

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

TAX APPEAL NO. 570 of 2012

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COMMISSIONER OF INCOME TAX AHMEDABAD IV....Appellant(s)

Versus

MAHADEV DEVELOPERS....Opponent(s)

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Appearance:

MR.VARUN K.PATEL, ADVOCATE for the Appellant(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**  
and  
**HONOURABLE MS JUSTICE SONIA GOKANI**

Date : 28/01/2013

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

Revenue is in appeal against the judgment of the Income Tax Appellate Tribunal dated 20<sup>th</sup> April 2012 raising following question for our consideration :

“Whether, in the facts and circumstances of the case, the Income Tax Appellate Tribunal has erred in law in deleting the addition of Rs.59,47,889/- made under section 80IB(10) of the Income Tax Act, 1961?”

Issue pertains to deduction claim by the assessee under section 80IB(10) of the Act on development of a housing project. Revenue, however, holds a belief that the respondent-assessee had not developed the housing project on the ground that the land was not owned by the assessee. The Tribunal, however, held that as per the development agreement, the assessee had to incur and bear all expenses for development of the land. The assessee had the right to allot possession of

the constructed units to the members of the housing project after developing the housing project. The Tribunal relied on the decision of this Court in the case of CIT v. Radhe Developers, 341 ITR 403 (Guj.) in which this Court had upheld the decision of the Tribunal under similar circumstances making following observations:

“34. We have reproduced relevant terms of development agreements in both the sets of cases. It can be seen from the terms and conditions that the assessee had taken full responsibilities for execution of the development projects. Under the agreements, the assessee had full authority to develop the land as per his discretion. The assessee could engage professional help for designing and architectural work. Assessee would enroll members and collect charges. Profit or loss which may result from execution of the project belonged entirely to the assessee. It can thus be seen that the assessee had developed the housing project. The fact that the assessee may not have owned the land would be of no consequence.

35. With respect to the question whether the assessee had acquired the ownership of the land for the purposes of the Income Tax Act and, in particular, Section 80IB (10) of the Act and to examine the effect of Explanation to Section 80IB(10) introduced with retrospective effect from 1.4.2001, since several aspects overlap, it would be convenient to discuss the same together.

36. We have noted at some length, the relevant terms and conditions of the development agreements between the assessee and the land owners in case of Radhe Developers. We also noted the terms of the agreement of sale entered into between the parties. Such conditions would immediately reveal that the owner of the land had received part of sale consideration. In lieu thereof he had granted development permission to the assessee. He had also parted with the possession of the land. The development of the land was to be done entirely by the assessee by constructing residential units thereon as per the plans approved by the local authority. It was specified that the assessee would bring in technical knowledge and skill required for execution of such project. The assessee

had to pay the fees to the Architects and Engineers. Additionally, assessee was also authorized to appoint any other Architect or Engineer, legal adviser and other professionals. He would appoint Sub-contractor or labour contractor for execution of the work. The assessee was authorized to admit the persons willing to join the scheme. The assessee was authorised to receive the contributions and other deposits and also raise demands from the members for dues and execute such demands through legal procedure. In case, for some reason, the member already admitted is deleted, the assessee would have the full right to include new member in place of outgoing member. He had to make necessary financial arrangements for which purpose he could raise funds from the financial institutions, banks etc. The land owners agreed to give necessary signatures, agreements, and even power of attorney to facilitate the work of the developer. In short, the assessee had undertaken the entire task of development, construction and sale of the housing units to be located on the land belonging to the original land owners. It was also agreed between the parties that the assessee would be entitled to use the the full FSI as per the existing rules and regulations. However, in future, rules be amended and additional FSI be available, the assessee would have the full right to use the same also. The sale proceeds of the units allotted by the assessee in favour of the members enrolled would be appropriated towards the land price. Eventually after paying off the land owner and the erstwhile proposed purchasers, the surplus amount would remain with the assessee. Such terms and conditions under which the assessee undertook the development project and took over the possession of the land from the original owner, leaves little doubt in our mind that the assessee had total and complete control over the land in question. The assessee could put the land to use as agreed between the parties. The assessee had full authority and also responsibility to develop the housing project by not only putting up the construction but by carrying out various other activities including enrolling members, accepting members, carrying out modifications engaging professional agencies and so on. Most significantly, the risk element was entirely that of the assessee. The land owner agreed to accept only a fixed price for the land in question. The assessee agreed to pay off the land owner first before appropriating any part of the sale

consideration of the housing units for his benefit. In short, assessee took the full risk of executing the housing project and thereby making profit or loss as the case may be. The assessee invested its own funds in the cost of construction and engagement of several agencies. Land owner would receive a fix predetermined amount towards the price of land and was thus insulated against any risk.”

In the result, Tax Appeal is dismissed.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

(vjn)

