 19-05-2011 and the claims of the concerned assessees have been allowed u/s 80 IB (10) of the IT Act. He has also referred to the development agreements and the agreements to sell and referred to various clauses of the same to show that the assessee was owner of the housing project with all dominant control and possession of the property remain with the assessee. The assessee was a developer of the housing project and all risks vest in the assessee. The assessee never acted as a contractor for the societies. He has submitted that the learned CIT(A) on proper appreciation of facts and material on record rightly directed the AO to allow the claim of the assessee. He further submitted that all the profits have been booked in the books of accounts of the assessee and for the completion of the project entire income is shown in the profit & loss accounts for financial year 2007-08 (assessment year 2008-09). Copy of the profit & loss account is filed in support of the contention to show that the assessee acted as a builder/developer of the housing project with all dominant control over the project and all profits have been booked by the assessee in its books of accounts. He, therefore, submitted that the revenue's appeals have no merits and may be dismissed.

6. We have considered the rival submissions and the material available on record. We find that the issues now raised in the present appeals are already taken into consideration and decided by ITAT Ahmedabad Bench in the case of Amaltas Associates Vs ITO (supra) in which earlier decision of this Bench in the cases of M/s. Radhe

Developers and Shakti Corporation (supra) had already been taken into consideration. Copy of the same is placed on record. The findings of the Tribunal in the case of M/s. Amaltas Associates (supra from Para 6 to 12 are reproduced as under:

> *"6. We have considered rival submissions and material available on record. Section 80IB (10) reads as under:*
>
> > *"80-IB. Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.--(1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections 3(3) to (11), (11A) and (11B) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.*
> >
> > *xxxx xxxx*
> >
> > *xxxx xxxx*
> >
> > *(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008 by a local authority shall be hundred per cent. of the profits derived in the previous year relevant to any assessment year from such housing project if,—*
> >
> > *(a) such undertaking has commenced or commences development and construction of the*

housing project on or after the 1st day of October, 1998 and completes such construction,—

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

(ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1st day of April, 2004, within four years from the end of the financial year in which the housing project is approved by the local authority.

Explanation.—For the purposes of this clause,—

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

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

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

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

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

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

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Explanation.— For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State Government).

7. The definition of "built-up area" is provided in section 80IB(14) (a) of the Act, which means "the inner measurements of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units." Before proceeding further, it would be relevant to mention the facts considered in the case of Radhe Developers and Shakti Corporation (supra) decided by the ITAT, Ahmedabad Benches. In the case of Radhe Developers (supra), the assessee claimed deduction under Section 80IB(10). However, the AO disallowed the claim on the ground that (i) the assessee was not the owner of the land, and (ii) each approval was also not in the name of the assessee and it had acted merely as an agent/contractor for construction of residential house. The claim was denied to the assessee. The Tribunal

considered the averments and material on record and held as under:

> *"27. A bare reading of these provisions of s. 80-IB(10), as they stood in the years under consideration, the requirements for claiming deduction for housing projects are that (i) there must be an undertaking developing and building housing project; (ii) such housing project is approved by the local authority; (iii) the development and construction of housing project has commenced on or after 1st Oct., 1998; (iv) the housing project is on a size of a plot of land which has minimum area of one acre; and (v) the residential unit developed and built has a built up area of 1,000 sq. ft. if it is situated in Delhi and Mumbai or within 25 kms of municipal limit of these cities and 1,500 sq. ft. at any other place. There is no other condition, which is to be complied by an assessee for claiming the deduction on profits of the housing project.*
>
> *28. The contention of the Revenue authorities that to claim deduction under s. 80-IB(l0), there is a condition precedent that the assessee must be owner of the land on which housing project is constructed has no force. We do not find any such condition as appearing in the provisions of the section extracted above. A plain reading of sub-s. (10) of s. 80-IB reveals and makes it evident that there must be an undertaking developing and building a housing project as approved by a local authority. It does not have any further condition that such development and building of the housing project should also be on a land owned by an assessee undertaking. It might be true that the land belongs to the person who has entered into an agreement with the assessee to develop and build housing project but on a perusal of the agreement as narrated above, it is evident that the*

development and building work has been carried out by the assessee in pursuance of a tripartite agreement and it is not by the land-owners. Therefore, the mere fact that the landowner and the undertaking developing and building housing project, are two different entities would not make any difference. The deduction would be eligible to the person who is developing and building housing project and not to the mere owner thereof.

A person who enters into a contract with another person is no doubt a contractor. Having entered into agreements with landowners for development and building the housing project, assessee was obviously a contractor but it does not derogate the assessee for being a developer, as well. The term contractor is not essentially contradictory to the term developer. As stated above, it is the undertaking that develops or builds the housing project that is entitled to deduction irrespective of the fact whether that it is the owner or not or whether it is the contractor thereof. The requirement for claiming deduction is that such an undertaking must develop and build housing project, be it on their own land or on the land of others and for which a tripartite agreement has been entered into for development and building housing project; or be the assessee a contractor for developing and building housing project or an owner of the land.

The word 'development' means the realization of potentialities of land or territory by building or mining. Accordingly, it can be safely said that a person who undertakes to develop real estate by developing and constructing a housing project is an eligible undertaking; developing and building of housing projects within the meaning of s. 80-IB(10) of the Act. In the present case in hand, the landowner has not made any conscious attempt to develop the property except ensuring their rights as

landowner so that the sale value of the land could be realized to them as per the terms of ' Agreement to Sale ' and the ' Development Agreement ' . The landowners, no doubt, have not thrown themselves into development of property. It is only the assessee who is developing the property. Throwing itself into the business of development and building of housing projects by taking all risks associated with the business by engaging architects, structural consultants, designing and planning of the housing schemes, payment of development charges, obtaining necessary permissions, approving plans, hiring machinery and equipments, hiring engineers, appointing contractors, etc. No doubt, the permission has been obtained in the name of the registered landowners, but the same have been obtained by the assessee firm through its partners who are holding power of attorney of the respective landowners. It is a fact that the assessee is a 'developer' and not a 'contractor' as held by the lower authorities. The developer is not working on remuneration for the landowners, but developer is working for himself in order to exploit the potential of its business in his own interest and, therefore, opted for all business risks associated with the business of development of real estate including developing and building of housing projects. As per the provisions of s. 2(1)(g) of Regulation of Employment and Conditions of Service Act (27 of 1996), the term ' Contractor ' means a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment; and includes a sub-contractor.

In those circumstances, the assessee is entitled to deduction under s. 80-IB(10) as it had developed and built the housing project; it had started

construction after 1 day of April 1998; the project is on the size of a plot of land which has a minimum area of one acre and the maximum built-up area of the residential units is not more than 1,500 sq. ft.

It may also be born in mind that deduction is not exclusively to an assessee but to an undertaking developing and building housing project, be it developed by a contractor or by an owner.

The assessee, in the instant case, can also be said to be the owner of the land as it had made part payment to the landowners during the financial years 2000-01 and 2001-02 for an amount of Rs. 56 lacs, and taken the possession of the land for development and building the housing project and satisfy that condition as well of being the owner of the land in view of provisions of s. 2(47)(v). When the assessee has taken on the possession of immovable property or retained it in part performance of a contract of a nature referred to in s. 53A of the Transfer of Property Act, 1882 it amounts to transfer under s. 2(47)(v).

In the instant case there was, definitely, a dominion of the developer over the land to the exclusion of others inasmuch as possession of the land is given to the developer by the land owners to carry out the construction activity of the housing project. The assessee developer has complied with all the conditions as provided under s. 80-IB(10) of the Act, so as to claim deduction. The assessee has also passed on the part consideration for acquiring the land through an 'Agreement to sale' and in view of the provisions of s. 2(47) r/w s. 53A of the Transfer of Property Act, 1882, the assessee has completely performed his part of the contract and developed the housing project and transferred the flats/tenements to the buyers in view of 'Agreement to sale' as well as 'Development agreement'. It

shows that the assessee was in full possession of the land for the development of housing project and has carried out all the activities of a complete housing project by taking all risks associated with this business. The assessee is engaged in complete infrastructure including engaging architects, structural consultants, designing and planning of the housing schemes, payment of development charges, obtaining necessary permissions, on behalf of the landowners, got the plans approved, hiring of machinery and equipments, hiring engineers, appointing contractors, etc.

As discussed above and in view of the case law of the Supreme Court in the case of Mysore Minerals Ltd. (supra), wherein it has been categorically observed as regards to ownership that anyone in possession of property in his own title exercising such dominion over the property as would enable others being excluded therefrom and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a formal deed of title might not have been sale ' and ' Development agreement ' , the assessee has acquired dominion over the land to the exclusion of others and he has completed the project on terms and conditions laid down under s. 80-IB(10) of the Act, to claim deduction on the profit derived from construction and development of residential housing project. There is no explicit condition enumerated in s. 80-IB(10) of the Act as regards to requirement of ownership for the claim of deduction. In view of above facts and circumstances of the case as well as legal proposition laid down by the Supreme Court in the case of Mysore Minerals Ltd. (supra), we hold that the assessee is entitled for claim of deduction on the profits derived from construction and development of residential housing project."

8. In the case of Shakti Corporation (supra), the assessee claimed the deduction under Section 80IB(10). The AO disallowed the assessee's claim on the ground that it was not the owner of the property; that the permission was not granted in the assessee's name and the approval from the Municipal Corporation was in the name of the original land owner and not in the name of the assessee. The Tribunal considered the averment and the material on record and allowed the claim of the assessee and it was held as under:

> *"In the instant case, there was no agreement to share the constructed area. This agreement relates only to purchase part of the land from the landowner by the assessee for a predetermined consideration. All the responsibilities for carrying out the construction, permission, NA, NOC, legal proceedings and the results of the development lies with the assessee. The first party is only to co-operate the assessee in carrying out the development and also to execute the documents whenever it is required by the developer. The assessee has also handed over the physical possession to the builder for carrying out the development of the project. The landowner does not have any right, interest, title in the development so carried out except to the extent he has to receive the consideration from the assessee. The assessee is entitled to publicize the project, print brochures, etc., and can sell the project at its own right. All the expenses have to be incurred by the assessee for carrying out the construction, etc. The landowner has to do nothing except to the extent he has to receive consideration from the assessee. His motive is not to develop, construct or carry on the business as a builder or developer. Practically no right in the land remains with the owner. For whole practical purpose the assessee acquired dominant right over the land and he can deal with the land in the manner in which he may like. Thus, the terms and*

conditions entered into, in our opinion, give all dominant control and rights over the land to the assessee. The assessee, in our opinion, will be constructing the building at its own cost and will remain the owner of the building at its own without any interference from the landowner. The landowner does not have any right to share the buildings. The agreement does not envisage that the assessee will be working as a contractor or agent on behalf of the landowner. The agreement cannot be regarded to be the joint venture or collaboration agreement. It is, in our opinion, the agreement for the sale of the land for a determined consideration under which the assessee is entitled to develop the project on the said land at its own cost in the manner in which he may decide.

The facts involved in the case of the assessee are similar to the facts in the case of Radhe Developers & Ors. (supra) and, accordingly, we are of the view that the assessee has acquired the dominant over the land and has developed the housing project by incurring all the expenses and taking all the risks involved therein. We may mention here that, in our opinion, the decision in the case of Radhe Developers & Ors. (supra) will not apply in a case where the assessee has entered into the agreement for a fixed remuneration merely as a contractor to construct or develop the housing project on behalf of the landowner. The agreement entered into in that case will not entitle the developer to have the dominant control over the project and all the risks involved therein will vest with the landowner only. The interest of the developer will be restricted only for the fixed remuneration for which he would be rendering the services. The decision in the case of Radhe Developers & Ors. (supra) has not dealt with such situation. The proposition of law laid down in the case of Radhe Developers & Ors. (supra) cannot be applied universally without looking into

the development agreement entered into by the developer along with the landowner. In the case of the assessee, since it had filed copy of the development agreement and crux of the agreement was that the assessee had purchased the land and had developed the housing project at its own, the assessee would be entitled to the deduction under section 80IB(10)."

9. The learned counsel for the assessee referred to the terms of the agreement for housing project (PB 62). According to which, the responsibility of the assessee have been analyzed in such manner that the planning, sanction of plan, work of construction, development of the property, labour engagement shall have to be done by the assessee in respect of the development of the property in question. It is further provided that the assessee shall provide parties/members to whom sale is to be made by enrolling the members. The assessee shall accept all the payments from the members/buyers. The learned counsel for the assessee filed details of the sale proceeds received from the parties of 110 units in the assessment year 2005-2006 and 2006-2007. It would support the case of the assessee that the assessee received entire sale consideration from the members/buyers after completion of the development and building housing project. Agreement further provides that the assessee shall provide payment for construction, engage architect, engineers/site supervisors and shall also obtain all permission from the AUDA. The assessee shall make all financial arrangements for the purpose of implementing housing project and shall execute all deeds in this behalf. The agreement further provides that the assessee shall recommend the names of the members for allotment and land shall remain open for construction for the assessee and the assessee shall have all rights for using of all the terrace and open space in any manner. The agreement further provides that after implementation and completion of the project, whatever profit/surplus or loss/deficit to the assessee out of the project will rest with the assessee

and the assessee shall be responsible and liable for all the losses suffered for the completion of the project and the assessee shall compensate in this behalf. The agreement further provides that the assessee shall incur all expenses for common facility like, lights, water, sewerage, lift, bore-well etc. The learned counsel for the assessee also filed copy of the agreement to sell dated 12-8-2003 through which the assessee purchased the property in question through agreement to sell for consideration of Rs.3 lakhs and also filed copy of the ledger account and banking statement of the assessee as well as of the society to show that the amount of sale consideration of Rs.3 lakhs is transferred in a sum of Rs.2.50 lakhs and Rs.50,000/- from the assessee and was received by the society in their account. It would therefore prove that the assessee made the payment of sale consideration of the property in question through banking channel. The details of the amount received as a sale proceeds from the members/proposed buyer is also filed to support the contention of the assessee that the assessee received entire sale proceeds in its books of accounts with all rights to use profit and loss. PB-130 is the reply filed before the learned CIT(A) to explain the above position that the assessee paid sale consideration to the society. The learned counsel for the assessee also referred to the queries raised by the CIT(A) in this regard which is properly explained by the assessee. The above facts would prove that the assessee entered into an agreement to sell with the society for consideration. All the responsibilities for carrying out the construction, permission and development of the project lie with the assessee. The real owner of the land was only to co-operate with the assessee in carrying out the development and also to execute necessary documents whenever required by the assessee as a developer. The real owner has also handed over the physical possession to the society as a builder for carrying out the development of the project. The land owner did not left with any right, interest or title in development which was carried out by the assessee. The assessee was entitled

to enroll the members for selling the units within its own rights. All the expenses have to be incurred by the assessee for carrying out the construction etc. The motive of the real owner was not to develop, construct or carrying out any business as a builder or developer and practically no right in the hands of the real owner in this behalf. With all intents and purposes, the assessee has acquired dominant right over the land and the assessee could deal with the land in the manner in which the assessee might have liked. The terms and conditions entered into between the assessee and the society as per the development agreement and agreement to sell provided all dominant control and rights over the land to the assessee and the assessee would be developing and constructing the housing project at its own cost and would remain owner of the building without any interference from the land owner. The agreement in question did not provide that the assessee would be working as a contractor or agent on behalf of the land owner. The agreement in question would not be regarded to be the joint-venture or collaboration agreement. It was the agreement for sale of the land for determined consideration under which the assessee was entitled to develop the housing project on the said land in its own cost and in the manner in which the assessee might have decided. The authorities below rejected the claim of the assessee, because, originally, the assessee was authorized to construct 94 residential units, but as against the agreement, later on, the assessee constructed 110 units. However, we find that there is bar to construct more flats or units by the assessee in the given facts of the case. It is a matter between the land owner and the assessee. Once sanction plan is approved by the municipal authorities on the papers submitted by the real owner, it could be deemed approval of construction of housing flats in favour of the assessee, more so, when the assessee entered into an agreement to sell whole of the property. So the objection of the authorities below that the assessee constructed more facts is not sustainable in law. The above facts, if considered in light

of decision of the ITAT, Ahmedabad Benches, in the case of Radhe Developers and the Shakti Corporation, we are of the view that the issue is now covered by the above decision of the Tribunal in favour of the assessee, because, the assessee has acquired dominion right over the land and has developed the housing project by incurring all the expenses and taking all the risk involved therein. The crux of the matter would be that the assessee has purchased the land and has developed the housing project at its own cost, therefore, we are of the view that the assessee will be entitled for deduction under Section 80IB(10) of the Act.

10. The assessee filed details of built up area of all 110 units of the residential flats at page no.52 and 53 of the PB to show that the built up area was less than 1500 sq. feet. However, the DVO reported in his report (PB-46) that considering the open terrace in front of pent-house room at 6th floor which is analogous to balcony/verandah, then built-up area in this manner will measure more than 2500 sq. feet to 2600 sq. feet approximately. It is therefore a case set up against the assessee that the open terrace is analogous to balcony/verandah and if it is included in the definition of built-up area, then it would exceed the prescribed limit. The definition of built-up area means inner measurement of the residential unit at the floor level including the projections and balconies as increased by the thickness of the walls but does not include the common areas shared with other residential units. The learned counsel for the assessee provided from different dictionaries the definition of "balcony" which reads as under:

> *1. (Arch.) A platform projecting from the wall of a building, usually resting on brackets or consoles, and enclosed by a parapet; as a balcony in front of a window. Also, a projecting gallery in places of amusements; as, the balcony in a theater. [1913 Webester]*

2. 1): an upper floor projecting from the rear over the main floor in an auditorium

2): a platform projecting from the wall of a building and surrounded by a balustrade or railing or parapet.

Source : Word Net (r) 2.0

3. 1(Arch.) A platform projecting from the wall of a building, usually resting on brackets or consoles, and enclosed by a parapet; as a balcony in front of a window. Also, a projecting gallery in places of amusements; as, the balcony in a theater.

Sources: Webster's Revised Unabridged Dictionary (1913).

11. When the above meaning of "balcony" is taken into consideration with the definition of "built-up area" as provided in the Act, it is clear that finding of the authorities below are not sustainable in law. It is an admitted fact that the open terrace in front of pent-house was considered as balcony/verandah. The open terrace is not covered and is open to sky and would not be part of the inner measurement of the residential floor at any floor level. The definition of "built-up area" is inclusive of balcony which is not open terrace. The DVO has considered the open terrace as analogous to balcony/verandah without any basis. Therefore, the authorities below were not justified in rejecting the claim of the assessee by taking the open terrace as balcony/verandah. Therefore, the assessee has complied with all the requirements of section 80IB (10) of the Act in this regard. Moreover, the ITAT, Nagpur Bench in the case of AIR Developers (supra) has held as under:

"In view of the decision of the Kolkata Bench of the Tribunal in the case of Bengal Ambuja Housing Development Ltd. v. Dy. CIT (IT Appeal No. 1595

(Kol) of 2005, dated 24-3-2006], which was squarely applicable to the instant case, it was to be held that if the assessee had developed a housing project wherein the majority of the residential units had a built-up area of less than 1500 sq. ft., i.e., the limit prescribed by section 80-IB(10) and only a few residential traits were exceeding the built-up area of 1500 sq. ft., there would be no justification to disallow the entire deduction under section 80-IB(10). It would be /air and reasonable to allow the deduction on a proportionate basis, i.e. on the profit derived from the construction of the residential unit which had a built-up area of less than 12500 sq. ft., i.e. the limit prescribed under section 80IB(10). In view of the above, the AO was to be directed that if it was found that the built-up area of some of the residential units was exceeding 1500 sq. ft., he would allow the proportionate deduction under section 80-IB(10). Accordingly, the appeal of the revenue was to be dismissed and cross-objection of the assessee was deemed to be partly allowed."

Therefore, in the light of the decision of the ITAT, Nagpur Bench, the authorities below should not have rejected the claim of the assessee at least on alternate contention that the assessee would be entitled for deduction under Section 80IB(10) on pro-rata basis. No other point was considered against the assessee for refusing relief under Section 80IB(10) by the authorities below. Since we have held above that the open terrace is not part of balcony/varandh therefore according to the submissions of the assessee, the built up area of the assessee was within the prescribed limit. Therefore, there is no need to give further finding with regard to alternate claim of the assessee. Considering the facts of the case, in the light of the above decisions, we are of the view that the assessee fulfilled the conditions and requirement of the Section 80IB(10) of the Act, therefore, the claim of the assessee for deduction should not have been denied by the authorities below. We accordingly, set aside the orders of

the authorities below and direct the AO to grant deduction to the assessee under Section 80IB(10) of the Act as claimed by the assessee.

12. In result, the assessee's appeal is allowed."

7. We have examined the facts of the present appeals in the light of the decisions in the case of M/s. Amaltas Associates (supra) and find that the assessee has satisfied all the requirements of section 80IB (10) of the IT Act in the matter in issue. The assessee has submitted the details of conditions of section 80 IB (10) of the IT Act and the details show that the assessee has fulfilled the conditions section 80IB (10) of the IT Act and the same have been reproduced above in this order in the reply of the assessee. No material or evidence is produced before us to contradict the explanation of the assessee that the assessee has fulfilled the conditions of section 80 IB (10) of the IT Act. Thus, the explanation of the assessee before the learned CIT(A) is not rebutted through any evidence or material. It would prove that approval of the housing project was obtained within the prescribed time along with building use permission. The assessee also satisfied the size of the plot of land and the maximum built-up area as per law. The other work done by the assessee as a builder is also explained for completion of the housing project to prove that the assessee has dominant control over the housing project with all rights and titles. The assessee also brought on record that it had entered into the agreements for sell for acquiring the land with both the societies for a consideration and the consideration is also paid by the assessee. The possession over the land was also given to the assessee. Thus, all the risks of the project were to be borne by the

assessee. The clauses of the development agreements also support the contention of the assessee. Since, the assessee paid the entire consideration of the property in question to the society and possession is given to the assessee, therefore, for all intents and purposes the assessee became the owner of the property in question with all rights, title and interests therein. The assessee was entitled to charge and collect the money on transfer and sale of the housing projects from the members. It was found that the assessee was following percentage completion method of accounting and profit is shown with reference to work in progress i.e. project work carried out during the year though the project was not completed/pending and the units were not sold. It was explained by the assessee that if it had not shown income from the sale of the flats, there would not have been any profit/loss from the housing project in the year under consideration. The learned Counsel for the assessee filed a copy of the profit & loss account for the financial year 2007-08 (assessment year 2008-09) to show that the project income of the assessee on completion of the housing project was shown in a sum of Rs.8,53,37,886/- and after deducting the direct and indirect expenses the net profit is shown in a sum of Rs. 3,38,66,039.75 Paise. It would, therefore, show that the assessee not only booked the profit from the housing project with all rights but also spent huge direct and indirect expenses for completion of the housing project as per law. The assessee was not getting any fixed remuneration from the societies and in fact the assessee could not have obtained any remuneration from the societies because of the property acquired by the assessee from both the societies through agreements to sell and the

development agreements. In fact, the assessee worked as a developer in order to exploit the potential of its business in its own interest and had undertaken the project with all risks associated with the business of housing project. The entire risk i.e. profit/loss is borne by the assessee and not by the societies.

8. The learned Counsel for the assessee referred to the terms of the development agreements and the agreement to sell (copies filed on record) with both the societies, according to which the responsibilities of the assessee have been analyzed in such manner that planning, sanction of plan, work of construction, development of the property, engagement of labourers etc. have to be done by the assessee. It was also provided that the assessee would receive the entire sale consideration of the housing units and the assessee shall be entitled to accept the payments from the members/buyers. The documents on record also provided that the assessee shall provide payment for construction, engage architect etc. and shall obtain permission from AUDA. The assessee shall make all financial arrangements for the purpose of implementing housing project. The assessee shall have all the rights, titles and interests in the housing project and the profit/loss to the assessee out of the housing project will remain with the assessee and the assessee shall be solely responsible for the outcome of the housing project. The assessee would incur all the expenses for completion of the housing project with all common facilities. Since, the agreements to sell provide that the property in question is transferred by the societies to the assessee for sale consideration; therefore, it would prove that the

assessee made the payments of sale consideration of the property in question to the societies. The assessee recorded all the sale proceeds in its books of accounts as is demonstrated by the learned Counsel for the assessee. The above facts would prove that the assessee entered into agreements to sell and development agreements with the societies for consideration. All the responsibilities for carrying out the construction, permission and development of the housing project lie with the assessee. The real owners of the land were only to cooperate with the assessee developer in carrying out development and also to execute documents whenever required by the assessee as developer. The real owners have also handed over physical possession of the property in question to the assessee as a builder for carrying out the development project. Thus, the land owners were not left with any right, title or interest in the development which was carried out solely by the assessee. The motive of the real owners of the land in question was not to develop; construct or carrying out any business as a builder or developer of project and no right is left in this behalf. For all intent and purposes, the assessee has acquired dominant right over the land and the assessee could deal in the land in any manner in which the assessee might have liked. The terms & conditions entered into between the assessee and the societies as per the development agreements and the agreements to sell provided all dominant control and right over the land to the assessee and the assessee developed and constructed the housing project at its own costs and risks and shall remain owner of the buildings without any interference from the land owners. The development agreements and

the agreements to sell do not provide that the assessee would work as contractor or agent on behalf of the societies. The facts of the case, if considered, in the light of the decisions of the ITAT Ahmedabad Benches in the cases of M/s. Radhe Developers, Shakti Corporation and M/s. Amaltas Associates (supra), we are of the view that the issue is fully covered by the above decisions of the Tribunal in favour of the assessee because the assessee has acquired dominant right over the land and has developed the housing project by incurring all the expenditure and by taking all the risks involved therein. The crux of the matter would be that the assessee has purchased the land in question and has developed the housing project at its own costs within the parameters as provided u/s 80 IB (10) of the IT Act, therefore, we are of the view that the learned CIT(A) was justified in holding that the assessee is entitled for deduction u/s 80 IB (10) of the IT Act. All the objections of the AO have been considered correctly by the learned CIT(A) and rightly decided the issue in favour of the assessee. The other conditions of section 80 IB (10) of the IT Act are not disputed by the AO. The same view is taken by ITAT Ahmedabad Bench in the case of M/s. Safal Associates (supra). Considering the facts of the case in the light of the above decisions, we are of the view that the assessee fulfilled the conditions and requirements of section 80 IB (10) of the IT Act, therefore, the claim of the assessee for deduction u/s 80 IB (10) of the IT Act should not have been refused by the AO. We accordingly, do not find any infirmity in the order of the learned CIT(A) in directing the AO to allow deduction u/s 80 IB (10) of the IT Act to the

assessee. There are no merits in the departmental appeals. The same are accordingly dismissed.

9. In the result, all the departmental appeals are dismissed.
Order pronounced in the open Court on 17-06-2011.

Sd/-	Sd/-
(D. C. AGRAWAL)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Date : 17-06-2011
Lakshmikant/-

Copy of the order forwarded to:

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

BY ORDER

Dy. Registrar, ITAT, Ahmedabad