आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER
AND
SHRI S.S. GODARA, JUDICIAL MEMBER

ITA No.1150, 1151, 1152, 1153/Ahd/2011
(Asstt Year: 2000-2001, 2001-2002, 2002-03, 2006-07)
AND
ITA No., 2147, 2148/Ahd/2011
(Asstt.Year : 2003-04, 2004-05)

M/s.Megha Developers C/o. V.P. Patel & Co., Advo., A-102, Akshardham, Shahibaug Nr. Unverbridge, Ahmedabad PAN : AAFFM 7541 M.	Vs	ITO, Ward-9(4) Ahmedabad.

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee(s) by :	Shri M.K. Patel
Revenue by :	Shri Dinesh Singh, Sr.DR

सुनवाई की तारीख/**Date of Hearing : 17/06/2015**
घोषणा की तारीख /**Date of Pronouncement: 19/06/2015**

आदेश/O R D E R

PER N.S. SAINI, ACCOUNTANT MEMBER: These six appeals are filed by the assessee against the orders of the CIT(A)-XV, Ahmedabad dated 31.1.2011 and 20.6.2011. Since issue involved in these appeals is identical in all these assessment years under appeals, we proceed to dispose of all these appeals by this consolidated order.

2. In these appeals, the common ground taken by the assessee reads as under:

"1. The ld.CIT(A) erred on facts in determining the land had not been practically purchased by the appellant, where the appellant had submitted the land investment deed and nexus of land payment were arranged by the appellant.

2. The ld.CIT(A) erred on facts and in laws nitrating that no any expenses were incurred towards construction materials etc. which is apparent perversity of the facts of the case.

3. The ld.CIT(A) erred on facts and in laws in disallow the deduction on the ground that appellant had constructed the shop where the profit from it had been offered for tax in the return of income."

3. Brief facts of the case are that the AO disallowed claim for deduction under section 80IB for the assessment years 2000-01, 2001-02, 2002-03 and Asstt.Year 2006-07 of Rs.11,24,990/- each and for the Asstt.Year 2003-04 & 2004-05 of Rs.21,86,870/- each, on the ground that the assessee has received development charges at the rate of 25% of the total receipts from the members and labour charges at the rate of Rs.700/- per sq.yard. According to the AO, deduction under section 80IB is allowable to the assessee to carry on the business of development and construction of house building. Further, the assessee has not incurred expenditure, such as purchase of cement, purchase of steel, labour expenses etc., and there is no opening stock as well as work-in-progress. Thus, the assessee was not carrying on the work of development and construction of house building, but carrying on as a contractor/agent.

4. On appeal, the CIT(A) confirmed the action of the AO by observing that the society, Punit (Motera) Cooperative Hsg. Society Ltd., Ahmedabad was the sole owner of the land and the

assessee has not incurred expenses on purchases of cement, steel etc. and that the assessee constructed and sold shops in the scheme, the built up area of which exceeds limit of 2000 sq.ft prescribed in clause (d) of section 80IB(10) with respect to shops constructed.

5. Before us, the AR of the assessee submitted that the issue was squarely covered by the decision of this Bench of the Tribunal in the case of sister concern of the assessee, M/s.Skyland Developers Vs. ITO, in ITA No.1191, 1192 and 1993/Ahd/2011 dated 9.6.2014, as the facts in that case and development agreement are identical in the case of present assessee also. Further, he pointed out from the development agreement placed at page nos.29 to 32 of the paper book that clause (2) provides for giving absolute possession and right to develop the scheme on the said land situated at Survey No.24/B, Paiki T.P. Scheme No.21, Final Plot No.141/1 moje Motera, Tal. Sub-Dist & Dist. Gandhinagar. Further clause no.(3) provides that the assessee will collect the land amount, construction amount from the booked members as fixed by the assessee, and on receipt of full amount, possession of constructed unit is to be handed over to the members by the assessee. Where the amount of land and construction was not received, the assessee had the right to hold the possession of the property and construction on it, and that the society will not interfere in it. Further, it also provides that the society after entering into the agreement with the assessee, had no right to interfere in it, and to allow any other person to enter the scheme. The clause (4) of the agreement allows the assessee to book the members of the scheme and collect the amount for it.

The assessee was allowed to make the agreement with the members of the scheme on the said property, and to carry out the work of development and construction of scheme of Punit (Motera) Co-op. Society Ltd. The residential plots and shops were to be constructed on the said land for members, and they have to pay amount of land and construction as decided by the assessee from time to time. The Society was to give additional amount to the assessee for obtaining electricity connection from AEC, cost of installation of line, legal charges etc. Further clause (6) of the agreement provides that the assessee was to appoint engineer for the scheme, and enter into agreement with the engineer. It further provides that for the purchase of land, on which the construction was to be done, the amount was to be given by the assessee, and during the construction period, if any finance was required, the assessee was free to obtain loan from banks/financial institutions. The clause no.(8) of the agreement provides that for construction of the scheme, the assessee will purchase the building material, and make payment for it, to appoint contractor and take necessary decision in this regard. Further, the clause (10) provides that the assessee shall have right of construction, total scheme book, development, organization of the said scheme, to place a revised plan or to revise the plan for additional construction to be made in future on receipt of the FSI. The assessee was to give receipts for payment, to give allotment letter and to give possession to members, and also have to remove defaulting members, and cancel their allotment. Further, clause (16) provides for payment of development charges to the assessee on the basis of units booked at the rate of 25% of the total receipts from members as well as

right to receive labor charges at Rs.700/- per square feet. According to the AR, this clause only provides for share of profits from the construction of the scheme on the land. It was, therefore, prayer of the AR to allow claim for deduction under section 80IB of the Act to the assessee, as claimed in the return of income for the assessment year under appeal.

6. On the other hand, the DR supported the orders of the lower authorities.

7 We find that a similar issue had come up before this Bench of the Tribunal in the case of M/s.Skyland Developers (supra) wherein the Tribunal held as under:

> *"4. The Authorized Representative of the assessee filed before us a copy of the consolidated order of this Bench of the Tribunal passed in the case of the assessee itself in ITA Nos. 1086 & 1087/Ahd/2007 in the Assessment Year 2002-03 and 2003-04 dated 11.03.2008 and submitted that the disallowance of deduction u/s. 80IB(10) to the assessee in Assessment Year 2002-03 and 2003-04 made by the Assessing Officer was deleted by the Commissioner of Income Tax(Appeals) on appeal filed by the assessee and on further appeal filed by the Revenue, the Tribunal confirmed the order of the Commissioner of Income Tax(Appeals) and dismissed the appeal of the Revenue. He further submitted that in the present years under consideration, the project remains the same on which the assessee has claimed deduction u/s. 80IB(10). He further submitted that the Revenue has not filed any further appeal to the High Court against the order of the Tribunal for Assessment Year 2002-03 and 2003-04. Thus, the issue has attained finality and therefore, following the order of the Tribunal in the present years of the appeal also, deduction u/s. 80IB(10) should be allowed to the assessee.*
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> *5. The Departmental Representative could not controvert the above submissions of the Authorized Representative of the assessee.*

6. We find that the Tribunal in Assessment Year 2002-03 and 2003-04 vide order dated 11.03.2008 has held as under:

> *"6. The CIT(A) considering these facts in 2002-03 assessment year took specific note of the fact that the view taken in 2000-01 assessment year is the latest in point of time by the CIT(A) since the order dated 27.1.2006 whereas the issue in 2001-02 assessment year was decided by his predecessor on 5.11.2004. Accordingly, taking into consideration these facts he was of the view that the facts and circumstances as taken into consideration by his predecessor in 2000-01 assessment year in his order dated 27.1.2006 needs to be followed. Being also of the view that the deduction u/s 80IB(10) which has been claimed in continuity with the earlier years, the facts and circumstances continued to be the same, he directed the A.O. to allow the deduction u/s 80IB for the assessment year under consideration also. For ready reference, we reproduce the specific finding addressing the facts and circumstances taken into consideration by the CIT(A) in 2000-01 assessment year which have been reproduced in page 3 of the impugned order and considered to be the .same in the year under consideration also:-*
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> > *"The relevant portion of the appellate order of my ld. predecessor given in Appeal No. CIT(A)-XV/ ITO. Wd.9(l)/78/05-06 dated 27/01/2006 is reproduced as under:*
> >
> > *"I have considered the submissions of the Authorised Representative carefully. The appellant is a supervision and labour contractor. During the year in appeal the appellant has carried out labour contract work and supervision work for construction of flats for the three Co. Op. Housing societies i.e. Pink City (Ranip) Co. Op. Housing Society Ltd., Kailasnath (Ranip) Co. Op. Housing Society Ltd. and Prakarsh (Ranip) Co. Op. Housing Society Ltd. I find that the appellant has satisfied all the three conditions required for deduction u/s. 80IB of the I. T. Act. The appellant has provided the funds to the societies for acquiring the land in their names and the societies had paid the sale consideration to original land owners. The appellant got the land converted by N.A./NOC proceedings. In turn, the development right was given to the appellant. The development charges of more than Rs. 25 lacs have*

been paid to AUDA on behalf of the society and the appellant has carried out construction work as per the plan. As per the conditions of the agreement, the appellant had put up the plan and made payments to AUDA for the development and construction of the scheme as per the approved plan. The appellant had also given advertisement in local newspapers to attract the members for booking. The appellant had prepared ground water tank, approach road and construction lift at the site of housing project. The appellant had appointed the RCC contractors and other labor contractor and experts to carry out the construction and development works. The appellant had also purchased the building materials and made payments to the respective parties. In view of these facts, I agree with the Authorised Representative that the appellant's role has been that of a full fledged contractor/builder in housing project. The development charges were fixed @ 23% of housing project which is in the guise of net income from the housing scheme. The appellant is involved from the beginning i.e. from the time of land purchase to the last step of completion of housing project These facts show that the appellant has actually carried out the work of construction. I agree with the contentions of the Authorised Representative that in a normal course of construction business, for erecting the building as per plan, the society has to entrust such very difficult task to experienced contractor/developer, as the members of society do not have any knowledge or expertise in construction and development work and for effective and timely completion of scheme such society engaged reliable and experienced developer/contractor and labour contractor; by an agreement by stipulating certain conditions. Thus the society in this case has entrusted the construction and labour work to the appellant firm as per the terms and conditions laid down in the development and labour agreement. In a normal course of construction business, the society has to bear the expenses in respect of Electricity connections, wire lines and legal expense incurred for the land etc., as the A.B.C. connections are to be obtained in the name of the society. Land is also purchased by the society. Hence for such work, development charges have been fixed at the rate of 23% in addition to Rs. 700/- for labour charges, which has been fixed in the guise of profit

and such type of agreements are common in the construction business. Further the profit declared by the appellant is substantially higher than the presumptive profit as per section 44 AD of the Income-tax Act. If members could not be booked for the vacant premises, then such vacant premises are to be held by the appellant as per Clause No.3 of the development agreement. For the construction of scheme, necessary building materials have been purchased and payments have been made and the labour contractor has been appointed for construction work by the appellant. These clauses prove that the ownership and the risk factor is there on the appellant Further as per the brochure of the scheme, the appellant firm has been shown as developers, which indicates the role of the appellant as a developer. On a consideration of the totality of facts, I arrive at the conclusion that the appellant has actually carried out the work of development and construction, as there was no other person who has done the work, and therefore, the appellant is entitled to deduction u/s. 801B of the I.T. Act. Further it has been held by ITAT, Mumbai in the case of Patel Engineering Ltd. vs. DCIT (2004) reported in 84 TTJ (Mum.) 646/94 ITD 411 ™ that merely because State Government paid for development of infrastructure facility carried out by the assessee as contractor, it cannot be said that the assessee had no developed infrastructure facility and for availing deduction under section 80-IA, 'infrastructure facility' should not necessarily be owned by the assessee. It is also found that the wordings of Section 80IA(4) and 80IB(10) are similar. Relying on the ratio laid down in the said case, the appellant is held to have carried out the development work. Accordingly, the Assessing Officer is directed to allow deduction u/s. 80IB(10) to the appellant."

7. In the light of the above facts both the parties have been heard although the Ld. D.R. placed reliance on the assessment order, however, confronted with the order of the Tribunal in the case of Radhe Developers which has consistently been followed by the Ahmedabad Bench in the case of contractors who have been held to be entitled to deduction u/s 80IB which has been denied solely on the ground that the land was not owned by the developer. The activity of the development has been carried on by the contractor-developer as per the agreement entered into

with the land owners which carried on the developmental activity in terms of the agreement. Simply because the land was not owned by the developers it has consistently been held is not a relevant criteria to disallow the deduction claimed not only in the case of Radhe Developers but also has been consistently followed by the Ahmedabad Benches. We find no merit in the departmental appeal in the light of the above facts and circumstances and position of law. Thus, since the facts and circumstances remain identical and no distinguishing fact despite specific opportunities could be pointed out by the Department, respectfully following the order of the Ahmedabad Bench, we dismiss the departmental appeal."

8. In the result, appeal in ITA No. 1086/ Ahd / 2007 by the Department is dismissed."

7. Keeping in view the facts and circumstances of the case, as the housing project and related agreement is the same which was in the Assessment Year 2002-03 and 2003-04 in the years involved in the present appeal and the fact that the decision of the Tribunal in the case of Radhe Developers which was relied upon by the Tribunal in the above quoted order has since been affirmed by the Hon'ble Gujarat High Court in the case of CIT Vs. Radhe Developers (2012) 341 ITR 403, we set aside the orders of the lower authorities and allow the claim for deduction u/s. 80IB(10) to the assessee for Rs 17,48,939/- in Assessment Year 2000-01, Rs 35,53,660/- in Assessment Year 2001-02 and Rs 9,56,170/- in Assessment Year 2006-07."

8 We, thus, find that the facts in the present appeal are similar as were in the case of M/s.Skyland Developers (supra) except that in the instant case, it has also been alleged by the Revenue that the assessee has not debited purchase of cement, steel etc. in the profit & loss account. Thus, we find that it is not in dispute that the assessee has actually made purchases of cement, steel etc. Actually, the AR of the assessee explained that as per the terms of agreement, the assessee was entitled to receive all the expenditure incurred for materials and 25% above that amount, apart from labour charges at Rs.700/- per square feet. Thus, the agreement for development was cost-plus-method. The assessee instead of debiting the cost of material in the profit & loss account

and crediting the profit & account with cost, and 25% thereof has credited the profit & loss account with only 25% of the cost of material and set off the expenses incurred for cost of material with corresponding receipts. In our considered view, simply because of the above presentation of account, which may not be fully correct, the assessee cannot be denied deduction under section 80IB, if the assessee is otherwise eligible for the same. As we find that apart from the above, other facts involved in the instant case is similar to the facts in the case of M/s.Skyland Developers (supra), the said decision is squarely applicable in the instant case.

9. Further, regarding the amendment brought to section 80IB(10) by the Finance (No.2) Act, 2004 w.e.f. 1.4.2005 by inserting clause (d), which provides that no deduction was allowable to the assessee where the built-up area of the shops and other commercial establishments included in the housing project exceeds 5% of the aggregate built up area of the housing project or 2000 sq.feet, whichever is higher. The issue now stands decided by the Hon'ble Gujarat High Court in the case of Manan Corporation Vs. ACIT, (2013) 356 ITR 44 (Guj) wherein it was held as under:

> *The object of section 80-IB(10) of the Income-tax Act, 1961, was essentially to provide incentive to undertakings in developing and building housing projects. Section 80-IB(10) originally indicated 100 per cent. deduction on the profits derived from housing projects approved by a local authority subject to certain conditions set out in the provision. However, this provision was amended by the Finance (No. 2) Act, 2004, with effect from April 1, 2005. By virtue of the amendment having come into effect from April 1, 2005, deduction is permissible to housing projects having residential units with commercial units to the extent permitted therein. Clause (d) has been introduced, which*

provides that the built-up area of the shops and other commercial establishments included in the housing project should not exceed 3 per cent. (with effect from April 1, 2005) of the aggregate built up area of housing project or 5,000 sq. ft., whichever is higher or 2000 sq. ft., whichever is less from April 1, 2010. The amendment could not be held to be retrospective as there was no explicit and specific wording expressing retrospectivity and even if it is assumed for the sake of argument that it is to be read by implication that does not appear to be reasonable. A taxing statute granting incentives for promoting economic growth and development should be liberally construed to facilitate and advance the objectives of the provision. When there are two possibilities of interpretation of a taxing statute, that which is favourable to the assessee should be always preferred. Moreover, the Government of India, Ministry of Finance, Department of Revenue issued Instruction No. 4 of 2009 to all Chief Commissioners of Income-tax and all Directors-General of Income-tax to the effect that the deduction in respect of section 80-IB(10) of the Act would be available on year to year basis where the assessee showing profits on partial completion or on the year of completion of the project. From a reading of the instruction, it can be also said that the Government being aware of both the accounting methods has expected either of them to be followed in cases of individual assessees. However, in the post-amendment period, strict adherence to the completion period of four years is insisted upon where the project completion method is followed. This limitation of period did not exist prior to the amendment. The amendment cannot discriminate against those following the project completion method if in the interregnum period, amendment is brought in the statute.

There were two projects of the assessee, namely, KP and PP, in respect of of the profits earned from which the assessee claimed deduction under section 80-IB(10) in the assessment year 2006-07 . The whole project was approved and completed prior to the insertion of the amended provision of section 80-IB(10) of the Act with effect from April 1, 2005. The Assessing Officer denied the deduction on two counts, namely, that the assessee failed to carry out its obligation necessary for claiming such deduction and that the assessee violated the condition laid down under the provision. The principal objection was of non-fulfilment of the

condition of limitation of built up area being more than 1,500 sq. ft and its ratio to commercial shops being more than 5 per cent. of the created built up area of housing project or 2,000 sq. ft, which ever is less. This was upheld by the Tribunal. On appeal to the High Court :

Held, that there was no criteria for making commercial construction prior to the amendment of the section and the plans were approved as housing projects by the local authority for both the projects of the assessee. Permission for construction of shops had been allowed by the local authority in accordance with rules and regulations, keeping in mind presumably the requirement of large townships. However, the projects essentially remained residential housing projects and that was also quite apparent from the certifi-cates issued by the local authority and, therefore, neither the absence of such provision of commercial shops nor on account of such commercial construction having exceeded the area contemplated in the prospective amendment could the deduction be denied to the assessee whose plans were sanctioned according to the prevalent rules. The assessee was entitled to deduction under section 80-IB(10) .

10. In the instant case, the project was approved by the Ahmedabad Urban Development Authority vide permission dated 11.6.1999, which was before the date of amendment to section 80IB(10) w.e.f. 1.4.2005. Therefore, this amendment is not applicable to the project under consideration, in view of the above quoted decision of the Hon'ble Gujarat High Court. Therefore, we hold that for the above cited reasons, the AO was not justified in not allowing deduction under section 80IB(10) to the assessee for the assessment years 2000-01, 2001-02, 2002-03 and Asstt.Year 2006-07 of Rs.11,24,990/- each and for the Asstt.Year 2003-04 & 2004-05 of Rs.21,86,870/- each. Hence, we set aside the orders

of the lower authorities and direct the AO to allow deduction to the assessee under section 80IB(10) of the Act.

11. In the result, all the appeals of the assessee are allowed.

Order pronounced in the Court on Friday the 19th June, 2015 at Ahmedabad.

Sd/-	**Sd/-**
(S.S. GODARA)	**(N.S. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated /06/2015