*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided On: 18.03.2015

\+ **ITA No.2069/2010**

COMMISSIONER OF INCOME TAX-VI ..... Appellant

Through: Ms. Suruchi Aggarwal, Advocate.

Versus

VRM INDIA LTD. ..... Respondent

Through: Ms. Padma Priya, Advocate.

AND

\+ **ITA No.318/2014**

COMMISSIONER OF INCOME TAX-VI ..... Appellant

Through: Ms. Suruchi Aggarwal, Advocate.

Versus

VRM INDIA LTD. ..... Respondent

Through: Ms. Padma Priya, Advocate.

AND

\+ **ITA No.320/2014**

COMMISSIONER OF INCOME TAX-VI ..... Appellant

Through: Ms. Suruchi Aggarwal, Advocate.

Versus

VRM INDIA LTD. ..... Respondent

Through: Ms. Padma Priya, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)
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1. The following substantial question of law arises for consideration in these appeals under Section 260-A of the Income Tax Act, 1961 (hereafter "the Act"):-

> Whether the Income Tax Appellate Tribunal was right in view of the contracts in question that the respondent-assessee is entitled to deduction under Section 80-IB(10) of the Income Tax Act, 1961?

2. These appeals of the revenue stem from decisions of the Income Tax Appellate Tribunal (ITAT) for assessment years (AY) 2002-03; 2004-05 and 2005-06. The Commissioner of Income Tax (Appeals) ("CIT(A")) and the ITAT had concurrently ruled against the revenue. Briefly the facts are that the assessee is engaged in the business of building and developing of housing projects. In its return of Income, the assessee claimed deduction under Section 80-IB(10) which was declined by the Assessing Officer ("AO") in the course of assessment under Section 143(3). The AO observed that the assessee company had been undertaking construction activity since 1996-97. The company had been allotted in FY 2001-02 a housing project worth

`12,53,65,692/- for constructing housing units measuring 450 sq. ft. each on more than one acre of land at Sector-62, Noida by the Indian Railway Welfare Organisation ("IRWO"). A housing Project worth `22,82,96,800/- had also been allotted for the construction of housing units measuring 38 to 42 sq. metre each on a total area of more than one acre of land at Sector 14, Dwarka, Phase-II, New Delhi, by the Delhi Development Authority ("DDA"). Both these continued in the year under consideration. The the contract receipts from these works during the year under consideration disclosed was `5,47,85,200/-. The profit from this contract receipt was shown at ` 48,40,725/-. Of this, ` 47,03,714/- was claimed as tax exempt income by virtue of Section 80-IB(10) of the Act.

3. The AO, upon a textual analysis of Section 80IB (10) was of the view that profit derived only from developing and building housing projects which are approved by local authority is eligible for deductions u/s 80IB. According to him, these conditions had to necessarily be fulfilled:

(i) a proposal for developing and building housing from the assessee's side.

(ii) the assessee should develop and build the housing project.

(iii) The project should "belong" to the assessee.

(iv) The assessee should have submitted its proposal to a local authority and there should be an approval of proposal for the project from local authority.

The AO observed that in this case, the assessee had executed works in respect of housing projects of IRWO & DDA. The project belonged to IRWO & DDA. The assessee company did not develop and build any housing project of its own but merely executed the contract work awarded to it by the principals, i.e DDA and IRWO. There was consequently no development of building of housing project *of the assessee*.

4. The assessee was asked to file copies of its proposals to Noida Authority (as it was a local authority) as well as DDA and the copies of approval granted to it by these local authorities for developing and building housing projects. The assessee company filed a letter dated 10.01.2002 of Executive Engineer SW D-9, DDA accepting the tender of the assessee; likewise, a letter dated 30.07.2001 from the Director Technical IRWO, accepting the tender for the construction of dwelling works was also placed on record. The IRWO, by its letter dated 16.09.2005 addressed to the AO, Ward 17(1) stated that the assessee was awarded a work for construction of 260 dwelling units including all civil, electrical, plumbing, sewerage, road, pavements, drains, underground water tank etc. at the rates provided in the schedule. The letter of DDA dated 17.09.2005 to the ITO, W.17(1), explained that the rate contract on which the work was awarded was ` 22,82,96,800/- and the work was completed as per specifications given. The AO declined the claim of the assessee under Section 80IB(10), by observing that assessee is only a contractor and not a developer. He also observed that in its support, the assessee company had relied upon the decision of ITAT Delhi Bench 'D' order in ITA No. 430 &

5026/Del/2004 dated 17.02.2006 in the case of *M/s Villayati Ram Mittal Pvt. Ltd. Vs. ITO 17(3), New Delhi*. In respect of this decision, the AO observed that against the order of ITAT dated 17.02.2006, the department had filed an appeal before this Court. He did not follow the decision of the ITAT and held that considering the facts and circumstances of the case, the deduction claimed under Section 80IB(10) could not be allowed as the assessee was a contractor and not a developer. The CIT(A) allowed the assessee's claim. Aggrieved, the revenue unavailingly appealed to the ITAT.

5. From the record, the ITAT found that the assessee company was mostly engaged in the business of building and developing housing projects together with infrastructure. During the years under consideration, it had developed and executed two housing projects for DDA and IRWO. The profits derived from these projects were claimed as tax exempt under Section 80IB(10). The revenue contended that the assessee was a mere contractor and not a developer and consequently in view of the amendment introduced retrospectively by insertion of Explanation to Section 80IB(10), the assessee's claim for deduction was ineligible. The ITAT agreed that exemption under Section 80IB(10) is only available to an assessee who is working as a developer and builder and not to an undertaking who is merely working as a contractor. Thereafter, it proceeded to analyse the facts before it, to see whether the assessee had worked as a contractor or as a developer and builder of housing projects.

6. The ITAT, after considering the contracts which the assessee had entered into and had executed, held that:

> *"In the instant case before us, the project undertaken by the assessee company was undisputedly approved prior to 03.03.2008. There is also no dispute to the fact that assessee has commenced construction of housing project after 01.10.1998. The copies of approval of the projects from the local authorities were also duly submitted to the AO and the same are appended in the assessee's paper book at pages 1 to 5. However, in view of the explanation introduced with retrospective effect, the benefit of exemption under Section 80IB(10) is available only to an undertaking developing housing projects as a developer and not merely as a work contractor.... As the words "developer" and "contractor" have not been defined in Section 80IB nor in the General Clauses Act, we can take the dictionary meaning. As per Chambers 21st Century Dictionary (Revised Edition), "contractor" means "a person or fiem that undertakes work on contract, specially connected with building, installation of equipment or the transportation of goods". The word "developer" has been defined as "someone who builds on land or improves and increases the value of building". It is crystal clear from the above definition that scope of work of developer is wider than the contractor insofar as contractor only undertakes works connected with the building, installation of equipment or the transportation of goods whereas the developer is a person who builds on land or improves or increases of a building by undertaking development of infrastructure and perennial facility of such building. Now, we have to examine the nature of work undertaken by the assessee in the instant case before us, with reference to the scope of work allotted to it and undertaken by it. For this purpose, we have gone through the agreement executed by the assessee and the complete scope of work assigned to the assessee in terms of the agreement and which has actually been undertaken by the assessee for performance of the work undertaken by it. In terms of the agreement so*

executed by the assessee, following is the scope of work assigned to the assessee :-

"Terms and Conditions"

(i) The scope of work, as stated in the NIT to the executed on Turnkey basis includes planning, designing, soil testing, earth filling, civil works, including its electrification, services like street lighting, sewerage, water supply drainage, roads, horticulture, landscaping, provision of dual water supply system, rains water harvesting as also construction of community hall, shopping centre, boundary wall, electric sub station, installation of transformer and equipment in it, laying of HT Cables, LT network, service cables etc. and making the units complete and habitable including watch and ward for 3 (three) years from the date of recorded completion. This scope of work given in the NIT is only indicative and not exhaustive. The agency shall be responsible for execution of all items required for completing these houses in all respects to make these units habitable and ready for occupation as well as functioning of all services, making environment fit for habitation without any additional cost, complete as per direction of the Engineer-in-charge.

(ii) The facts will be maintained till these are handed over to the Engineer-in-charge in good conditions are free from all defects.

(iii) The services will be handed over to the various local bodies after its completion as per approved plans etc. as stated in the NIT also.

(iv) Before taking up the work, the layout plans as well as building plans, structural designs etc. are to be got approved from DDA/competent authority as mentioned in NIT by adhering to be time schedule laid down in the NIT.

(v) The agency will also be responsible for getting the fire fighting arrangements, approved from the Delhi Fire Service before execution of the water supply scheme."

22. It is crystal clear from the scope of work as enumerated above and which has been undertaken by the assessee, that the assessee has worked as a builder and developer of housing project as a whole and for this purpose he has undertaken work of planning, designing of layout plan and architectural/structural drawing of complete housing project as approved by the DDA. It has also carried out survey of the site, also prepared layout plan within the development controls, and has also undertaken detailed soil investigation, prepared complete structural, design and drawing for foundations and drawing for super structure. The assessee company has also undertaken the work of planning, designing and execution of internal sanitary system, water supply system, drainage system, including all its fittings and fixtures, testing etc. As a developer, the assessee company has also undertaken necessary arrangements for supply of water through dual pipe system, planning, designing, earth filling, civil works including its electrification, infrastructure services like street lighting, sewerage, water supply, drainage, roads etc. As a developer, the assessee company has also undertaken horticulture, landscaping, provisions for dual water supply, rains water harvesting and also construction of community hall, shopping centre, electric sub-station installation of transformer and equipment in it and also lying of HT cables etc. Had the assessee undertaken the housing project as works contract, its scope of work was limited to civil construction work. Whereas as a developer, assessee had undertaken work of land scaping, roads, electrification, infrastructure services like street lighting, sewerage, water supply, drainage, horticulture, electric sub stations, installation of transformer, laying HT cables etc.

23. The detailed scope of the work as enumerated above which was undertaken by the assessee, it can safely be concluded that on the facts of the case, the assessee has worked

as a developer and not merely as a work contractor. Accordingly, we do not find any merit in the action of the AO for declining claim of deduction u/s 80IB(10) of IT Act. With regard to AO's observation that the project should be owned by the assessee for claim of exemption u/s 80IB(10) is misplaced insofar as there is no condition in Section 80IB that the project undertaken by the assessee as a developer and builder should be owned by the assessee. The only condition is with regard to the fact that only activity of developing and building a housing project would be eligible for claim of exemption u/s 80IB. It means that the assessee who is a developer and builder in substance would only be eligible for the deduction and not a contractor simplicitor. With regard to the learned DR's contention that since the assessee himself has shown as a contractor in the tax audit report he will not be eligible for claim of deduction u/s 80IB. In this regard, it is pertinent to mention here that whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view, which the assessee might taken of his rights, nor can the existence or absence of entries in his books of account or observation in the tax audit report will be of much relevance. Particulars in the tax audit report are not restricting the status of the assessee as to the contractors only. Even admission of the assessee is held to be not conclusive as held by the Hon'ble Delhi High Court in the case of Faster Industries Ltd. 316 ITR 260. Hon'ble Supreme Court in the case of Staluj Cotton Mills -116 ITR 1 observed that the way in which entries are made by an assessee in his books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss. The assessee may, by making entries which are not in conformity with the proper principles of accountancy, concealed profit or showed loss and the entries made by him cannot be regarded as conclusive one way or the other. What is necessary to be considered is the true nature of the transaction and whether in fact it has resulted in profits or loss to the assessee.... In view of these judicial pronouncements, mere mention by the assessee in TAR will not detract him from the legal rights which he is entitled to under Section 80IB of the Act. Similarly, since

ownership of the project is not provided as a precondition for the claim of deduction u/s 80IB(10), there is no merit in the AO's allegation for decline of assessee's claim for such plea."

Similarly, for AYs 2002-03 and 2005-06, the ITAT followed its above ruling and allowed the assessee's claim under Section 80-IB(10).

7. The revenue contends that the assessee is only a civil contractor and not an infrastructure facility or project developer. According to him, it is the concerned principal in each contract - i.e the IRWO and DDA, which are infrastructure developers and not the assessee. He relied on the conclusions of the AO that for an enterprise - to claim deduction under Section 80-IA- should own such infrastructure facility, and that the enterprise should enter into agreement with the Government or local authority for (i) development or (ii) maintaining and operating or (iii) developing, maintaining or operating a new infrastructure facility; should transfer such infrastructure facility to the Government or local authority and that such enterprise should start maintaining infrastructure facility on or after 1st April, 1995. According to the revenue, the assessee did not fulfill any of those conditions.

8. It was argued that deduction under Section 80-IA(4) was provided to infrastructure project developers to supplement State effort to finance and develop such facilities. Exemption under Section 80-IA(4) was provided to encourage private sector participation in infrastructure development. To qualify for exemption, the enterprise should carry on the business of (i) developing, (ii) maintaining and

operating or (iii) developing, maintaining and operating an infrastructure facility. Counsel also compared Section 80-IA(4A) introduced by Finance Act, 1995 with the provisions of Section 80-IA(10), to highlight the similarity in scope and content. Counsel lastly urged that the distinction between a works contract and an infrastructure development is the element of risk which necessarily always is with the owner. In the absence of that risk element, every contractor can claim to be a project developer, which defeats the intention of Section 80-IA(10).

9. Learned counsel for the assessee argued that since factual findings of the ITAT having been rendered final, this court should not interfere under Section 260-A of the Income Tax Act. She also contended that there could be no doubt that both projects which the assessee executed were development projects in respect of residential houses and given the intention behind Section 80-IB (10) i.e to boost private participation in housing, ownership of lands cannot be an added condition when the plain terms of the provision do not enact such pre-condition.

Analysis and Conclusions

10. Section 80-IA was introduced by the Finance Act, 1995 w.e.f. 1st April, 1996. It exempted an enterprise carrying on the business of developing, maintaining and operating any infrastructure facility. To be eligible for deduction, an assessee had to carry out all the three activities, i.e., (i) to develop, (ii) to maintain, and (iii) to operate. After the amendment by Finance Act, 1999, w.e.f. 1st April, 2000,

deduction under section 80-IA(4) became available to any enterprise carrying on the business of (i) developing, or (ii) maintaining and operating, or (iii) developing, maintaining and operating any infrastructure facility. Therefore, from assessment year 2000-01, deduction is available if the assessee carries on the business of any one of the said three types of activities, and also when the assessee carries on the activity of only developing. Section 80-IB reads as follows:

> *"**80IB.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) 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.*
>
> *(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely :—*
>
> *(i) it is not formed by splitting up, or the reconstruction, of a business already in existence :*
>
> *Provided that this condition shall not apply in respect of an industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;*
>
> *(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;*

(iii) it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India :

Provided that the condition in this clause shall, in relation to a small scale industrial undertaking or an industrial undertaking referred to in sub-section(4) shall apply as if the words "not being any article or thing specified in the list in the Eleventh Schedule" had been omitted.

Explanation 1.—For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :—

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee.

Explanation 2.—Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with;

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or

more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power."

11. Subsequently, Section 80-IB enacts by various provisions specific conditions in respect of different classes of activities, for income to qualify for deduction (as well as its extent). The specific activities mentioned are industrial undertakings [Section 80 IB (3)]; industrial undertakings in industrially backward States specified in the Eighth Schedule [Section 80 IB (4)]; industrial undertakings in industrially backward districts notified by the Central Government [Section 80 IB (5)]; ship business [Section 80 IB (6)]; hotel [Section 80 IB (7)] business of multiplex theatre [Section 80 IB (7A)] convention centre business [Section 80 IB (7B)]; company carrying on scientific research [Section 80IB (8) and (8A)]. The Section then goes on and enacts as follows:

"(9) The amount of deduction to an undertaking shall be hundred per cent of the profits for a period of seven consecutive assessment years, including the initial assessment year, if such undertaking fulfils any of the following, namely:—

(i) is located in North-Eastern Region and has begun or begins commercial production of mineral oil before the 1st day of April, 1997;

(ii) is located in any part of India and has begun or begins commercial production of mineral oil on or after the 1st day of April, 1997 :

Provided that the provisions of this clause shall not apply to blocks licensed under a contract awarded after the 31st day of March, 2011 under the New Exploration Licencing Policy

announced by the Government of India vide Resolution No. O-19018/22/95-ONG.DO.VL, dated the 10th February, 1999 or in pursuance of any law for the time being in force or by the Central or a State Government in any other manner; (This proviso was inserted in by the Finance Act, 2011, w.e.f. 1-4-2012).

(iii) is engaged in refining of mineral oil and begins such refining on or after the 1st day of October, 1998 but not later than the 31st day of March, 2012;

(iv) is engaged in commercial production of natural gas in blocks licensed under the VIII Round of bidding for award of exploration contracts (hereafter referred to as "NELP-VIII") under the New Exploration Licencing Policy announced by the Government of India vide Resolution No. O-19018/22/95-ONG.DO.VL, dated 10th February, 1999 and begins commercial production of natural gas on or after the 1st day of April, 2009;

(v) is engaged in commercial production of natural gas in blocks licensed under the IV Round of bidding for award of exploration contracts for Coal Bed Methane blocks and begins commercial production of natural gas on or after the 1st day of April, 2009.

Explanation.—For the purposes of claiming deduction under this sub-section, all blocks licensed under a single contract, which has been awarded under the New Exploration Licencing Policy announced by the Government of India vide Resolution No. O-19018/22/95-ONG.DO.VL, dated 10th February, 1999 or has been awarded in pursuance of any law for the time being in force or has been awarded by the Central or a State Government in any other manner, shall be treated as a single "undertaking".

(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 but not later than the 31st day of March, 2005, within four years from the end of the financial year in which the housing project is approved by the local authority;

(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five 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 city of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place;

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

(e) not more than one residential unit in the housing project is allotted to any person not being an individual; and

(f) in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely:—

(i) the individual or the spouse or the minor children of such individual,

(ii) the Hindu undivided family in which such individual is the karta,

(iii) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta.

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).”

12. It is plain that textually, Section 801B(10) deduction can be availed by an undertaking developing and building housing projects- approved before 31.03.2008 by the local authority. Such undertaking should have embarked on construction of the housing project on or after 01-10-1998. 100% deduction can be availed of the profits derived from construction of such housing projects. The explanation to Section 80-1B(10), introduced later, clarifies that nothing contained in that provision applies to an undertaking that executes the housing projects as a works contract awarded by any person including the central or state government.

13. “Development” and construction of a housing project is an undefined phrase of wide import. The Bombay High Court the had occasion in *Commissioner of Income Tax v Vandana Properties* [2013] 353 ITR 36 (Bom) to decide the permissibility of deduction in a case where the assessee had to develop and construct a block of residential flats. The Court held that:

“…the expression "housing project" in common parlance would mean constructing a building or group of buildings consisting of several residential units. In fact, the Explanation in section 80-IB(10) supports the contention of the assessee that the approval granted to a building plan constitutes approval granted to a housing project. Therefore, it is clear that construction of even one building with several residential units of the size not exceeding 1000 square feet ("E" building in the present case) would constitute a "housing project " under section 80-IB(10) of the Act.”

The Court also dealt with the submission of the size of the project:

> *"25. The question, therefore, to be considered is, whether the Revenue is justified in reading the expression "plot of land" in section 80-IB(10)(b) as "vacant plot of land" ?*
>
> *26. The object of section 80-IB(10) in granting deduction equal to one hundred per cent. of the profits of an undertaking arising from developing and constructing a housing project is with a view to boost the stock of houses for lower and middle income groups subject to fulfilling the specified conditions. The fact that the maximum size of the residential unit in a housing project situated within the city of Mumbai and Delhi is restricted to 1000 square feet clearly shows that the intention of the Legislature is to make available a large number of medium size residential units for the benefit of the common man. However, in the absence of defining the expression "housing project " and in the absence of specifying the size or the number of housing projects required to be constructed on a plot of land having minimum area of one acre, even one housing project containing multiple residential units of a size not exceeding 1000 square feet constructed on a plot of land having minimum area of one acre would be eligible for section 80-IB(10) deduction. If the construction of section 80-IB(10) put forth by the Revenue is accepted, it would mean that if on a vacant plot of land, one housing project fulfilling all conditions is undertaken, then deduction would be available to that housing project and if thereafter several other housing projects are undertaken on the very same plot of land, the deduction would not be available to those housing projects as the plot ceases to be a vacant plot after the construction of the first housing project. Such a construction if accepted would defeat the object with which section 80-IB(10) was enacted.*
>
> *27. Moreover, plain reading of section 80-IB(10) does not even remotely suggest that the plot of land having minimum area of one acre must be vacant. The said section allows deduction to a housing project (subject to fulfilling all other conditions) constructed on a plot of land having minimum area of one acre*

> *and it is immaterial as to whether any other housing projects are existing on the said plot of land or not. In these circumstances, construing the provisions of section 80-IB(10) by adding words to the statute is wholly unwarranted and such a construction which defeats the object with which the section was enacted must be rejected."*

14. Likewise, in *Commissioner of Income Tax v G.R. Developer* 2013 (353) ITR 01 (Karn) the Karnataka High Court had the occasion to consider whether the provision which required project approval before 2005 applied for older projects and whether if a few commercial units were built in terms of local regulations in an otherwise residential complex, Section 80-IB (10) became inapplicable. The court held it not to be so. Similarly, the explanation though clarificatory, cannot be held to be retrospective. In this context, it is noticed that the Supreme Court in *Virtual Soft Systems v Commissioner of Income Tax* 2007 (9) SCC 665 held that:

> *"…if the statute does contain a statement to the effect that the amendment is clarificatory or declaratory, that is not the end of the matter. The court has to analyse the nature of the amendment to come to a conclusion whether it is in reality a clarificatory or declaratory provision. Therefore, the date from which the amendment is made operative does not conclusively decide the question. The court has to examine the scheme of the statute prior to the amendment and subsequent to the amendment to determine whether the amendment is clarificatory or substantive."*

In this case, the Explanation states that the benefit of deduction would not apply to someone who *"executes the housing project as a works contract awarded by any person"* applies from the date that explanation was enacted.

In the facts of this case, it is evident that the assessee was awarded both contracts as turnkey projects. The conceptualization, overall planning and execution, oversight of entire execution, deployment of personnel at various stages, etc. was with the assessee. In almost similar circumstances, the Gujarat High Court in *Katira Construction Co Ltd v Union of India* 2013 (352) ITR 513 held the assessee to have engaged in the development and construction of a housing project:

> *"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 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."*

15. Since the assessee developed an infrastructure facility/project and was not required to maintain or operate, it was entitled to cost, plus the margin of income or profit; not to expect this treatment would render one who develops an infrastructure facility project, unable to realise its cost. If the infrastructure facility is, after its development, transferred to the Government, naturally the cost would be paid by the Government. Therefore, the mere circumstance that the Indian Railways or DDA paid for development of a housing project carried

out by the assessee, did not mean that the assessee did not develop the residential complex. If the revenue's interpretation is accepted, no enterprise, carrying on the business of only developing the infrastructure facility, would be entitled to deduction under section 80-IB (10). The conclusions of the ITAT in this context were rendered after a detailed analysis of the facts and the contracts entered into by the assessee with IRWO and DDA. The narrow ground on which the AO concluded that the projects were "owned" by IRWO or DDA and that the assessee was only a works contracts, was unwarranted.

16. In view of the above conclusions, the revenue's appeals fail; the question of law framed is answered in the affirmative, in the assessee's favour; the appeals are consequently dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

MARCH 18, 2015