IN THE INCOME TAX APPELLATE TRIBUNAL 'A' BENCH : AHMEDABAD

(**Before Hon'ble Shri T.K.Sharma, J.M. & Hon'ble Shri A.N.Pahuja, A.M.)**

I.T.A.No. 2129/Ahd./2009 : Assessment Year 2006-07

ITO, Ward-2(6), Baroda –Vs- M/s. Rudraksh Developers, Baroda
(PAN : AAIFR 1340J)
(Appellant) (Respondent)

Appellant by : Shri A.K.Patel, D.R.
Respondent by: None

O R D E R

Per Shri T.K.Sharma, Judicial Member :

This appeal is filed by the Revenue against the order of ld. CIT(A)-II, Baroda dated 14.05.2009 for allowing the deduction to the assessee made under section 80IB(10) by the AO for the assessment year 2006-2007.

2. Briefly stated the facts are that the assessee is a partnership firm engaged in the business of development of land and construction of housing projects. For the assessment year under appeal, it filed the return of income on 28.12.2006 declaring income at Rs. 'Nil'. In the return of income, the assessee claimed deduction under section 80IB(10) amounting to Rs.36,32,257/-. During the course of assessment proceedings, the AO noted that the assessee has undertaken to construct only a part of FSI available to it under the approval accorded to it by the local authority. The AO accordingly held that profit arising from sale of unutilised FSI cannot be attributable to the profits attributable to the development and construction of the project. On this basis, he restricted the deduction claimed under section 80IB(10) to Rs.21,54,398/-.

3. On appeal before the ld. CIT(A), it was contended by the A.R. that similar issue came up before the Hon'ble ITAT, Ahmedabad in ITA No.2482/Ahd/2006 in the case of M/s. Radhe Developers & Others. The ld. CIT(A), following the aforesaid

decision of the ITAT in the case of Radhe Developers held that the AO is not justified in restricting the claim of deduction under section 80IB(10) to Rs.21,54,398/-. She accordingly directed the AO to allow deduction under section 80IB(10) amounting to Rs.36,32,257/-.

4. Aggrieved with the above order of the ld. CIT(A), the Revenue is in appeal before the Tribunal on the following grounds:

(i) On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in allowing the deduction u/s 801B(10) to the assessee, who was not granted approval by the local authority to carry on the business of an undertaking developing and building housing projects, in contravention of a plain reading of section 80IB(10) r.w.s. 80IB(1), Explanation to section 80IB(10) and rule 18BBB.

(ii) The Id. CIT(A) failed to make a combined reading of section 80IB(1), which is the substantive provision, and section 801B(10), which is a machinery provision, ' postulating complete identity between the assessee as referred to in section 80IB(1), and the undertaking developing and building housing projects approved by the local authority as referred to in section 80IB(10), not permitting such splitting between the assessee and the person who is granted approval by the local authority for developing and building housing projects, as presumed by the CIT(A).

(iii) The Id CIT(A) failed to abide by the scheme of section 80IB based on complete identity between the assessee as referred to in section 80IB(1), on the one hand, and the entity fulfilling the conditions laid down in sections 80IB(3), 80IB(9), 80IB(11) and 80IB(11AA), besides section 80IB(10), on the other.

(iv) The Id CIT(A) failed to appreciate that the land being integral part of any housing project, the assessee, without owning the land component, could not pass on full title over dwelling units to the customers so as to derive profits from developing and building housing projects and this integration is further fortified by the requirement of approval by the local authority as well as grant of completion certificate by the local authority under clause (ii) of the Explanation below section 80IB(10), both of which are granted to the landowner, thus treating him alone as running the undertaking from the beginning to the end.

(v) The ld. CIT(A) erred in dispensing with the ownership of land intrinsically linked with the approval by the local authority, also in disregard of section 80IB(10(b) providing for the condition of minimum size of the plot of land,

which can be fulfilled only by the landowner and the person getting approval from the local authority.

(vi) The ld. Ld. CIT(A) erred in making assumption regarding passing on of the benefit of section 80IB(10) by the landowner getting approval from the local authority for developing and building of housing projects to the person with whom he enters into agreement for execution of such projects, without there being any provision in section 80IB for such passing on, as contained in section 80HHC(1A).

(vii) Without prejudice, the ld. CIT(A) erred in allowing deduction u/s 80IB(10) in respect of the proceeds attributable to the sale of unutilised FSI and not to the dwelling units in the housing projects, which could not be termed as profit 'derived' from developing and building housing projects in terms of this provision."

5. At the time of hearing before us, none was present from the side of the assessee. However, we proceed to dispose off this appeal after hearing the ld. D.R. On behalf of the Revenue, Shri A.K.Patel appeared and contended that the ratio laid down in the case of Radhe Developers & Others is not applicable to the facts of the impugned case. The salient features of the facts as existed in the case of Radhe Developer's decision are as under:

"1. There was an agreement to sale in favour of assessee developer and possession was given by the land owner. Sale consideration was also paid.

2. All approvals / permissions were obtained by Power of Attorney of land owner i.e. assessee.

3. Right to take / peruse all govt. / Quasi govt. proceedings rested with the assessee developer by an agreement.

4. For all these bundles of rights the assessee developer had paid consideration to land owner and obtained all rights including ownership rights."

5.1 The ld. D.R. further drew our attention to the findings of the ITAT's order in para 18 in the case of Radhe Developers (*supra*), which is the foundation of the decision, reads as under:

"... .... From the clauses of the Development and Construction Agreements as well as Agreement for sale, both dated 18.05.2000, extracted above we observe that these two Agreements effectively transfer to the assessee-firm all the rights of development and construction and to deal with the land for consideration payable within a stipulated time; that the assesses *had been put in possession*

of the land of the terms and conditions as mentioned in these two Agreements; that the assessee-firm ha also paid consideration of Rs.56 lacs during the two F.Yrs. i.e. 2000-01 and 2001-02; that the assessee-firm has to obtain necessary approvals from the local authorities; i.e., BMC on behalf of the land owners and all the expenses for such purposes are to be incurred by the assessee; *that the assessee-firm has engaged the firm of Architect and also incurred expenses towards the charges payable to Corporation, etc., for obtaining the approvals; that even from the books of account, it is noticed that for obtaining the approval, the assessee-firm has paid the development charges to various regulating agencies i.e AUDA, BMC and GEB(Gujarat Electricity Board), etc. and that these expenses are incurred by the assessee-firm and the Assessing officer has brought out the complete details year-wise in his assessment orders at page No.5 reading as under:-……"*

5.2 The ld. D.R. further referred to the principle laid down in the recent case of Hon'ble Apex Court in the case of Faqir Chand Gulati –vs- Uppal Agencies Pvt. Ltd. & Anr. in Civil Appeal No.3302 of 2005 dated 10.07.2008 and stated that the following issues were raised.

(i) A development agreement is one where the land-holder provides the land. The Builder puts up a building. Thereafter, the land owner and builder share the constructed area. The builder delivers the 'owner's share' to the land-holder and retains the 'builder's share'. The land-holder sells / transfers undivided share/s in the land corresponding to the Builder's share of the building to the builder or his nominees. The land-holder will have no say or control in the construction of have any say as to whom and at what cost the builder's share of apartments are to be dealt with or disposed of. Such an agreement is not a "joint venture" in the legal sense. It is a contract for "services".

(ii) On the other hand, an agreement between the owner of a land and a builder, for construction of apartments and sale of those of apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction / development and be accountable to each other for their respective acts with reference to the project.

(iii) The title of the documents is not determinative of the nature and character of the document, though the name may usually give some indication of the nature of the document. The use of the words "joint venture" or "collaboration" in the agreement will not make the transaction a joint venture, if there are no provisions for shared control and losses.

5.3 On the basis of the aforesaid arguments, the ld. D.R. stated that neither the AO nor the ld. CIT(A) has gone into the agreements and Builders Development agreement, from where it can be inferred that the assessee is a developer or a contractor. He accordingly contended to set aside the issue for verification of different agreements and documents in the light of the judgment of Hon'ble Apex Court in the case of Faqir chand Gulati (*supra*). Further, the ld. CIT(A) has not considered the reasoning given by the AO and merely followed the decision of M/s. Radhe Developers (*supra*). Therefore, this issue be remanded to the file of the AO.

6. After hearing the ld. D.R., we have carefully gone through the orders of the authorities below. We have also perused the case laws. We find considerable force in the submissions made by the ld. D.R. because the issue involved in this appeal needs re-verification in the light of the judgement of the Hon'ble Apex Court in the case of Faqir Chand Gulati (*supra*). Similarly, the ITAT, Ahmedabad Bench in the cases also laid down certain principles in the light of the judgement of the Hon'ble Apex Court in the case of Faqir Chand Gulati (*supra*) and the AO is also requested to consider the case law of the ITAT in the case of Shakti Corporation (*supra*). The ITAT, in this case, held as under:

> *"16. The facts involved in the case of the assessee are similar to the facts in the case of Radhe Developers (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 (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 (supra) has not dealt with such situation. The proposition of law laid down in the case of Radhe Developers cannot be applied universally without looking into the development agreement entered into by the Developer along with the landowner. In the case of Shakti Corporation since the assessee has filed copy of the development agreement and crux of the agreement is that the assessee has purchased the land and has developed the housing project at its own, therefore, we are of the view that the assessee will be entitled for the deduction u/s 80IB(10). The decision of the Hon'ble Supreme Court in the case of Faqir Chand Gulati (supra) will not assist the Revenue, as*

the agreement is not sharing of the constructed area. In other cases the copy of agreement since has not been submitted before us, if submitted, the terms and conditions of the agreement were not specifically argued before and placed before us, we therefore, in the interest of justice and fair play to both the parties set aside the order of the CIT(A) and restore all other appeals to the file of the AO with the direction that the AO shall look into the agreement entered into by each of the assessees with the landowner and decide whether the assessee has in fact purchased the land for a fixed consideration from the landowner and has developed the housing project at its own cost and risks involved in the project. In case the AO finds that practically the land has been bought by the Developer and Developer has all dominant control over the project and has developed the land at his own cost and risks, the AO should allow the deduction to the assessee u/s 80IB(10). In case the AO finds that the Developer has acted on behalf of the landowner and has got the fixed consideration from the landowner for the development of the housing projects, the assessee should not be allowed deduction u/s 80IB(10) to the assessee."

6.1 In view of the above, we set aside the order of the ld. CIT(A) and restore this issue to the file of the AO with the direction that he will consider the principles laid down by the Hon'ble Apex Court in the case of Faqir Chand Gulati (*supra*) as well as the decision of the ITAT in the case of M/s. Shakti Corporation (*supra*) and re-adjudicate the claim of the assessee regarding allowing of claim of deduction under section 80IB(10), after giving opportunity of being heard to both sides.

7. In the result, for statistical purposes the appeal of the Revenue is treated as allowed.

Order pronounced in the Court on 10.06.2011

Sd/-	Sd/-
(A.N.Pahuja)	(T.K.Sharma)
Accountant Member	Judicial Member

Dated : 10 /06/2011

Copy of the order is forwarded to :

1) The Assessee
2) The Department
3) CIT(A) concerned
4) CIT concerned
5) D.R., ITAT, Ahmedabad

True Copy

By Order

Deputy Registrar, ITAT, Ahmedabad

Talukdar/Sr.P.S.