

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD C BENCH, AHMEDBAD**

[Coram: Pramod Kumar AM and S.S. Godara JM]

ITA No.2216/Ahd/2014
Assessment Year: 2010-11

**Income Tax Officer
Ward – 5(1), Baroda.**

.....Appellant

Vs.

Shree Narayan Associates,
%Shivam+, Near Vasundhara Society,
Waghodia Road,
Vadodara . 390 019.
[PAN: ABBFS 2999 G]

.....Respondent

Appearances by:

Rajesh Kumar Meena *for the appellant*
None *for the respondent*

Date of concluding the hearing : 26.05.2017
Date of pronouncing the order : 26.05.2017

O R D E R

Per Pramod Kumar AM:

1. By way of this appeal, the Assessing Officer has challenged correctness of the order dated 28th May 2014, passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act,1961 for the assessment year 2010-11.

2. Grievance raised by the appellant Assessing Officer is as follows:

“1. Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) was right in law and facts in allowing the claim of the assessee for deduction u/s 80IB(10) of the I.T. Act, 1961 of Rs.1,60,88,554/- holding that the assessee is a developer u/s.80IB(10), without appreciating that the assessee was not the owner of the land on which the project was constructed and approval by the local authority was not granted to the assessee but to the land owner. The land owner

directly sold pieces of land to the Unit Holders. The assessee entered into a separate agreement with the plot owners for construction of houses.”

3. The short reason for which deduction under section 80IB(10) has been declined to the assessee is that the assessee did not own the land on which the housing project, by the name of Narayan Bungalowsq is built. The assessee was in development agreement with Smt Lilawaitiben Goverdanbahi Desai & Ors and the approval of the regulatory authority was also in the name of the original landowners. While there is little dispute that the assessee had de facto control over land and the entrepreneurial risk was borne by the assessee, the deduction was declined on the ground that the conditions regarding deduction under section 80IB(10), i.e. ownership of land and approval of project etc, were not satisfied and that the assessee was merely acting as a contractor. When assessee carried this issue, i.e. deduction of Rs 1,60,88,554 under section 80IB(10) being declined, in appeal before the CIT(A), he reversed the action of the Assessing Officer. In doing so, he relied upon Hon~~ble~~ jurisdictional High Court~~s~~ judgment for the assessment year 2005-06 in assessee~~s~~ own case for the same project. It was also noted that similar deduction, for the same project, has also been allowed in the assessment years 2006-07 and 2008-09, and that there is no material change in facts and circumstances of the case. Yet, the Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

4. We have heard the learned Departmental Representative, perused the material on record, including the written note filed by the assessee, and duly considered facts of the case in the light of the applicable legal position.

5. We see no infirmity in learned CIT(A) following the views expressed by Hon'ble jurisdictional High Court, in assessee's own case and in respect of the same project, when no distinguishing factors have been pointed out. No such points of distinctions were pointed to us either. In any event, the views expressed by the coordinate bench, in the case of Shri Umeya Corporation Vs Income Tax Officer (ITA Ni. 211/Ahd/2010; order dated 7th July 2015), summing up the views of Hon'ble jurisdictional High Court on this issue, are as follows:

6. *We find that, in the case of CIT Vs Radhe Developers [(2012) 341 ITR 403 (Guj)], Hon'ble jurisdictional High Court had an occasion to consider the issue of ownership of land, on which housing project is developed, in the context of eligibility of deduction under section 80IB(10). Hon'ble jurisdictional High Court has, in this context, inter alia observed as follows:*

32. Sec. 80-IB(10) of the Act thus provides for deductions to an undertaking engaged in the business of developing and constructing housing projects under certain circumstances noted above. It does not provide that the land must be owned by the assessee seeking such deductions.

33. It is well settled that while interpreting the statute, particularly, the taxing statute, nothing can be read into the provisions which has not been provided by the legislature. The condition which is not made part of s. 80-IB(10) of the Act, namely that of owning the land, which the assessee develops, cannot be supplied by any purported legislative intent.

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.

(Emphasis, by underlining, supplied by us)

7. *In our humble understanding, therefore, in order to answer the question as to whether the condition precedent for deduction under section 80IB has been satisfied inasmuch as whether or not the assessee is engaged in “developing and building housing projects”, all that is material is whether assessee is taking the entrepreneurship risk in execution of such project. When profits or losses, as a result of execution of project as such, belong predominantly to the assessee, the assessee is obviously taking the entrepreneurship risk qua the project and is, accordingly, eligible for deduction under section 80IB(10) in respect of the same. The assumption of such an entrepreneurship risk is not dependent on ownership of the land. The business model of “developing and building housing projects” by buying, on outright basis, and constructing residential units thereon could probably be the simplest business models in this line of activity, but merely because there is an improvisation in the business model or because the assessee has adopted some other business models for the purpose of developing and building housing project does not vitiate fundamental character of the business activity as long as the risks and rewards of developing the housing project, in substance, remain with the assessee. It is difficult, if not altogether impossible, to visualize all the business models that an assessee may use in this dynamic commercial world even as, in substance, the fundamental character of the business remains the same, but certainly such modalities or complexities of business models cannot come in the way of eligibility for an incentive which is for the purpose of ‘developing and building a housing project’. There is no justification, conceptual or legal, in restricting eligibility of deduction under section 80IB(10) to any particular business model that an entrepreneur adopts in the course of developing and constructing housing project.*

.....while giving effect to the opinion of Third Member u/s.255(4) of the Act, we take view in conformity with order of jurisdictional High Court in case of ABG Heavy Industries Ltd. (supra) available at this time though contrary to the opinion expressed by the Third Member. So in view of above discussion, following the ratio of jurisdictional High Court in case of ABG Heavy Industries Ltd. (supra), the Assessing Officer is directed to allow deduction u/s.80IA(4) of the Act to the assessee with regard to the projects in question for both the years.

9. *It is not even the case of the Assessing Officer that the assessee did not assume the entrepreneurship risks of the housing project. The format of arrangements for transfer of built up unit, and business model of the assessee for that purpose, is not decisive factor for determining eligibility of deduction under section 80 IB (10), but that is all that the authorities below have found fault with. The objections of the authorities below are thus devoid of legally sustainable merits. In view of the above discussions, and bearing mind entirety of the case, we are of the considered view that the stand of the authorities below, in declining deduction under section 80IB (10) and on the facts of this case, is incorrect. We vacate the same and direct the Assessing Officer to delete the disallowance.*

6. The business model adopted by the assessee does not vitiate the claim of deduction under section 80IB(10) but then the Assessing Officer has primarily declined the deduction with that basic approach. There is no dispute regarding assessee having taken the entrepreneurial risk and acted as an entrepreneur rather than as a contractor, and that is what is relevant. In view of the above discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

7. In the result, the appeal is dismissed. Pronounced in the open court today on the 26th day of May, 2017.

Sd/-
S.S. Godara
(Judicial Member)

Sd/-
Pramod Kumar
(Accountant Member)

Ahmedabad, dated the 26th day of May, 2017

*Copies to: (1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File*

By order

*Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad*